IN THE
Supreme Court of Virginia

RECORD NO. 170133

JUDICIAL INQUIRY AND REVIEW
COMMISSION OF VIRGINIA,

Petitioner,

v.

RUDOLPH BUMGARDNER, III, Senior Judge
and
HUMES J. FRANKLIN, JR., Retired Judge of the
Twenty-Fifth Judicial Circuit,

Respondents.

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA AND THE RUTHERFORD INSTITUTE IN SUPPORT OF THE RESPONDENTS

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The **American Civil Liberties Union of Virginia ("ACLU of Virginia")** is the statewide affiliate of the national American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution of the United States. ACLU of Virginia has approximately 7,000 members across the Commonwealth. In support of those principles, the ACLU of Virginia has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae, including *Perez v. Dietz Development, LLC; Jaynes v. Commonwealth of Virginia; Howell v. McAuliffe; Luttrell v. Cucco; and Neal v. Fairfax County Police Department.* The ACLU of Virginia has a significant interest in the outcome of this case and others concerning freedom of speech and the protection of fundamental rights.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

STATEMENT OF THE CASE

Judge Rudolph Bumgardner, III, and Judge Humes J. Franklin, Jr., stand accused by JIRC of violating Canons 1, 2A, 2B, and 5A(1) by engaging in political activity related to an intense public controversy over the relocation of the Augusta County Courthouse. The actions of Judges Bumgardner and Franklin upon which the JIRC predicates its allegations of misconduct encompass protected expressive political activity on matters of public concern sheltered from censure by the JIRC under the First Amendment to the Constitution of the United States.[1]

SUMMARY OF ARGUMENT

The expression of Judges Bumgardner and Franklin was core political speech protected by the strict scrutiny standard of First Amendment review. The First Amendment interests at stake include the right of judges to express their views on important issues of public concern, and the right of the public to receive those views. The strict scrutiny standard protects both candidates for judicial office and sitting judges, and protects judges elected by voters as well as judges selected by legislatures. While the Constitution does permit prohibitions banning

[1] The Parties have presented to this Court opposing factual recitations. Amici here argue that however this Court may resolve those factual contentions, *all* of the expressive activity of Judges Bumgardner and Franklin is protected under the First Amendment from censure by the JIRC.

certain government employees, including judges, from engaging in partisan political activity, that principle extends only to such partisan action as direct participation in the election or political campaigns of candidates for office. The First Amendment does not allow bans on general expression of political views. This Court should follow the lead of other courts and apply strict scrutiny to restrictions on judicial speech, and not the less stringent test typically applicable to discipline of government employees. Even if the government employee speech test is applied, however, the expression of Judges Bumgardner and Franklin is constitutionally protected. Finally, this Court may and should construe the Virginia Canons in a manner that fully exculpates Judges Bumgardner and Franklin, avoiding First Amendment tensions entirely.

ARGUMENT

I. THE EXPRESSION OF JUDGES BUMGARDNER AND FRANKLIN WAS CORE POLITICAL SPEECH PROTECTED BY THE STRICT SCRUTINY STANDARD OF FIRST AMENDMENT REVIEW.

A. The Speech Here Lies at the Core of the First Amendment.

The expressive activity engaged in by Judges Bumgardner and Franklin, dealing with the relocation of the Augusta County Courthouse, is quintessentially political speech on issues of public concern lying at the

core of the First Amendment. Their speech would receive the highest level of protection known to the American Constitution if they were any other citizens.

"Laws "that burden 'core political speech,' . . . are presumptively invalid and subject to a strict scrutiny test." *Jaynes v. Commonwealth*, 276 Va. 443, 461 (2008). "Under that test a statute will be deemed constitutional only if it is narrowly drawn to further a compelling state interest." *Id.* (*citing McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 347 (1995)).

The JIRC does not contest that the speech engaged in by Judges Bumgardner and Franklin constituted "political speech." Indeed, the "political" nature of the Judges' expression is the very premise of the JIRC's case. The JIRC could not plausibly assert that the speech of the Judges was anything other than political speech, for speech concerning the location of a courthouse, and by extension speech germane to the administration of justice, is quintessentially political. Speech concerning the courts and the legal system is at the very core of the First Amendment. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575 (1980) (noting in relation to restrictions on access to criminal trials that "it

would be difficult to single out any aspect of government of higher concern and importance to the people.").

The First Amendment trumps the rules of the JIRC, not the other way around. "The operation of the Virginia [Judicial Inquiry and Review] Commission, no less than the operation of the judicial system itself, is a matter of public interest." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

B. The Strict Scrutiny Standard Applies to Judicial Speech.

Were they not judges, it would be unthinkable that a government agency could, consistent with the First Amendment, censure them in any way for the political speech for which the JIRC now seeks to exact its punishment. The contesting parties attach starkly different consequences to the characterization of the speech of the two Judges as "political." The JIRC treats the word "political" as a pejorative. As the JIRC would have it, it is inherently unethical for Virginia Judges and Justices to engage in any expression that is "political," and when they do, they are subject to discipline. Judges Bumgardner and Franklin, in contrast, extol "political speech" as constitutionally sacred, deserving the highest levels of constitutional protection.

