No. _____

In The
Supreme Court of the United States

TIMOTHY C. FOX, in his official capacity as the Attorney General for the State of Montana; JONATHAN MOTL, in his official capacity as the Commissioner of Political Practices for the State of Montana,

Petitioners,

v.

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

Whether, in the exercise of its Tenth Amendment and Article IV, Section 4 authority, Montana's decision to prohibit political party endorsements and expenditures in nonpartisan judicial elections is a facially unconstitutional abridgement of the First Amendment, or whether, in accordance with *Renne v. Geary*, the Ninth Circuit's ruling must be reversed and remanded for development of a factual record.

PARTIES TO THE PROCEEDING

The Sanders County Republican Central Committee, a political party under Montana law, was the Plaintiff-Appellant-Appellee below.

Tim Fox, in his official capacity as the Attorney General of the State of Montana, and Jonathan Motl, in his official capacity as the State of Montana Commissioner of Political Practices, were the Defendants-Appellees-Appellants below. Each of the these parties was substituted by operation of Fed R. App. P. 43(c)(2).

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PETITION FOR A WRIT OF CERTIORARI

The State of Montana respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. 1-6, 12-31) on the two appeals below are reported at *Sanders County Republican Cent. Comm. v. Fox*, 717 F.3d 1090 (9th Cir. 2013), and *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012). The initial order of the district court denying the motion for preliminary injunction (App. 32-45) is reported at *Sanders County Republican Cent. Comm. v. Bullock*, 2012 U.S. Dist. LEXIS 88544 (D. Mont. 2012), and subsequent orders of the district court after remand are included in the appendix (App. 7-11).

JURISDICTION

The denial of the petition for rehearing en banc was entered on August 16, 2013 (App. 46-47). A timely request for an extension was granted by Justice Kennedy, extending the time in which to file this petition until January 13, 2014. *Fox, et al. v. Sanders County Republican Cent. Comm.*, No. 13A457 (Nov. 7,

2013). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Guarantee Clause provides in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government. . . .

U.S. Const., art. IV, § 4.

2. The First Amendment provides in relevant part:

> Congress shall make no law respecting . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

U.S. Const., amend. I.

3. The Tenth Amendment provides in relevant part:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Const., amend. X.

4. The statute primarily at issue provides in relevant part:

> **Unlawful for political party to endorse judicial candidate.** A political party may not endorse . . . or make an expenditure to support or oppose a judicial candidate.

Mont. Code Ann. § 13-35-231.

The Sanders County Republican Central Committee argued, and the Ninth Circuit held, that enforcement of severable portions of Mont. Code Ann. § 13-35-231, set forth above, should be permanently enjoined. Other constitutional provisions and statutes at issue are provided in the appendix at App. 48-50.

STATEMENT OF THE CASE

Montana has a republican form of government guaranteed to every state by Article IV, Section 4 of the United States Constitution ("[a]ll political power is vested in and derived from the people[.]" Mont. Const. art. II, § 1). Exercising that sovereign guarantee and the powers reserved to the States by the Tenth Amendment, Montana has long regulated its judicial elections, prescribed the structure of its judiciary, and prohibited political party endorsements or expenditures in nonpartisan judicial elections – determinations which lie at "the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). Since statehood, the people of Montana have required election of supreme court justices and

district court judges. In 1889, upon joining the Union, Montana adopted a Constitution requiring that supreme court justices and district court judges be attorneys admitted to practice in Montana and be elected. 1889 Mont. Const. art. VIII, §§ 6, 12 (App. 49-50). And, since 1935, Montana statutes have prohibited political party endorsements and expenditures in nonpartisan judicial elections. *See* 1935 Mont. Laws, 24th Sess., ch. 182, §§ 3, 13 (App. 76-77, 82).

During the Montana constitutional convention in 1971-1972, the delegates debated various methods of selecting judicial officers, including the merits of nonpartisan election (App. 60-74). The delegates decided the method of selection would not change, and the people of Montana ratified that decision by popular vote. 1972 Mont. Const. art. VII, § 8(1) (App. 49). After ratification of the of the 1972 Constitution, the Montana Legislature adopted a reorganized version of the 1935 law, and recodified the provision at issue at Mont. Code Ann. § 13-35-231 (App. 50).

The Sanders County Republican Central Committee (SCRCC) is a county committee of a "political party" within the meaning of Mont. Code Ann. § 13-38-105 (App. 53). It filed suit to enjoin enforcement of Mont. Code Ann. § 13-35-231, so that it could endorse judicial candidates in nonpartisan elections and make expenditures to publicize any endorsement (App. 51-59). In the Complaint, filed May 29, 2012, SCRCC stated its unabashed intention "to promote the election of candidates to public office who share its ideological views" (App. 53). SCRCC emphasized that "[g]iven

the increasing intrusions by left-leaning state judges into areas of policy traditionally reserved to the Legislature, SCRCC desires to endorse judicial candidates. . . ." (App. 54). SCRCC wants to transform nonpartisan judicial elections into partisan affairs.

SCRCC sought a preliminary injunction on the endorsement provision of the statute, but did not challenge the portions of the statute prohibiting expenditures or contributions (App. 35). The hearing on SCRCC's motion for preliminary injunction occurred on June 11, 2012, the Honorable Charles C. Lovell presiding (App. 32-33). The district court, in a reasoned decision after the hearing, denied SCRCC's motion for preliminary injunctive relief in an order entered on June 26, 2012 (App. 32-45). The district court noted that SCRCC admittedly "wishes to endorse judicial candidates for the very purpose of injecting partisanship into the elections." *Sanders County Republican Cent. Comm. v. Bullock*, 2012 U.S. Dist. LEXIS 88544 (D. Mont. June 26, 2012) at **12, 14-15 (App. 33, 42). Determining that SCRCC sought to engage in political speech during a campaign for political office, the district court applied strict scrutiny (App. 37-38). Consequently, relying on the "unequivocally compelling interest that Montana has in maintaining an independent and fair judiciary," the district court considered whether the prohibition of party endorsements is narrowly tailored to achieve that interest (App. 39-44).

The district court concluded, citing *Mistretta v. United States*, 488 U.S. 361, 407 (1989), that the

"states' interest in judicial independence and fairness necessitates, by definition, a nonpartisan judiciary" (App. 38). Noting the paucity of case law applying strict scrutiny in this area, the district court was persuaded by the dissenting opinion of Judge Rymer in the Ninth Circuit's decision in *Geary v. Renne*, 911 F.2d 280, 301 (9th Cir. 1990) (en banc), *reversed and vacated sub nom.*, 501 U.S. 312 (1991) (vacating without reaching the merits because the case was not justiciable) (App. 40-43). In *Geary v. Renne*, Judge Rymer had reasoned:

> [T]he fact that [the statute] targets the collective voice only with respect to endorsements for nonpartisan offices may render it drawn as precisely as it can be, for to preclude party endorsements in nonparty elections is the flip side of a candidate's running for nonpartisan office without party identification.

Id. (Rymer, J., dissenting) (App. 41).

The district court determined that there might not be a way to more narrowly tailor statutes of this type (App. 41). Applying Judge Rymer's analysis, the district court reasoned: "If, contrary to Section 13-35-231, political parties were permitted to endorse nonpartisan judicial candidates, then the elections might be nonpartisan only in form. Nonpartisan elections, perhaps, can truly be nonpartisan only if political parties are prohibited from endorsing the candidates." (App. 41).