The seminal decision of the Supreme Court of the United States dealing with judicial speech is *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The Supreme Court in *White*, in an opinion by Justice Scalia, held unconstitutional the "announce clause" of Minnesota's Judicial Conduct Canon 5A, which prohibited a judicial candidate from announcing "his or her views on disputed legal or political issues." *Id.* at 770. Recognizing that the Minnesota law was a content-based restriction on core political speech, the Supreme Court applied strict scrutiny to the restriction and struck it down.

Minnesota sought to justify its law as vindicating its compelling interests in maintaining the impartiality and the appearance of impartiality of its judiciary. The Supreme Court chastised the state, however, for its vagueness in defining what exactly it meant by impartiality. "One meaning of 'impartiality' in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding." *Id*. at 775. The Minnesota canon failed strict scrutiny on this score, however, because the announce clause at best "barely" served this interest at all:

> We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or

> against particular *parties*, but rather speech for or against particular *issues*.

Id. at 776 (emphasis in original).

The Supreme Court proceeded to then dismiss as unpersuasive the proffered justification that the announce clause preserved judicial impartiality in the sense of ensuring that judges would not be perceived as possessing pre-conceived views on legal issues, or that judges would not be open-minded with regard to the resolution of legal issues. It was virtually impossible for any judge to arrive on the bench without some pre-conceived views, the Supreme Court held, and any such claimed state justification was "not a *compelling* state interest, as strict scrutiny requires." *Id.* at 777 (emphasis in original). The Supreme Court was also unpersuaded by the open-mindedness rationale, concluding that the state had "not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests." *Id.* at 781.

In *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), the Supreme Court again applied the strict-scrutiny test to restrictions on the conduct of judicial candidates, upholding a restriction on personal solicitation of campaign contributions by candidates for judicial office. The

Supreme Court "emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Id.* at 1666 (*quoting Burson v. Freeman*, 504 U.S. 191, 2112) (plurality opinion)). In finding that the Florida canon presented such a rare case, the Supreme Court emphasized that while the First Amendment strongly protects the rights of judicial candidates to speak, the Florida law was narrowly tailored to vindicate the compelling governmental interest in avoiding the reality or perception that judges through personal financial solicitations will favor donors, many of whom are lawyers and litigants who will appear before them. *Williams-Yulee*, 135 S.Ct. at 1668.

Lower courts have steadily expanded these principles, insisting that judicial candidates only be penalized for intentional or reckless misstatements, and insisting that state judicial ethics canons not be interpreted in a manner that penalizes general expression on issues of public concern.

In *In re Chmura*, 608 N.W.2d 31 (Mich. 2000), the Supreme Court of Michigan held that strict scrutiny applied to a Michigan Judicial Canon 7B, restricting the speech of candidates for judicial office. The court in *Chmura* recognized the importance to the public in receiving expression germane to the justice system, holding that "[b]y chilling this debate, Canon 7(B)(1)(d)

impedes the public's ability to influence the direction of the courts through the electoral process." *Id.* at 42-43. Following the familiar pattern, the Supreme Court of Michigan accepted that Michigan's Canon was "not narrowly tailored to serve the state's compelling interests." *Id.* at 43. Significantly, the court emphasized that Michigan could not defend its restriction on the paternalistic ground that it was necessary to protect voters from themselves, on the fear that they might be influenced by a prospective judge's views and make errant decisions, holding that "the state's interest in preserving public confidence in the judiciary does not support the sweeping restraints imposed by Canon 7(B)(1)(d)." Quoting from the Supreme Court of the United States, the court emphatically admonished that "'[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.'" *Id.* (*quoting Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

In *Butler v. Alabama Judicial Inquiry Commission*, 802 So. 2d 207 (Ala. 2001), the Supreme Court of Alabama applied strict scrutiny to strike down an Alabama judicial cannon prohibiting a judicial candidate from disseminating false information concerning a candidate or opponent, because the canon failed to incorporate an "actual malice" standard requiring proof that the statement was made with knowledge of falsity or

reckless disregard for truth or falsity. *Id.* at 218 ("We find Canon 7B.(2) to be facially unconstitutional because it is not narrowly tailored to serve the state's compelling interest in protecting the integrity of the judiciary. The language in the latter clause of Canon 7B.(2) prohibiting the dissemination of 'true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person' is unconstitutionally overbroad because it has the plain effect of chilling legitimate First Amendment rights.").

In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the United States Court of Appeals for the Eleventh Circuit applied *White* to strike down Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct, restricting the speech of candidates for judicial office. Applying strict scrutiny, the Eleventh Circuit held that the state had a compelling interest in "preserving the integrity, impartiality, and independence of the judiciary" and "ensuring the integrity of the electoral process and protecting voters from confusion and undue influence," *id.* at 1319, but ruled that the Georgia Canon was not narrowly tailored to effectuate those interests, and thus failed strict scrutiny. *Id.* at 1319-1323.

The Supreme Court of Ohio in *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014), held that the First

Amendment was violated by application of an Ohio Judicial Conduct Rule prohibiting a judicial candidate from knowingly or recklessly conveying information about the candidate or the candidate's opponent that, if true, would be deceiving or misleading to a reasonable person. The Supreme Court of Ohio held that because the law was content-based, strict scrutiny was the appropriate standard of First Amendment review. *Id.* at 1122. Following the national pattern, the Supreme Court of Ohio did not question that Ohio had compelling interests in "promoting and maintaining an independent judiciary, ensuring public confidence in the independence, impartiality, integrity, and competence of judges." *Id.* at 1123. Also following the national pattern among courts striking down restrictions on judicial speech, however, the court went on to hold that the Ohio rule failed the second prong of strict scrutiny. The portion of the Ohio rule that penalized truthful but misleading statements, the court held, did "not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive some listeners," and that "[t]his 'dramatic chilling effect' cannot be justified by Ohio's interest in maintaining a competent and impartial judiciary." *Id.* at 1126.

In *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016), the Sixth Circuit applied strict scrutiny to strike down some and uphold some provisions of

the Kentucky Canons governing judicial campaign speech. The court struck down Kentucky's "Campaigning Clause," prohibiting campaigning as a member of a political organization, as well as what the court described as "the infelicitously named speeches clause, which bans judicial candidates from 'mak[ing] speeches for or against a political organization or candidate.'" *Id.* at 689 (quoting Kentucky Canon 5A(1)(c)).

C. Strict Scrutiny Applies to the Non-Partisan Expression of Sitting Appointed Judges.

1. The Issue was Not Resolved in *White.*

White and *Williams-Yulee* dealt with the speech of judicial candidates, but did not address the issue posed here, the First Amendment standard applicable to the non-partisan speech of sitting appointed judges. Justice Kennedy's concurring opinion in *White* explicitly noted that this issue was reserved:

> This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering* . . . and *Connick* . . ., could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the

> efficient administration of justice, is not an issue raised here.[2]

White, 536 U.S. at 795 (Kennedy, J., concurring). The issue is a matter of first impression for this Court.

2. The First Amendment Interests at Stake Include Both the Right to Speak and the Right to Receive Information.

The strict scrutiny standard is not displaced merely because a judge is sitting and not campaigning. The First Amendment principles supporting this proposition are twofold, encompassing both the right of the judge to convey information, and the right of the public to receive information. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The First Amendment "freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (*citing Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). "[T]he right to receive publications is such a fundamental right. . . It would be a barren marketplace of ideas that had only sellers and no

[2] The government employee speech standards referenced in Justice Kennedy's remarks, as articulated in *Pickering v. Board of Education of Township High School Dist. 205, Will City*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), are discussed in Section II of this Brief.

buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

Many of the lower court decisions from other jurisdictions applying the strict scrutiny standard to speech by sitting judges have emphasized both the right of the judge to speak and the right of the public to listen.

In *Scott v. Flowers*, 910 F.2d 201, 211–13 (5th Cir. 1990), the court held that the First Amendment was violated when the Texas Commission on Judicial Conduct reprimanded a sitting judge for writing an open letter to the public critical of the administration of the county judicial system of which he was a part. In finding that the censure of Judge Scott violated the First Amendment, the Fifth Circuit stated that it had "no difficulty in concluding that Scott's open letter, and the comments he made in connection with it, address matters of legitimate public concern." *Id*. at 211. The court strongly emphasized the strong interest of the public in receiving information about the operation of the system of justice from a judge with expertise on those operations. *Id.* Judge Scott had leveled his criticisms, the Fifth Circuit noted, "in a manner calculated to attract the attention of the public—the body with the ultimate power to change county policy by voting the responsible officials out of office." *Id.* Indeed, the court treated the media attention given to Judge Scott's expression as a positive factor in the

First Amendment analysis favoring Judge Scott, for that attention attested to the importance to the public of hearing Judge Scott's views. *Id.* ("The public indeed was interested in Scott's views, as evidenced by the attention given his letter by the local media.")

The Fifth Circuit then turned to the question of whether "Scott's right to speak is outweighed by the state's asserted interest in promoting the efficiency and impartiality of its judicial system." *Id.* On this point, the court held that the state's interest in regulating the speech of Judge Scott was *weaker* than a state's interests in regulating the speech of other "typical" government employees. *Id.* ("[T]he state's interest in suppressing Scott's criticisms is much weaker than in the typical public employee situation, as Scott was not, in the traditional sense of that term, a public employee."). Judge Scott, the Fifth Circuit held, was not like a teacher, an assistant district attorney, or a firefighter. *Id.* He was, rather, "an elected official, chosen directly by the voters of his justice precinct, and, at least in ordinary circumstances, removable only by them." *Id.* The court recognized that states do have an interest in regulating the speech of judges that is unique to the role of judges in society. *Id.* at 212. These specialized state interests, however, do not extend to controlling comments by judges on political issues involving the general administration of justice. Rather, the

court reasoned, the state's interests begin and end on participation in partisan political campaign activity. *Id.* The Fifth Circuit thus distinguished its own prior holding in *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 305 (5th Cir.1977) (en banc), *cert. denied*, 435 U.S. 1013 (1978), which upheld Louisiana's "resign to run" statute. Unlike the election campaign-related restriction in *Morial*, the Fifth Circuit in *Scott* reasoned, Texas had attempted to muzzle Judge Scott's freedom to comment on public affairs concerning the judicial system: "Unlike the statute upheld in *Morial*, the reprimand of Scott does infringe upon the right 'to make statements . . . on public issues outside a campaign context' and thus touches upon 'core first amendment values.'" *Scott*, 910 F.2d at 212.