Finally, the district court concluded that Judge Rymer's analysis had support in this Court's recognition in *Citizens United v. FEC*, 558 U.S. 310, 341 (2010), that the Court had "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons" where the restrictions "were based on an interest in allowing governmental entities to perform their functions." (App. 41-42).

Emphasizing that SCRCC's "express objective is to use endorsements to transform Montana's nonpartisan judicial elections into functionally partisan elections and, more specifically, to attack 'left-leaning judges,'" the district court concluded that "at this point in the litigation" SCRCC was not likely to prevail on the merits (App. 42-43). The district court also determined that neither the public interest nor the balance of equities favored an injunction because in a state that has chosen nonpartisan judicial elections "[a]n appearance of partisanship will hardly foster public confidence in the courts." (App. 43). Finally, the district court was concerned that there was no factual record to guide its decision – a circumstance, ironically, which influenced this Court's determination not to address the merits in *Renne v. Geary*, 501 U.S. 312, 324 (1991) ("The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and ill-defined factual record presented us.") (App. 44).

SCRCC promptly appealed, followed by an expedited briefing schedule, and oral argument before the Ninth Circuit on August 31, 2012. The Ninth Circuit reversed on September 17, 2012, over Judge Schroeder's dissent, and directed entry of a preliminary injunction. *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012) (App. 12-31). The majority extended the ruling of *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), in which this Court applied strict scrutiny and held unconstitutional an "announce clause" that prohibited candidates for judicial election from announcing their views on disputed legal issues. *White*, 536 U.S. at 781. The Ninth Circuit ruled that SCRCC's speech was protected under *Citizens United*, and that section 13-35-231 was facially unconstitutional as to endorsements and expenditures to publicize endorsements. *Sanders County*, 698 F.3d at 745-46, 749. The Ninth Circuit ruled that Montana "lacks a compelling interest in forbidding political parties from endorsing judicial candidates [and,] even if it were otherwise, section 13-35-231 is not narrowly tailored to this end." *Sanders County*, 698 F.3d at 747. The court concluded that the restriction was not even rational. *Id.* at 748. The majority trivialized Montana's concerns as "best practices" that could not survive constitutional scrutiny. *Id.* at 746. The Ninth Circuit barely mentioned the Tenth Amendment and completely failed to address the Guarantee Clause. *Id.* at 748.

In Judge Schroeder's dissent, she decried the majority decision "as a big step backwards for the

state of Montana, which we all agree has a compelling interest in maintaining an independent and impartial judiciary." *Sanders County*, 698 F.3d at 749. She maintained the majority's ruling was an "unwarranted extension" of *White* because "[p]artisan endorsements do not protect the candidate's right to speak that was at the core of [*White*]." *Id*. The "result is to encourage a judiciary dependent on political alliances." *Id.* at 750. Judge Schroeder emphasized that "[p]olitical endorsements, much more than judges' discussion of the issues, lead to political indebtedness, which in turn has a corrosive impact on the public's perception of the judicial system." *Id*. (citations omitted). Judge Schroeder further emphasized that judicial elections are *different* than other elections, and that states properly treat them differently. *Id.* at 751. She would have upheld the denial of a preliminary injunction, and stressed the majority ignored that the "inevitable impact of increasing partisanship . . . serves only to erode the perceived and actual fairness of litigation in the state courts [which] are the unfortunate and unforeseen consequences of the majority's unwarranted extension of [*White*], especially when viewed in the light of *Citizens United*." *Id.*

The majority relied on the en banc Ninth Circuit opinion in *Geary v. Renne*, which this Court has vacated. 698 F.3d at 745. Judge Schroeder, who voted with the en banc majority in *Geary v. Renne*, dissented with the admonition that the "majority ignores the practical effects of its decision on that interest when

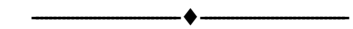
it takes a formulaic approach to First Amendment doctrine." *Id*. at 749. "This means parties can work to secure judges' commitments to the parties' agendas in contravention of the non-partisan goal the state has chosen for its selection process." *Id*.

After remand, the district court immediately vacated the trial setting and entered a permanent injunction against enforcement of the entire statute (including the ban on contributions by political parties, which SCRCC had not challenged) (App. 10-11). Because the Ninth Circuit decision resulted after an expedited appeal on a scant record developed on a motion for preliminary injunction heard two weeks after the complaint was filed, Montana requested an opportunity to file motions for summary judgment in order to more fully develop the record. The district ruled "summary judgment motions by the parties seem superfluous in light of the [Ninth] Circuit's opinion" that the statute is facially unconstitutional (App. 11). Montana promptly appealed.

The same three-judge Ninth Circuit panel affirmed in part and reversed in part on June 21, 2013. *Sanders County Republican Cent. Comm. v. Fox*, 717 F.3d 1090 (2013) (App. 1-6). The panel held it was bound, based on Ninth Circuit precedent, to follow its previous published opinion finding the statute facially unconstitutional as to endorsements and expenditures, reversed on the question of whether the contribution ban should be enjoined, and remanded with instructions to revise the permanent injunction accordingly. *Id.* at 1091-92. The district court thereafter modified

its permanent injunction so that it only prohibited enforcement of the endorsement and expenditure portions of the statute (App. 7-9). The petition for rehearing en banc was denied on August 16, 2013 (App. 46-47).

In the rush to declare the Montana statute unconstitutional on its face, and notwithstanding this Court's warning in *Renne v. Geary* that an issue with such far-reaching consequences cannot be decided on an "amorphous and ill-defined record," the Ninth Circuit's decision effectively mooted the district court's desire for a complete record to guide its decision (App. 44).



REASONS FOR GRANTING THE PETITION

In a decision contrary to this Court's highly relevant or controlling decision in *Renne v. Geary*, the Ninth Circuit hurried to declare Montana's ban on political party endorsements and expenditures in nonpartisan judicial elections a facially unconstitutional violation of the First Amendment. It accomplished this by ignoring the constitutional underpinnings supporting the state's sovereign authority to institute nonpartisan judicial elections and by postulating less restrictive alternatives which do not serve the state's interests.

In *Renne v. Geary*, which involved nearly identical issues and an equally undeveloped factual record, this Court vacated and remanded. Accordingly, the

Court should do the same here. If this decision is allowed to stand, Montana and other states in the Ninth Circuit will be denied equal sovereignty with states in other circuits.

This Court should grant the writ, reverse, and instruct the case be remanded for development of a record to guide judicial decision-making regarding constitutional issues of fundamental importance to the people of Montana, the States, and the Judiciary.

I. MONTANA'S LIMITED BAN ON POLITICAL PARTY ENDORSEMENTS FOR NONPARTISAN JUDICIAL ELECTIONS DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Contrary To The Ninth Circuit, Montana's Interest Is Very Compelling.

The constitutional issues raised in this case are of extreme and fundamental importance to the sovereign power of the states to regulate and determine the form and manner of judicial elections and the qualifications of independent, impartial and nonpartisan judicial officers. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, ___ U.S. ___, 133 S. Ct. 2612, 2623 (2013) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). Under the Guarantee Clause, states retain authority "to determine the conditions under which the right of suffrage may be exercised [and] . . . prescribe the qualifications of its

officers and the manner in which they shall be chosen." *Id*. (citations omitted); *Gregory*, 501 U.S. at 460. The authority of the people of the States to determine the qualifications of their officials "is an authority that lies at 'the heart of representative government.'" *Gregory*, 501 U.S. at 463 (citation omitted).