The Fifth Circuit concluded that Texas had failed to meet what the court described as the state's "very difficult burden" of demonstrating "that its concededly legitimate interest in protecting the efficiency and impartiality of the state judicial system outweighs Scott's first amendment rights." *Id.* The court rejected the state's general incantation of these interests, pointedly observing that Texas had failed, either in its briefs or during oral argument, to explain exactly "*precisely how*" Judge Scott's public criticisms would impede those goals. *Id.* at 213 (emphasis added). In a strong affirmation of traditional First Amendment values, the Fifth Circuit observed

that the public interest was served by an open airing of Judge Scott's views, and not "by casting a cloak of secrecy around the operations of the courts." *Id.* The public expression of Judge Scott, the court concluded, had actually "furthered the very goals that the Commission wishes to promote." *Id.*

In *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004), the Mississippi Judicial Commission sought to discipline a sitting judge for statements in a letter to the editor published in a newspaper and a subsequent interview on a radio talk show expressing views hostile to the rights of gays and lesbians. The Supreme Court of Mississippi held that strict scrutiny was the appropriate First Amendment standard, and that the disciplinary action against the judge violated the First Amendment. While the statements may have exposed the judge as lacking impartiality with regard to gays and lesbians, the court reasoned, and may indeed require the judge to recuse himself in cases involving gays and lesbians, the interests of justice were actually served by bringing the judge's partiality into the open. *Id.* at 1016 ("There is an old Malayan proverb which states: 'Don't think there are no crocodiles because the water is calm.' This teaching is applicable to the case sub judice, because Commission urges us to "calm the waters" when, as the guardians of this

state's judicial system, we should be helping our citizens to spot the crocodiles. For the reasons stated herein, we find the judge may not be sanctioned for his statements which are protected by the First Amendment to the United States Constitution. We reject the Commission's findings and recommendation, and we finally dismiss the Commission's complaint and this case with prejudice.")

In *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007), Judge Robert Jenevein, a Texas state court trial judge, was disciplined by the Texas Commission on Judicial Conduct for statements made at a press conference. The Fifth Circuit held that Texas had compelling government interests in preserving the integrity and impartiality of the judiciary. The court went on to hold, however, that to the extent the censure of Judge Jenevein was based on the content of his speech at the press conference, the state's actions were not narrowly tailored to effectuate those state interests.

> Like the Supreme Court in *Republican Party of Minnesota*, we hold that the Commission's application of this cannon to Judge Jenevein is not narrowly tailored to its interests in preserving the public's faith in the judiciary and litigants' rights to a fair hearing. Indeed, in a sense the censure order works against these goals. For although Judge Jenevein's speech concerned a then-pending matter in another court, it was also a matter of judicial administration, not the merits of a pending or

> future case. He was speaking against allegations of judicial corruption and allegations of infidelity against his wife made for tactical advantage in litigation, concluding with a call to arms, urging his fellow attorneys and judges to stand up against unethical conduct. The Commission's stated interests are not advanced by shutting down completely such speech. To the point, the narrow tailoring of strict scrutiny is not met by deploying an elusive and overly-broad interest in avoiding the "appearance of impropriety."

Id. at 560.

In contrast, the Fifth Circuit upheld that part of the censure of Judge Jenevein grounded in his donning of his judicial robe during the press conference and his decision to conduct the press conference inside his courtroom. This action, the court reasoned, did not penalize the judge for the content of his message, but rather for overtly exploiting the trappings of his judicial office to boost his message. *Id.* at 560-61.

The Fifth Circuit in *Jenevein* heavily emphasized the importance *to the public* in having access to the views of judges on matters of public concern germane to the legal system, observing that "[t]o leave judges speechless, throttled for publicly addressing abuse of the judicial process by practicing lawyers, ill serves the laudable goal of promoting judicial efficiency and impartiality." *Id.* The court thus found the actions of the

Texas Commission "shutting down all communication between the Judge and his constituents" was a violation of the First Amendment. *Id.* at 560.

3. The Citizens of Augusta County Benefited from Receiving the Views of Judges Bumgardner and Franklin.

The JIRC cannot plausibly maintain that voters in Augusta County would have been better off sheltered from hearing the views of Judges Bumgardner and Franklin. The Constitution of Virginia prohibits the General Assembly from moving the county seat. *See* Art. IV, section 14. The decision is left to the voters of the county. *See* Va. Code § 15.2-1644. Augusta County was thus a mini-marketplace of ideas, in which expression by experienced jurists on the wisdom of moving or not moving the courthouse was particularly important to the citizenry.

The First Amendment does not operate like the famous line from the movie *A Few Good Men*: "You want the truth? You can't handle the truth!" "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 577 (2013) (*quoting Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002)). *See also Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 105 (1990) ("We reject the paternalistic

assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); *Rubin v. Coors Brewing Company*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment . . . the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 738 (1996) (Thomas, J., concurring) ("In case after case . . . the Court, and individual Members of the Court, have continued to stress . . . the antipaternalistic premises of the First Amendment"); *Riley v. National Federation of the Blind of North Carolina*, Inc., 487 U.S. 781, 790-91 (1988) ("The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

Justice Kennedy's concurring opinion in *White* embraced the classic First Amendment view that the marketplace of ideas, rather than the paternalistic intervention of government, should govern when dealing with judicial speech:

> If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.

White, 536 U.S. at 795, (Kennedy, J., concurring).

4. There is No Valid Reason for Eliminating the First Amendment Protection that a Judge Possesses to Engage in Non-Partisan Political Expression Merely Because the Judge has Assumed Office.

In *Griffen v. Arkansas Judicial Disciplinary and Disability Comm*ission, 130 S.W.3d 524 (Ark. 2003), the Supreme Court of Arkansas held that the Arkansas Judicial Disciplinary and Disability Commission violated the First Amendment when it invoked Arkansas Judicial Canon 4C to admonish a judge for appearing before a legislative caucus to express views on a controversial public issue. Arkansas Court of Appeals Judge Wendell Griffen, an African-American, appeared before the Arkansas

Legislative Black Caucus in a public meeting called to discuss the recent dismissal of University of Arkansas basketball coach Nolan Richardson. In a passionate speech, Judge Griffen urged lawmakers not to "reward the captains of colleges and universities with personnel actions, admission standards, and institutional practices and policies that exclude, inhibit, and mistreat black students, faculty, staff and citizens by appropriating more tax revenue to their schools." *Id.* at 526. Judge Griffen subsequently leveled similar critiques in the media, including *USA Today*, claiming that race had been a factor in Coach Richardson's firing. For these actions, Judge Griffen was disciplined by the Arkansas Judicial Commission.

In finding that the Commission's actions violated the First Amendment, the Supreme Court of Arkansas refused to narrowly interpret the Supreme Court's decision in *White* by limiting the scope of *White* to either candidates for judicial office or the specific judicial canon at issue in *White*. Rather, the court in *Griffen* properly interpreted *White* as requiring application of the strict scrutiny test to the expression of a sitting Judge such as Judge Griffen, holding that "it is crystal clear from *White* and previous cases that the strict-scrutiny test must be applied in cases such as we have before us in which a fundamental right such as free speech is circumscribed." *Id.* at 535-36. The Supreme Court of Arkansas held that

while Arkansas did have a compelling governmental interest in maintaining the independence of the judiciary, the application of the Arkansas Judicial Canons to restrict speech failed the "narrow tailoring" prong of strict scrutiny. *Id.* at 536.

The Supreme Court of Washington, in *Matter of Disciplinary Proceeding Against Sanders*, 955 P.2d 369 (Wash. 1998), held that the First Amendment was violated by disciplinary action against a sitting judge, Washington Supreme Court Justice Richard Sanders. Justice Sanders had attended a pro-life rally, to express his belief in the preservation of human life, and thank his supporters. The court began by declaring:

> Judges do not forfeit the right to freedom of speech when they assume office. They do agree, however, that the right must be balanced against the public's legitimate expectations of judicial impartiality. But the constitutional concern weighs more heavily in that balance, requiring clear and convincing evidence of speech or conduct that casts doubt on a judge's integrity, independence, or impartiality in order to justify placing a restriction on that right.

Id. at 370.

In an analysis directly germane to the present case against Judges Bumgardner and Franklin, the Supreme Court of Washington cautioned against any mechanical invocation of the blanket word "political," noting that "[s]imply labeling activity or speech "political" or "not political" is an

ineffective means of resolving the issues presented here." *Id*. at 373-74. The court invoked a decision by Judge Richard Posner from the United States Court of Appeals for the Seventh Circuit, *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir.1993), to expose the deficiencies of such an approach. In striking down the Illinois restriction on the speech of judicial candidates, Judge Posner observed that "interference with the marketplace of ideas and opinions is at its zenith when the 'customers' are most avid for the market's 'product.'" *Id.* at 229. In the context of the speech of Judges Bumgardner and Franklin, citizens of Augusta County most needed their participation in the marketplace of ideas concerning the location of the courthouse when decision-making over that location was imminent. Judge Posner's opinion also warned against any simplistic understanding of that which was or was not "political," observing that "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Id.*[3]

Particularly germane to Judge Bumgardner's and Franklin's appeal here, the Supreme Court of Washington found that Judge Posner's analysis applied to both judicial candidates *and* sitting judges:

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[3] This statement by Judge Posner in *Buckley* would later be cited by approval in Justice Scalia's opinion for the Supreme Court in *White*. *See White*, 536 U.S. at 772-73.