As this Court has recognized, judges are different than officials in the executive and legislative branches. *Gregory*, 501 U.S. at 471-73. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and *nonpartisanship*." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added). *See also Wersal v. Sexton*, 674 F.3d 1010, 1022-23 (8th Cir. 2012). Because judicial offices are different, the states may treat them differently: "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

> The State's interest in the structure of Government is "super" compelling because of its constitutional significance. The guarantee clause commits the United States, including the courts of the United States, to protect the structure chosen by the citizens of each state. In this sense, structure is more compelling than corruption, for example, which is an evil that the state has a "compelling" interest in avoiding but which lacks the constitutional

> underpinnings of the state's form of government.

Geary, 911 F.2d at 297 n.8 (Rymer, J., dissenting). Because the state's interest in conducting nonpartisan judicial elections is "of constitutional dimension . . . it must be accorded weight of the most compelling sort." *Id.* at 298.

Though the compelling nature of the state's interest was not at issue in the Ninth Circuit because the parties agreed and the district court concluded that the state's interest was compelling (App. 38-39), *Sanders County*, 698 F.3d at 746, the Ninth Circuit actually concluded that the State's interest was not compelling – a feat it accomplished by ignoring its constitutional underpinnings and mischaracterizing it as just an interest "in forbidding political parties from endorsing judicial candidates." *Sanders County*, 698 F.3d at 747. That determination was manifestly incorrect.

B. Montana's Prohibition On Political Party Endorsements And Expenditures In Nonpartisan Judicial Elections Is As Narrow As It Can Be.

The Ninth Circuit determined that if the state's interest were compelling, section 13-35-231 was not narrowly tailored. *Id*. at 747. The Ninth Circuit, however, erred in concluding that Montana's political party endorsement and expenditure prohibition was not narrowly tailored. As happened in *Geary v. Renne* over two decades ago, and again here, the Ninth Circuit's analysis is wrong in two fundamental respects.

First "[i]t misapprehends the nature of the state's interest, and in so doing, undervalues it. Second, it hypothesizes less restrictive means without considering their relationship to the interest at stake or whether they work." *Geary*, 911 F.2d at 298 (Rymer, J., dissenting).

The Ninth Circuit failed to appreciate that strict scrutiny does not require a state to choose completely ineffectual means or alternatives which "would effectively destroy the nonpartisan system. . . ." *Geary*, 911 F.2d at 302 (Rymer, J. dissenting). In the district court's eminently reasonable view, nonpartisan judicial elections would be nonpartisan in "form" only if political parties were permitted to endorse nonpartisan candidates (App. 41). And as Judge Rymer pointed out in *Geary v. Renne*,

> a nonpartisan election is by definition *not* theirs. The purpose of an election within the nonpartisan structure has nothing to do with settling the internal divisions within a political party. Rather, a nonpartisan structure abandons the political party as a conduit for the electorate's views. Nonpartisanship envisions "direct representation of citizens rather than indirect representation through parties as intermediaries."

Id. at 299 (emphasis in original) (citation omitted) (Rymer, J., dissenting). Thus, Montana law is "drawn as precisely as it can be, for to preclude party endorsements in nonparty elections is the flip side of a candidate's running for nonpartisan office without party identification." *Cf. Geary*, 911 F.2d at 301 (Rymer, J., dissenting) (App. 41).

In the Ninth Circuit's view, "Montana could appoint its judges, with a bipartisan and expert panel making nominations – a less restrictive alternative currently practiced in several states." *Sanders County*, 698 F.3d at 747. This misses the mark entirely because it ignores the constitutional underpinnings of Montana's interest in determining the structure of its republican form of government. The people of Montana have chosen nonpartisan judicial elections. Requiring a state to choose a nonelective appointment process, including even "bipartisan" panels, would clearly not serve the state's interest in controlling its structure or form of government. It is self-evident that "nonpartisan means no party and there is accordingly no less restrictive means of filling a no-party office, than a no party election." *Geary*, 911 F.2d at 299 (Rymer, J., dissenting).

Finally, the Ninth Circuit's determination that the Montana statute is underinclusive also misses the mark because in a state that has exercised its sovereign prerogative to have nonpartisan judicial elections, partisan political endorsements and expenditures threaten both the legitimacy and functioning of a nonpartisan judiciary. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and *nonpartisanship*." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added). *See also Citizens United v. FEC*, 558 U.S. 310, 341 (2010) ("The Court has upheld a narrow class of speech restrictions . . . based on an interest in allowing governmental entities to perform their

functions."); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 557 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service"). Montana law is narrowly tailored because if it included non-political-party groups it would be overinclusive. Montana's nonpartisan structure is narrowly tailored to prohibiting only political party endorsements and expenditures.

II. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S DECISION IN *RENNE V. GEARY* AND IF ALLOWED TO STAND, THE PRINCIPLE OF EQUAL SOVEREIGNTY WILL BE SACRIFICED.

Adopting the reasoning of Judge Rymer's dissent in *Geary v. Renne* and recognizing this Court's unwillingness to address the merits in *Renne v. Geary*, the district court concluded that a matter of such monumental importance should not be decided on less than a complete record (App. 43-44). In *Renne* this Court observed: "The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and ill-defined factual record presented to us." *Renne v. Geary*, 501 U.S. at 324. The Ninth Circuit's ruling that the Montana statute is facially unconstitutional prevented the development of an adequate record in this case. The Ninth Circuit's ruling is contrary to *Renne v. Geary*. Consequently, this Court should grant the writ, reverse,

and instruct the case be remanded to the district court for further proceedings.

This case satisfies this Court's criteria for exercising discretionary jurisdiction. First of all, the Ninth Circuit's decision is contrary to *Renne v. Geary*, which is the most "relevant" decision of this Court for purpose of Rule 10. The issues raised in *Renne v. Geary* were nearly the same as the issues raised here and the adequacy of the record here as a guide to judicial decision-making is even worse than in *Renne*. This case concerns highly important constitutional issues involving the interplay between the First Amendment, the Guarantee Clause, and the Tenth Amendment.

Moreover, it is actually urgent that this Court take this case to address the Ninth Circuit's mistake. If this decision is allowed to stand, Montana and other states in the Ninth Circuit will be unable to conduct truly nonpartisan judicial elections. As a practical matter, Montana and other states would then be forced to choose between two alternatives long disfavored by the people of Montana and numerous other states: partisan judicial elections or judicial nomination processes. While states in other circuits will be free to conduct nonpartisan judicial elections without being required to adopt policies their people disfavor, states in the Ninth Circuit will be denied that authority. This circumstance violates the principle of equal sovereignty. *See*, *e.g.*, *Shelby County*, 133 S. Ct. at 2623; *United States v. Louisiana*, 363 U.S. 1, 16 (1960); *Lessee of Pollard v. Hagan*, 44 U.S. 212, 3

How. 212 (1845). Consequently, this Court should grant the writ and reverse and remand for development of the record.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 13, 2013

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, *Plaintiff-Appellee*, v. TIMOTHY C. FOX,* in his official capacity as Attorney General for the State of Montana; James Murry, in his official capacity as the Commissioner for Political Practices for the State of Montana, *Defendants-Appellants*.	No. 12-35816 D.C. No. 6:12-cv-00046-CCL OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, Senior District Judge, Presiding

Submitted June 17, 2013**

Filed June 21, 2013

* Timothy C. Fox is substituted for his predecessor, Steven Bullock, as Attorney General for the State of Montana. Fed R. App. P. 43(c)(2).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: Mary M. Schroeder and
Ronald M. Gould, Circuit Judges, and
Jed S. Rakoff, Senior District Judge.***

Opinion by Judge Rakoff

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's permanent injunction enjoining the State of Montana's Attorney General and Commissioner of Political Practices from enforcing in its entirety a Montana statute making it a criminal offense for any political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate" in a nonpartisan judicial election, Mont. Code Ann. § 13-35-231.