> We are cognizant of the fact that Judge Posner was concerned with restrictions on the conduct of a candidate for judicial office rather than the conduct of a sitting judge. The distinction between a candidate for judicial office and a sitting judge is that the candidate has an additional attribute of free expression to weigh in the balance—that of the electorate's right to be informed. Nevertheless, we believe the opinion represents the best analysis of the ineffectiveness of merely applying the label "political" to a judge's activity or speech as a means to determine whether it is in violation of the canons. Moreover, Judge Posner's reasoning embraces as its touchstone recognition of the need to balance a judge's right to free expression against the public's interest in having judges impartially decide cases in accordance with the law. We see no different analysis as applicable here.

Sanders, 955 P.2d at 374.

The Supreme Court of Washington proceeded to apply strict scrutiny to strike down the disciplinary action taken against Justice Sanders. The court concluded that the Judicial canons "must not be interpreted in the individual case to go so far as to permit sanctioning speech and conduct that does not clearly and convincingly lead to the conclusion that the words and actions call into question the integrity and impartiality of the judge." *Id.* at 377.

5. The Strict Scrutiny Standard Applies to the Speech of Appointed Judges.

In our federal system, a state is free to decide for itself how to select judges. Yet no matter how a state chooses to select its judges, it is not free to violate the First Amendment. There is nothing in the manner in which a state selects its judges that alters the interests of a sitting judge to exercise his or her First Amendment rights to speak on matters of public concern, or that alters the interest of the public in receiving that information.

In *In re Kendall*, 712 F.3d 814 (3rd Cir. 2013), the United States Court of Appeals for the Third Circuit held that the First Amendment was violated when the Supreme Court of the Virgin Islands held a lower-court Virgin Islands judge in contempt for writing an opinion critical of the Virgin Islands Supreme Court and alleging corruption in the Virgin Islands criminal justice system. Judges in the Virgin Islands are selected under the federal model, nominated by the governor and confirmed by the legislature. The Third Circuit held that "the First Amendment prevents the government from criminally punishing a sitting judge's speech about one of his pending cases unless it poses a clear and present danger to the administration of justice." *Id.* at 738-39.

As Judge Alex Kozinski observed in a case involving a claim against an appointed federal judge:

> A judge does not check his First Amendment rights at the courthouse door, to be reclaimed at the expiration of his judicial tenure. *See generally* Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L. Re 1181 (1986). The Code of Conduct encourages judges to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Code of Conduct for United States Judges Canon 4. Engaging in such law-related activities—including speeches that comment on current events and legal developments—is permitted not only because judges are citizens, but because they are particularly knowledgeable on such topics. Their speech may thus enhance the public discourse and lead to a more informed citizenry.

In re Judicial Misconduct, 632 F.3d 1289, 1289 (9th Cir. Jud. Council 2011) (Kozinksi, C.J.)

Virginia and South Carolina are unique in their method of delegating to legislatures the sole power to select judges. Yet the fact that judges are selected in those two states *indirectly* through the political process, by using structures of *representative democracy* to populate the judiciary instead of the direct democratic structure of popular election, does not diminish the interest of judges, once selected, in expressing themselves on issues of public concern, or the interests of the public in hearing them.

Moreover, there is nothing in the elected or appointed status of a judge that impacts the question of whether a judge's expressive conduct in

any way impairs his or her independence or impartiality. Nothing in the application of the Virginia Canons to the entry of Judge Bumgardner and Judge Franklin into the debate over the location of the Augusta County courthouse would impugn their independence or integrity in the adjudication of cases. And their expression remains neutral as to their integrity and independence without regard to whether they were selected directly by voters or indirectly through the filter of the legislature. Their expression is utterly unrelated to the values of independence recognized by the Supreme Court in *Williams-Yulee*, echoing the wisdom of John Marshall: "A judge instead must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or controul him but God and his conscience.'" *Williams-Yulee*, 135 S.Ct. at 1667 (*quoting* Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830)).

6. First Amendment Principles Allowing Bans on Participation By Government Employees on Partisan Political Activity Do Not Apply to the Issue-Related Speech of Judges.

The Constitution of the United States has long been interpreted as permitting laws that restrict government employees from engaging in certain partisan political activities directly connected to elections and the political campaigns of candidates. The first Supreme Court case to deal

with such legislation was *Ex parte Curtis*, 106 U.S. 371 (1882). *Curtis* sustained a law that banned employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government.