The panel held that to the extent that appellants challenged the permanent injunction against enforcement of section 13-35-231's ban on endorsements and expenditures, the panel was bound to follow its prior published decision finding those provisions unconstitutional. *See Sanders Cnty. Republican Cent.*

*** The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

**** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Comm. v. Bullock, 698 F.3d 741 (9th Cir. 2012). Accordingly, the panel affirmed the district court's entry of a permanent injunction as it pertained to those portions of the statute.

The panel noted that in its prior decision of September 17, 2012, the court had not reached the issue of the constitutionality of the statute's ban on contributions and that no such challenge had subsequently been raised. The panel therefore remanded to the district court with instructions to revise the permanent injunction so that it enjoined only the statute's ban on endorsements and expenditures, and not the statute's ban on contributions.

COUNSEL

Timothy C. Fox, Montana Attorney General, and Michael G. Black, Montana Assistant Attorney General, Helena, Montana, for Defendants-Appellants.

Matthew G. Monforton, Bozeman, Montana, for Plaintiff-Appellee.

Lawrence A. Anderson, Great Falls, Montana; Matthew Menendez, Alicia Bannon, and David Earley, Brennan Center for Justice at NYU School of Law, New York, New York, for amicus curiae The Brennan Center for Justice at NYU School of Law.

OPINION

RAKOFF, Senior District Judge:

On May 29, 2012, appellee Sanders County Republican Central Committee ("the Committee") filed suit against appellants, the State of Montana's Attorney General and its Commissioner of Political Practices, seeking a declaration that certain portions of a Montana statute making it a criminal offense for any political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate" in a nonpartisan judicial election, Mont. Code Ann. § 13-35-231, were unconstitutional and requesting an injunction against its enforcement. On June 26, 2012, the district court denied the Committee's motion for a preliminary injunction. On September 17, 2012, this Court reversed that decision, with Judge Schroeder dissenting, and remanded the case for further proceedings consistent with the Court's opinion. *See Sanders Cnty. Republican Cent. Comm. v. Bullock,* 698 F.3d 741 (9th Cir. 2012). Specifically, this Court determined that Montana's ban on endorsements and expenditures by a political party in a judicial election violated the Committee's rights under the First Amendment, *id.* at 745-48, and that the enforcement of section 13-35-231's prohibition of such endorsements and of the expenditures needed to make those views publicly known should be preliminarily enjoined. *Id.* at 748-49.

Upon remand to the district court, appellants moved for an order vacating the previously-set September 25, 2012, trial date and sought an opportunity

to file motions for summary judgment. The district court vacated the trial date and, finding that summary judgment motions would be "superfluous" in light of this court's preliminary injunction opinion, entered judgment on September 19, 2012, permanently enjoining appellants from enforcing section 13-35-231 in its entirety. Appellants now appeal from that judgment.

To the extent that appellants challenge the permanent injunction against enforcement of section 13-35-231's ban on endorsements and expenditures, this panel is bound to follow its published decision finding those provisions unconstitutional. *See Gonzalez v. Arizona,* 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), *cert. granted,* 133 S. Ct. 476 (2012) ("[A] published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so'. . . ." (quoting *Hart v. Massanari,* 266 F.3d 1155, 1170 (9th Cir. 2001))). Accordingly, we affirm the district court's entry of a permanent injunction as it pertains to those portions of the statute.

However, the district court, apparently under the mistaken impression that this court had found section 13-35-231 unconstitutional in all respects, entered a permanent injunction against the enforcement of section 13-35-231 in its entirety, including the statute's ban on contributions by a political party to a judicial candidate. In its decision of September 17, 2012, this court had not reached the issue of the statute's ban on contributions, noting that the Committee "does not here challenge Montana's ban

on contributions to judicial candidates by political parties." *Sanders Cnty. Republican Cent. Comm.,* 698 F.3d at 744 n.1. Nor in the brief proceedings before the district court after the matter was remanded following our decision did the Committee challenge the statute's ban on contributions. And in its submission on the instant appeal, the Committee once again disavows any such challenge. *See Lair v. Bullock,* 697 F.3d 1200 (9th Cir. 2012) (finding, on a motion for a stay pending appeal, that Montana was likely to succeed on an appeal of a permanent injunction against enforcement of certain restrictions on campaign contributions).

We therefore remand to the district court with instructions to revise the permanent injunction so that it enjoins only the statute's ban on endorsements and expenditures, and not the statute's ban on contributions.[1] The parties shall bear their own costs.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

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[1] It is clear that the statute's contribution ban is severable from its endorsement and expenditure bans, and the parties nowhere suggest otherwise. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3161 (2010) ("'Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" (quoting *Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 328-29 (2006))).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff, vs. TIMOTHY C. FOX, in his official capacity as Montana's Attorney General, and JAMES MURRY, in his official capacity as Montana's Commissioner of Political Practices, Defendants.	CV 12-46-H-CCL ORDER NUNC PRO TUNC AMENDING PRELIMINARY INJUNCTION ORDER DATED SEPTEMBER 19, 2012 (Filed Jun. 24, 2013)

The Sanders County Republican Central Committee challenges Montana Code Annotated § 13-35-231, which makes it unlawful for a political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate."

In advance of Montana's 2012 general election, the Committee applied for a temporary restraining order and a preliminary injunction enjoining enforcement of the statute. After hearing and considering the parties' arguments, the Court denied the Committee's application, concluding that the plaintiffs were not likely to succeed on their claim that the statute is unconstitutional. (Doc. 29.) The Court

noted in its order that the Committee was challenging only the statute's ban on endorsements and not the ban on expenditures or contributions. (*Id.* at 4.)

The Committee filed an interlocutory appeal. The Ninth Circuit panel, with Judge Schroeder dissenting, reversed this Court's order. The panel held that Section 13-35-231 is facially unconstitutional. *Sanders County Republican Central Committee v. Bullock,* 698 F.3d 741 (9th Cir. 2012). This Court understood the Ninth Circuit's decision to invalidate the entire statute – not merely the endorsement or expenditure provisions. *Id.* at 748 ("[T]he statute here is facially unconstitutional . . . .") This Court did not interpret the Ninth Circuit decision to sever those provisions from the statute, leaving the ban on contributions intact. The panel ordered:

> For the foregoing reasons, we conclude that, because section 13-35-231 is unconstitutional on its face, *Montana must be enjoined forthwith from enforcing it* or otherwise interfering with political party's right to endorse judicial candidates and to expend monies to publicize such endorsements.

Id. at 749 (emphasis added).

In light of the Ninth Circuit's decision, the Court granted summary judgment in favor of the Committee on remand and ordered: "The defendants are permanently enjoined from enforcing Montana Code Annotated § 13-35-231." (Doc. 45.)

The defendants appealed that order. They argued, among other things, that the Ninth Circuit had only invalidated the expenditure and endorsement provisions of Section 13-35-231, not the statute's ban on contributions.

The original three-judge panel agreed with the defendants. It held that the Committee had challenged only the endorsement and expenditure provisions of Section 13-35-231, so only those provisions were invalidated. Since those provisions are severable, the panel concluded, the statute's ban on contributions was not invalidated. The panel therefore remanded the case to this Court "with instructions to revise the permanent injunction so that it enjoins only the statute's ban on endorsements and expenditures, and not the statute's ban on contributions." The Court now does so.

IT IS ORDERED that the Court's September 19, 2012 order enjoining Montana's enforcement of Montana Code Annotated § 13-35-231 (doc. 45) is AMENDED. Pursuant to the Ninth Circuit's decision, Montana is PERMANENTLY ENJOINED from enforcing Section 13-35-231's ban on endorsements and expenditures but not the statute's ban on contributions.

Dated this 24th day of June 2013.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff, vs. TIMOTHY C. FOX, in his official capacity as Montana's Attorney General; and JAMES MURRY, in his official capacity as Montana's Commissioner of Political Practices; Defendants.	CV 12-46-H-CCL ORDER (Filed Sep. 19, 2012)

The Sanders County Republican Central Committee moved this Court for a preliminary injunction that enjoins the defendants from enforcing the endorsement prohibition in Montana Code Annotated § 13-35-231. That statute reads: "A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate." On June 26, 2012, the Court denied the plaintiffs [sic] motion and scheduled a bench trial for September 25, 2012.

The plaintiffs filed an interlocutory appeal seeking emergency relief from the United States Court of Appeals for the Ninth Circuit. On September 17,

2012, the Ninth Circuit, with Judge Schroeder dissenting, issued an an [sic] opinion reversing and remanding this matter. The opinion was accompanied by the mandate, reinvesting this Court with jurisdiction in the case. That court concluded that the statute is facially unconstitutional and that the defendants must be permanently enjoined from enforcing it Defendant since moved this Court for an order vacating the September 25, 2012, trial date and also for an opportunity for the parties to file motions for summary judgment. While the trial date must be vacated, the summary judgment motions by the parties seem superfluous in light of the Circuit's opinion. Accordingly,

IT IS ORDERED that the Clerk of Court is directed to enter judgment in favor of the Sanders County Republican Central Committee and close this case. The defendants are permanently enjoined from enforcing Montana Code Annotated § 13-35-231.

IT IS FURTHER ORDERED that the bench trial scheduled to begin on September 25, 2012, is hereby VACATED.

Dated this 19th day of September 2012.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff-Appellant, v. STEVEN BULLOCK, in his official capacity as Attorney General for the State of Montana; JAMES MURRY, in his official capacity as the Commissioner for Political Practices for the State of Montana, Defendants-Appellees.	No. 12-35543 D.C. No. CV-12-00046 OPINION (Filed Sep. 17, 2012)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, Senior U.S. District Judge, Presiding

Argued and Submitted August 31, 2012
Seattle Washington

Before: SCHROEDER and GOULD, Circuit Judges, and RAKOFF, Senior District Judge.*

* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

RAKOFF, Senior District Judge:

Since 1935, Montana has selected its judges through nonpartisan popular elections. Mont. Code Ann. § 13-14-111. Further to this end, Montana makes it a criminal offense for any political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate," Mont. Code Ann. § 13-35-231, and individuals who facilitate such activities may also be held criminally liable, Mont. Code Ann. § 13-35-105. The voters of Montana are thus deprived of the full and robust exchange of views to which, under our Constitution, they are entitled.

Appellant Sanders County Republican Central Committee ("the Committee") seeks to endorse judicial candidates and to enable the expenditures that would make those views publicly known. The Committee argues that Montana's ban on political party endorsements is an unconstitutional restriction of its First Amendment rights of free speech and association.[1] On May 29, 2012, the Committee filed suit against Montana's Commissioner of Political Practices James Murry and against Montana's Attorney General Steven Bullock seeking injunctive relief and a declaration that the statute is unconstitutional. On June 26, 2012, the district court denied the Committee's motion for a preliminary injunction. The Committee appeals that decision and seeks immediate

[1] Appellant does not here challenge Montana's ban on contributions to judicial candidates by political parties.

injunctive relief to prevent Montana from enforcing the statute against the Committee and its members. We have jurisdiction under 28 U.S.C. § 1292(a)(1). For the following reasons, we reverse the district court and grant immediate injunctive relief.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1115 (9th Cir. 2011) (quoting *Winter v. NRDC,* 555 U.S. 7, 24-25 (2008)). A denial of a preliminary injunction is generally reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011). However, where a district court's denial of a preliminary injunction motion "rests solely on a premise of law and the facts are either established or undisputed, our review is *de novo.*" *Sammartano v. First Judicial Dist. Ct.,* 303 F.3d 959, 964-65 (9th Cir. 2002). In the instant case, where the essential issues are matters of law, we review the district court's conclusions *de novo.*

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Protected Speech

When seeking a preliminary injunction "in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its

First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Thalheimer,* 645 F.3d at 1116. Here, there can be no question that the Committee has carried its initial burden.

As the Supreme Court has found, "[t]he First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Citizens United v. Fed. Election Comm'n,* 130 S.Ct. 876, 898 (2010) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 223 (1989)); *see also Buckley v. Valeo,* 424 U.S. 1, 48 (1976) ("Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."). Thus, political speech – including the endorsement of candidates for office – is at the core of speech protected by the First Amendment.

This protection extends as much to political parties exercising their right of association as to individuals. As this Court stated in *Geary v. Renne,* "because the exercise of these basic first amendment freedoms traditionally has been through the media of political associations, political parties as well as party adherents enjoy rights of political expression and association." 911 F.2d 280, 283 (9th Cir. 1990) (en banc), *rev'd on other grounds, Renne v. Geary,* 501 U.S. 312 (1991). More recently, the Supreme Court, in extending First Amendment protection of political

speech to corporations, reaffirmed that "[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United,* 130 S.Ct. at 900.[2]

The threat to infringement of such First Amendment rights is at its greatest when, as here, the state employs its criminalizing powers. As the Supreme Court further found in *Citizens United,* "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." 130 S. Ct. at 904. Thus, the Committee has clearly shown that section 13-35-231, on its face, restricts the Committee's exercise of its First Amendment rights.

B. Strict Scrutiny

The burden therefore shifts to Montana to attempt to justify the restriction. *See Thalheimer,* 645 F.3d at 1116. As a preliminary matter, the Court must determine what standard it must apply to the assessment of such alleged justifications: "strict scrutiny"

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[2] In her dissent, our respected colleague seems to suggest that a political party has no independent First Amendment right to free speech beyond the rights of its constituent members. This position ignores the explicit recognition in *Citizens United* that associations have their own free speech rights, separate and independent from those of their members. *See Citizens United,* 130 S. Ct. at 904.

or "balancing." While the district court applied strict scrutiny, Montana argues that this Court should apply a balancing test that weighs against the Committee's First Amendment rights the state's Tenth Amendment right to structure its judicial institutions as it deems fit.