One of the first Nineteenth century decision to interpret and apply *Curtis* came from this Court. In *Louthan v. Commonwealth*, 79 Va. 196 (1884), this Court properly interpreted *Curtis* as drawing a sharp distinction between the regulation of partisan political activity and the suppression of freedom of speech on matters of public concern. Carter Louthan, a public employee, was indicted for advocating for certain persons to be electors for President and Vice-President of the United States. This Court held that Louthan's conviction violated the free speech principles embraced in the United States and Virginia Constitutions, rejecting the assertion of the Commonwealth that Louthan forfeited his free speech rights when he assumed public office. This Court relied on *Curtis*, explaining that *Curtis* was never intended to squelch the general free speech rights of public employees:

> The supreme court of the United States declared the act of congress constitutional because it did not destroy but protected the political privileges of these employees of the government, and guaranteed to them the right as freely as all others in the country, to act on political questions according to their own

> desire, and support without control, and without let or hindrance, the political party which they preferred.
>
> We cannot read that case and regard it as giving countenance to congress, or to any other legislative body, to seal the lips of citizens, and exclude them from the assemblies of the people, unless they will sit dumb among their fellow men, and to forbid their holding communion with their fellow-citizens on governmental questions, to directly or indirectly influence the votes of others.

79 Va. at 204.

The principles set forth in *Curtis* and *Louthan* were applied in the next century in decisions upholding the federal Hatch Act, 18 U.S.C. § 61 (1939), and its prohibition on federal employees "interfering with an election" or taking active part in "political management or in political campaigns." In *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947), the Supreme Court upheld the Hatch Act's prohibition, which it described as taking an "active part in political management or political campaigns." *Id.* at 103. The Supreme Court elaborated on the reach of the Hatch Act and the concomitant limits imposed by the First Amendment in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). The Supreme Court in *Letter Carriers* explained that *Mitchell* was premised on the view that the Hatch Act was "leaving 'untouched full participation by

employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency.'" *Id*. at 556 (*quoting Mitchell*, 330 U.S. at 99). The Supreme Court further explained:

> The Act did not interfere with a 'wide range of public activities.' . . . It was 'only partisan political activity that is interdicted. . . . (Only) active participation in political management and political campaigns (is proscribed). Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.'

Letter Carriers, 413 U.S. at 556 (internal citations to *Mitchell* omitted). The Supreme Court in *Letter Carriers* made plain the difference between the types of activities that could be forbidden and the types of activities that could not. The "partisan political" conduct that fell within a constitutionally permissible ban included:

> activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.

Id. at 556. General "non-partisan" political activity, however, remained protected:

> Whatever might be the difficulty with a provision against taking 'active part in political management or in political campaigns,' the Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic, or cultural organizations, . . . and exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, *referendums, approval of municipal ordinances*, and the like.

Id. at 555-56 (emphasis added).

As explained in *Biller v. United States Merit Systems Protection Board*, 863 F.2d 1079 (2nd Cir. 1988), "a line may be discerned that solves the definitional problem of sorting out what activity is permitted from that which is prohibited." *Id*. at 1089. This "line becomes visible through the Supreme Court's recognition in both *Letter Carriers* and *Mitchell* that the Hatch Act carefully distinguishes between partisan political activities and mere expressions of views." *Id.* Thus, "finding 'partisan activity' implicitly requires a nexus between the government employee and the effort to promote the political party or elect its candidate." *Id.* at 1090.

This critical divide has been recognized by courts in the context of judicial speech. *See, e.g., Wersal v. Sexton*, 674 F.3d 1010, 1025 (8th Cir. 2012) (upholding a ban on political endorsements, holding that "the endorsement clause is plainly a restriction of speech for or against particular parties, rather than for or against particular issues."); *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010) (upholding a ban on political endorsements, citing the line between "partisan political activities" and "mere expressions of views"). Significantly, South Carolina, the only other state that uses the same method of judicial selection as Virginia, explicitly honors this division, stating that "'Political organization' denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office." Rule 501, S.C. Code of Judicial Conduct.

Applying these principles, the expression of Judges Bumgardner and Franklin plainly falls on the protected side of the divide. Their expression was not partisan political activity directed to the election of a candidate, but was expression on matters of public concern, fully protected by the First Amendment.

II. THE EXPRESSION OF THE JUDGES IS PROTECTED UNDER THE GOVERNMENT EMPLOYEE SPEECH STANDARD.

A. The Government Employee Test Ought Not Apply to Judicial Speech on Matters of Public Concern.

The First Amendment standard governing discipline of government employees is not an apt fit for analyzing the speech of judges on matters of public concern. This test, established over time in three controlling Supreme Court cases, *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), contemplates a two-part inquiry. A court must first determine whether the expression at issue constituted speech "as a citizen on matters of public concern," or expression engaged in by the speaker as a government employee. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 147. If the speech qualifies as speech by a citizen on matters of public concern, it is protected unless the government demonstrates that its interest in restricting the speech outweighs the expressive interests of the speaker. *Pickering*, 391 U.S. at 468. *Garcetti* elaborated on the two-part test by holding that speech falling within a public employee's official responsibilities should not be treated as speech as a citizen on public concern. *Garcetti*, 547 U.S. at 424.

This Court should follow the lead of other courts and reject application of the government employee test to the speech of judges, instead opting for the more robust protections of strict scrutiny.

In *Jenevein v. Willing*, as previously explained, the Fifth Circuit applied strict scrutiny to the discipline of a sitting judge. In explicitly refusing to follow the *Pickering-Connick-Garcetti* line of employee speech cases, the Fifth Circuit emphasized that the Judge was no ordinary state "employee."

> Our "employee" is an elected official, about whom the public is obliged to inform itself, and the "employer" is the public itself, at least in the practical sense, with the power to hire and fire. It is true that Judge Jenevein was an employee of the state. It is equally true that as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee. . . .We are persuaded that the preferable course ought not draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office. Rather, we turn to strict scrutiny of the government's regulation of the elected official's speech to his constituency, requiring such regulations to be narrowly tailored to address a compelling government interest, a question to which we now turn.

Jenevein, 493 F.3d at 557-58 (internal citations and footnotes omitted).

In *Matter of Hey*, 452 S.E.2d 24 (W. Va. 1994), the Supreme Court of West Virginia held that the First Amendment was violated by disciplinary

action taken against a sitting judge for remarks the judge made on a radio talk show, defending himself with regard to matters raised in disciplinary action that had been taken against him, and criticizing members of the Hearing Board. "Unquestionably, it is within this Court's power to discipline judges," the court observed. *Id.* at 29. "But in doing so we have a corresponding duty not to ignore judges' constitutionally protected rights." *Id.* The Supreme Court of West Virginia was sensitive to the notion that the constitutional balance applicable to the discipline of judges was not precisely the same as that implicated in the discipline of other state employees:

> Judges are not typical, run-of-the-bureaucracy employees, nor does our oversight of judicial disciplinary proceedings present us with an employment context. Moreover, the State's interests in regulating judicial conduct are both of a different nature and of a greater weight than those implicated in the usual government employment case. The State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system-and in maintaining the appearance of the same-that justify unusually stringent restrictions on judicial expression, both on and off the bench.

Id. at 30.

B. Even if the Government Employee Test Is Applied, the Speech of Judges Bumgardner and Franklin is Protected from Censure.

Even if this Court were to apply the government employee speech test to the expression of Judges Bumgardner and Franklin, they must still prevail. Their speech on the relocation of the Augusta County Courthouse was manifestly speech on matters of public concern not connected to their official duties. The interests of the Judges to speak and the interests of the Augusta County citizens to listen far outweigh any interests of the Commonwealth. The JIRC's vague and abstract recitations of the need to preserve the integrity and independence of the judiciary are not enough to turn the color of First Amendment litmus paper. As so many of the judicial decisions cited in this Brief Amicus Curiae have emphasized, the quality of the justice system is enhanced, not encumbered, by the free flow of information on matters germane to the administration of justice.

In *Hey*, for example, the Supreme Court of West Virginia, notwithstanding its skepticism that the government employee speech cases were the best doctrinal fit, nonetheless found the government employee decisions by analogy. 452 S.E.2d at 30 ("Despite these differences, the public employee-free speech cases provide an appropriate analogy.") In holding that the disciplinary action against Judge Hey violated the First

Amendment, the court distinguished between state interests grounded in palpable interference with the administration of justice and interests grounded in amorphous concerns about judges entering into arenas of public controversy. The Supreme Court of West Virginia held that the West Virginia "canons cannot constitutionally be manipulated to apply to a judge's off-the-bench remarks about a subject of public concern that is neither presently pending before him nor likely to come before him and that does not violate some other more specific provision of the Code or the law." *Id.* at 33. In an important validation of classic First Amendment principles, the court declared that Judge Hey's mere stirring of public controversy could not justify abridging his freedom of speech, even though he was a sitting judge: "Admittedly, Judge Hey's comments created a storm of controversy and were not appreciated by many of the listeners, but it is in this context that the First Amendment plays its most important function." *Id*. (*citing Waters v. Churchill*, 511 U.S. 661 (1994), *quoting Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate'"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high

purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging")).

III. THIS COURT SHOULD CONSTRUE THE VIRGINIA CANONS TO AVOID FIRST AMENDMENT TENSIONS.

Judges Bumgardner and Franklin have proffered reasonable constructions of the Virginia Canons under which their expressive activity would be exculpated. This Court may avoid a direct ruling on the First Amendment issues altogether, however, by interpreting the Virginia Canons in a manner that places the activities of Judges Bumgardner and Franklin outside their proscriptions. Such a narrowing construction would heed the principle of constitutional avoidance, a wise maxim of judicial restraint cautioning that if reasonably possible, a statute or regulation should be construed in a manner that will avoid raising serious constitutional problems. *See, e.g., Commonwealth v. Doe*, 278 Va. 223, 229 (2009) ("Therefore, whenever possible, we will interpret statutory language in a manner that avoids a constitutional question.").

CONCLUSION

Amici urge the Court to hold that Judges Bumgardner and Franklin may not be disciplined for their expression.

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Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

Required copies of this Amicus Brief and accompanying Motion were electronically filed with this Court and hand delivered to the Clerk's Office on April 17, 2017, in compliance with Rules 5:26 and 5:32. Copies of the Brief were emailed to Counsel for the Parties at:

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