But while the Tenth Amendment preserves to the states the power to regulate the roles that political parties may play in the design of judicial and other institutions, that does not imply that the states have similar leeway in placing restrictions upon a political association's right to speak. *See Eu,* 489 U.S. at 222-24 ("A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" (quoting *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217 (1986))); *Geary,* 911 F.2d at 288 (Reinhardt, J., concurring) ("[T]here is all the difference in the world between refusing to delegate to political parties the decision as to which candidates appear on the general-election ballot and prohibiting political party organizations from announcing their views on the merits of candidates seeking public office.").

Thus, we find that because the statute here at issue is, on its face, a content-based restriction on political speech and association, and thereby threatens to abridge a fundamental right, it is "subject to strict scrutiny, which requires the Government to prove that the restriction 'furthers a compelling

interest and is narrowly tailored to achieve that interest.'" *Citizens United,* 130 S. Ct. at 882 (quoting *Fed. Election Comm'n v. Wis. Right To Life, Inc.,* 551 U.S. 449, 464 (2007)); *see also Geary,* 911 F.2d at 283 (applying strict scrutiny in striking down California's ban on political party endorsements of candidates for nonpartisan office).[3]

C. Compelling Interest and Narrow Tailoring

The district court found, and the parties do not here dispute, that Montana has a compelling interest in maintaining a fair and independent judiciary. Where Montana and the district court err, however, is in supposing that preventing political parties from endorsing judicial candidates is a necessary prerequisite to maintaining a fair and independent judiciary. *See United States v. Alvarez,* 132 S. Ct. 2537, 2549 (2012) ("The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest."); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992) ("[T]he danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is *necessary* to serve the

[3] For similar reasons we reject Montana's argument that a balancing test should be applied to weigh the competing constitutional concerns of Appellants' First Amendment rights of speech and association against potential litigants' due process interests in a fair and impartial judiciary.

asserted compelling interest." (internal quotation marks and citations omitted)). Montana offers no evidence to support this facially doubtful proposition, and it flies in the face of the fact that many of the other 38 states that elect their judges not only allow party endorsements but require party nominations.[4] Nor does Montana suggest that, as a result, the judiciaries of these other states lack fairness or integrity. *See Republican Party of Minn. v. White,* 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) ("Many [elected state judges], despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity."). It may be, of course, that Montana reasonably believes that restricting political endorsements of judicial candidates enhances the independence of its judiciary; but such supposed "best practices" are not remotely sufficient to survive strict scrutiny.

Under a strict scrutiny standard, therefore, Montana lacks a compelling interest in forbidding political parties from endorsing judicial candidates. Moreover, even if it were otherwise, section 13-35-231 is not narrowly tailored to this end.

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[4] For a summary of which states require partisan elections, *see* Roy A. Schotland, *New Challenges to States' Judicial Selection,* 95 Geo. L.J. 1077, 1085 (2007).

To begin with, the existence of content-neutral alternatives "'undercut[s] significantly' any defense of such a statute." *R.A.V.,* 505 U.S. at 395 (quoting *Boos v. Barry,* 485 U.S. 312, 329 (1988)) (alteration in original). If Montana were concerned that party endorsements might undermine elected judges' independence, Montana could appoint its judges, with a bipartisan and expert panel making nominations – a less restrictive alternative currently practiced by several states.

This is not to say, obviously, that Montana's decision to elect its judges is impermissible.[5] But if Montana "chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *White,* 536 U.S. at 788 (quoting *Renne,* 501 U.S. at 349 (Marshall, J., dissenting)) (alteration in original); *see also Renne,* 501 U.S. at 349 (Marshall, J., dissenting) ("[T]he prospect that voters might be persuaded by party endorsements is not a *corruption* of the

[5] We disagree with the dissent's suggestion that affording political parties their full First Amendment rights inevitably requires that judicial elections be treated no differently than elections for the political branches. Montana's decision to exclude parties from the nomination and balloting process for judicial candidates remains a valid choice to limit party involvement in judicial institutions. *See* Mont. Code Ann. § 13-14-111. Contrary to the dissent, we do not see how a political party, in the absence of a role in the nomination and balloting process, is materially different from any other interest group that is permitted under Montana law to endorse a judicial candidate.

democratic process; it *is* the democratic process."). To hold otherwise would turn "First Amendment jurisprudence on its head." *White,* 536 U.S. at 781.[6]

Furthermore, section 13-35-231, while not narrowly tailored to achieve its ends, is at the same time under-inclusive, in that it forbids judicial endorsements by political parties but not by other associations, individuals, corporations, special interest groups, and the like. As noted by the Eighth Circuit in *Republican Party of Minn. v. White* (*White II*),

> There are numerous other organizations whose purpose is to work at advancing any number of similar goals, often in a more determined way than a political party. Minnesota worries that a judicial candidate's consorting with a political party will damage that individual's impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party's policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the constitutional, legislative, public policy and procedural beliefs of organizations such as

[6] While, as the dissent notes, *White* concerned the unconstitutionality of limits on a judge's speech during a judicial election, nothing in the majority opinion in *White* suggests that laws limiting speech by parties differ from laws limiting speech by candidates. In both cases, the First Amendment requires strict scrutiny of such limitations, and for the reasons here explained the challenged statute criminalizing party political speech does not withstand strict scrutiny.

> the National Rifle Association (NRA), the National Organization for Women (NOW), the Christian Coalition, the NAACP, the AFL-CIO, or any number of other political interest groups.

416 F.3d 738, 759 (8th Cir. 2005). Such under-inclusivity "diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994).

In short, Montana has shown neither that section 13-35-231 is necessary to achieve a compelling state interest nor that it is narrowly and rationally tailored to that purpose.

II. IRREPARABLE HARM

With judicial elections imminent in Montana, and the candidates already selected and announced, the need for immediate injunctive relief enjoining Montana from prohibiting and penalizing political parties' endorsements of judicial candidates is apparent. Nevertheless, the district court, in denying preliminary relief, pointed to the dearth of evidence before it and held that it ought not decide issues of such "fundamental and far-reaching import" without a complete record. True, the matter is of great importance, but as noted, the statute here is facially unconstitutional, and the burden then shifts to the state to try to justify the statute, either by evidence or argument, which, as shown above, it has failed to do. In such circumstances, and with the Committee's

First Amendment rights being chilled daily, the need for immediate injunctive relief without further delay is, in fact, a direct corollary of the matter's great importance. Indeed, the fact that the Committee will otherwise suffer irreparable harm is demonstrated by "a long line of precedent establishing that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Thalheimer,* 645 F.3d at 1128 (quoting *Klein v. City of San Clemente,* 584 F.3d 1196, 1208 (9th Cir. 2009)). When, as here, a party seeks to engage in political speech in an impending election, a "delay of even a day or two may be intolerable." *Klein,* 584 F.3d at 1208 (citation omitted). We conclude that the Committee would suffer irreparable injury if a preliminary injunction were not granted.

III. BALANCE OF HARDSHIPS

Given the foregoing, it is patent that the hardships to the Committee from not issuing the injunction outweigh the cognizable hardship (if any) to the state from issuing the injunction. The Committee seeks to publicly endorse two judicial candidates in this year's election, and, if prohibited by law from doing so, its free speech rights will be lost forever. Nor is the harm from this ban on speech limited to the political parties it explicitly addresses. In *Alvarez,* Justice Breyer warned that "the threat of criminal prosecution . . . can inhibit the speaker from making [protected] statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." 132

S. Ct. at 2553 (Breyer, J., concurring) (citing *Gertz v. Welch,* 418 U.S. 323, 340-341 (1974)). Here, the Committee's "members have often been afraid to even discuss at its meetings topics relating to judicial candidates so as to avoid even the appearance of endorsing any of them." Montana's threat of prosecution has thus had a "chilling" effect, radiating from the disfavored speaker to untargeted individuals and plainly protected speech.

If Montana is preliminarily enjoined from enforcing the statute, it would suffer if there were any way to save the statute from being declared unconstitutional. But, as we have already shown, there is none, for the statute is unconstitutional on its face, and the state's proffered justifications, even if construed most favorably to the state, cannot survive strict scrutiny. Montana, in short, can derive no legally cognizable benefit from being permitted to further enforce an unconstitutional limit on political speech. *Cf. Allee v. Medrano,* 416 U.S. 802, 814 (1974) (upholding injunction preventing police harassment as doing no more than "requir[ing] the police to abide by constitutional requirements"). Because we find that Montana's ban on party endorsements of judicial candidates offends the First Amendment, we conclude that the balance of hardships favors the Appellant.

IV. PUBLIC INTEREST

The *Winter* test also asks us also to consider the public interest. *See Winter,* 555 U.S. at 24. But here

we view public interest factors as subsumed within our analysis of likelihood of success on the merits, irreparable injury, and balance of hardships. *See, e.g., Klein,* 584 F.3d at 1207-08 (addressing irreparable injury, balance of hardships, and public interest elements in tandem). We conclude that the public interest here favors the requested injunction.

V. CONCLUSION

For the foregoing reasons, we conclude that, because section 13-35-231 is unconstitutional on its face, Montana must be enjoined forthwith from enforcing it or otherwise interfering with a political party's right to endorse judicial candidates and to expend monies to publicize such endorsements. The mandate will issue forthwith, and the case is otherwise remitted to the district court for further proceedings consistent with this Opinion.

REVERSED AND REMANDED.

COUNSEL

Matthew G. Monforton, Bozeman, Montana, for Plaintiff-Appellant.

Steven Bullock, Montana Attorney General, Michael G. Black (argued) and Andrew I. Huff, Montana Assistant Attorneys General, Helena, Montana, for Defendants-Appellees.

Sanders County Republican Central Committee v. Bullock, 12-35543

SCHROEDER, Circuit Judge, dissenting:

This decision is a big step backwards for the state of Montana, which we all agree has a compelling interest in maintaining an independent and impartial judiciary. The majority ignores the practical effects of its decision on that interest when it takes a formulaic approach to First Amendment doctrine. This is the first opinion to hold that even though a state has chosen a non-partisan judicial selection process, political parties have a right to endorse candidates. This means parties can work to secure judges' commitments to the parties' agendas in contravention of the non-partisan goal the state has chosen for its selection process.

The Supreme Court in *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765 (2010) recognized that judges have a life beyond the bench and make statements throughout their legal careers on political and legal issues. "[J]udges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches." *Id.* at 778. Such activity differs from partisan endorsements. Judges' public discussion of their legal and political values therefore poses less of a threat to judicial open-mindedness than do endorsements by political parties.

Partisan endorsements do not protect the candidate's right to speak that was at the core of *White I*.

Nor is endorsement necessary to protect the rights of the members and leaders of political parties to express judicial candidate preferences since they can lawfully endorse in their individual capacities.

This is thus an unwarranted extension of *White I*. This and other such extensions of *White I* lead to disruptions and distortions in the non-partisan processes states have developed in order to prevent judicial elections from turning on promises to decide cases in ways that will get votes. Thirty-nine states have judicial elections, and nearly all have enacted laws to treat judicial elections differently from political elections. American Judicature Society, Judicial Campaigns and Elections: Campaign Conduct, *available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state=. The Conference of Chief Justices has decried the trend toward eliminating these distinctions. Conference of Chief Justices, Declaration: Judicial Elections are Different than Other Elections (2007), *available at* http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html. The Conference's Declaration, quoting Chief Justice Roberts in his confirmation hearing, states, "[j]udges are not politicians. They cannot promise to do certain things in exchange for votes."

The Supreme Court in *White I* held only that the state violated the First Amendment when it prohibited "candidates for judicial election from announcing their views on disputed legal and political issues." 536 U.S. at 788. Today's decision extends this protection to

political parties' endorsements in previously non-partisan elections. The result is to encourage a judiciary dependent upon political alliances. Political endorsements place judges in a position of indebtedness to "powerful and wide-reaching political organizations that can make or break them in each election cycle." *Republican Party of Minn. v. White* (*White II*), 416 F.3d 738, 768 (8th Cir. 2005) (Gibson, J., dissenting). Partisan politics are particularly pernicious because parties serve as "natural bundling agents that coordinate sprawling political coalitions across all types of policy domains and venues." *See* Michael S. Kang & Joanna M. Sheperd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisionmaking,* 86 N.Y.U. L. Rev. 69, 107 (2011). Failing to recognize this, the majority and the Eighth Circuit in *White II* err in concluding that political parties are just another interest group. *See* 416 F.3d at 755.

Political endorsements, much more than judges' discussion of issues, lead to political indebtedness, which in turn has a corrosive impact on the public's perception of the judicial system. *See Wolfson v. Brammer,* 822 F. Supp. 2d 925, 931 (D. Ariz. 2011) ("Public confidence in the independence and impartiality of the judiciary is eroded if judges or candidates are perceived to be subject to political influence."); *Siefert v. Alexander,* 608 F.3d 974, 985-86 (7th Cir. 2010) ("Due process requires both fairness and the appearance of fairness in the tribunal."); *see also Cox v. Louisiana,* 379 U.S. 559, 565 (1965) (upholding state statute prohibiting picketing outside

a courthouse because of the state's interest in protecting "against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process"); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 565 (1973) (upholding the Hatch Act's ban on partisan activity by federal civil servants because "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it . . . ."). Recognizing this, the Seventh Circuit has held that a ban on judges' endorsements of political candidates is not subject to strict scrutiny and is constitutional. *Siefert,* 608 F.3d at 986 ("While *White I* teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is.").

The detrimental effects of the parties' ability to endorse in judicial elections is multiplied by their ability to engage in expenditures on behalf of or in opposition to judicial candidates. *See Citizens United v. Fed. Elec. Comm'n.,* 130 S. Ct. 876 (2010). The fact that political parties can back up their endorsements with significant sums of money threatens to further erode state judges' ability to act independently and impartially. *See* Brennan Center for Justice, The New Politics of Judicial Elections 2009-10 (2011), *available at* http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf.

In holding that Montana has a less restrictive means of structuring its judicial selection process, the majority fails to comprehend that this would take more than a simple tweak of the system. The majority presents judicial appointment as a less restrictive means of achieving the state's admittedly compelling interest in an impartial judiciary and one that does not implicate the First Amendment. *See White I,* 536 U.S. at 788-92 (O'Connor, J., concurring). This alternative, however, is more theoretical than realistic. Despite dramatic changes in judicial election processes, states have been reluctant to shift to judicial appointments. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection,* 95 Geo. L.J. 1077, 1081-82 (2007). As the American Judicature Society has noted, no state in the past decade, since the Court's decision in *White I,* has used its democratic process to shift away from judicial elections. *See* American Judicature Society, Chronology of Successful and Unsuccessful Merit Selection Ballot Measures, *available at* http://judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf. "[A] generation of experience . . . makes it clear that elections will stay in many and perhaps all of the states that have that system." Conference of Chief Justices, *supra.* In sum, a shift away from judicial elections is not a realistic alternative in states that have chosen judicial elections.

Today's decision is another step in the unfortunate slide toward erasing the fundamental distinctions that states have created between their selection processes for judicial offices and political offices.

These distinctions are foundational to states' abilities to maintain separation of powers between the branches of government. *White I,* 536 U.S. at 803-04 (Ginsburg, J., dissenting) ("Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. . . . The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected."). The Supreme Court's decision in *White I* was not intended to collapse these differences. The Court said, "[w]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783.

The inevitable impact of increasing partisanship, coupled with the potential for increasing volumes of monetary contributions, serves only to erode the perceived and actual fairness of litigation in the state courts. These are the unfortunate and unforeseen consequences of the majority's unwarranted extension of *White I,* especially when viewed in the light of *Citizens United.*

In my view, the Republican Central Committee should not succeed on the merits of its argument that the ban on political parties' endorsements is unconstitutional. I therefore respectfully dissent and would affirm the denial of a preliminary injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff; vs. STEVEN BULLOCK, in his official capacity as Montana's Attorney General; JAMES MURRY, in his official capacity as Montana's Commissioner of Political Practices; Defendants.	CV 12-46-H-CCL ORDER (Filed Jun. 26, 2012)

The Sanders County Republican Central Committee applies for a preliminary injunction that enjoins the defendants from enforcing the endorsement prohibition in Montana Code Annotated § 13-35-231. That statute reads: "A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate."

On June 1, 2012, the Court denied the Committee's application for a temporary restraining order. In its order, the Court directed the parties to appear for a hearing on the Committee's application for a preliminary injunction. The hearing was set for June 11,

2012, and the Court permitted the parties to file additional briefs addressing the application.

Kathleen French, chair of the Committee, appeared at the hearing and was represented by Matthew G. Monforton. Assistant Attorneys General Michael G. Black and Andrew Huff represented the defendants.

BACKGROUND

The plaintiff is the county central committee for the Republican Party in Sanders County. It states that one of its goals "is to promote the election of candidates to public office who share its ideological views." To that end, it wishes to endorse candidates in nonpartisan judicial elections. According to the Committee, "Given the increasing intrusions by left-leaning state judges into areas of policy traditionally reserved to the Legislature, [the Committee] desires to endorse judicial candidates for the primary and general elections in 2012."

Montana Code Annotated § 13-35-231 prohibits political parties from endorsing judicial candidates. Consequently, the Committee claims that it has not publicly endorsed candidates and has often refrained from even discussing judicial candidates at Committee meetings.

In early March 2012, the Committee wrote a letter to Defendant James Murry, Montana's Commissioner of Political Practices, stating that it wished

to endorse judicial candidates and that it believed it had a constitutional right to do so under the U.S. Supreme Court's decision in *Citizens United v. FEC,* 130 S. Ct. 876 (2010). Commissioner Murry responded that Section 13-35-231 is an election law that he is obligated to enforce.

The Committee then filed its complaint for injunctive and declaratory relief and also filed an application for a temporary restraining order, which the Court denied.

Having heard and considered the parties' arguments, the Court is now prepared to rule on the Committee's application for a preliminary injunction.

PRELIMINARY INJUNCTION STANDARD

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1115 (9th Cir. 2011) (quoting *Winter v. Natural Resource Def. Council, Inc.,* 555 U.S. 7, 24-25 (2008)).

"[T]he moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the

government to justify the restriction." *Id.* at 1116 (citations omitted).

ANALYSIS

At the preliminary injunction hearing, the Committee confirmed that the only portion of Section 13-35-231 that it challenges is the prohibition against political party endorsements of judicial candidates. It does not challenge the portions of the statute prohibiting expenditures or contributions.

The Court concludes that the Committee's claims are justiciable but that the Committee is not likely to succeed on the merits of its claims at this point in the litigation. The Court also concludes that the public interest and equities weigh against an injunction. The Court therefore denies the Committee's application.

I. Committee by-laws and justiciability

As a threshold matter, the defendants argue that this case is not justiciable because the Committee has not adopted by-laws that would allow it to endorse judicial candidates. Without such by-laws, the defendants argue, the Committee does not have the authority to endorse judicial candidates, and any decision from this Court on the matter would therefore be an advisory opinion. The defendants claim, "No claim can be ripe unless and until [the committee's]

rules allow it to make endorsements in nonpartisan judicial elections." The Court disagrees.

The Ninth Circuit addressed similar circumstances in *San Francisco County Democratic Central Committee v. Eu,* 826 F.2d 814 (9th Cir. 1987), *aff'd, Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989). There, the court held that a central committee does not need to have adopted by-laws that permit a particular method of speech in order to challenge a statute that prohibits such speech. *Id.* at 823; *see also Eu,* 489 U.S. at 214 n.15. The court explained:

> We . . . reject the State's suggestion that if political parties are reluctant to violate the statutes they must obtain standing by adopting bylaws that conflict with the statutes and then disregarding those bylaws in actual practice. Institutions are not required to make the empty gesture of passing rules that are void as a matter of law and ignored as a matter of institutional practice in order to satisfy standing requirements. Certainly a failure to make such a futile gesture gives us no grounds for inferring that the parties' bylaws merely reflect a neat coincidence of what the parties want and what the statutes require.

Id.

At least in Montana, there is good reason for this rule. If a central committee adopts a by-law permitting speech that is otherwise prohibited by statute,

that itself is a violation of Montana law. *See* Mont. Code Ann. § 13-35-104.

Here, then, the Committee may challenge Section 13-35-231's prohibition of endorsements, even though the Committee has not adopted a by-law that would allow it to endorse a judicial candidate.

II. Section 13-35-231 and the First Amendment

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Committee claims that Section 13-35-231, which prohibits political parties from endorsing judicial candidates, violates the First Amendment.

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)). The First Amendment therefore "has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.* (citations and internal quotation marks omitted).

That being said, a government may restrict political speech if it can show that the restriction

"furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *FEC v. Wisc. Right to Life, Inc.,* 551 U.S. 449, 464 (2007)); *see also Geary v. Renne,* 911 F.2d 280, 282-83 (9th Cir. 1990) (en banc), *judgment reversed and vacated on other grounds,* 501 U.S. 312 (1991).

A. Compelling state interest

Both parties in this case agree that Montana has a compelling interest in ensuring that its judiciary is independent and fair. They are not alone. As Justice Kennedy remarked, "Judicial integrity is . . . a state interest of the highest order." *Republican Party of Minn. v. White,* 536 U.S. 765, 793 (Kennedy, J., concurring); *accord Capterton* [sic] *v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 889 (2009); *see also Siefert v. Alexander,* 608 F.3d 974, 979-80 (7th Cir. 2010) (recognizing that it is "beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop . . . independent and faithful jurists"), *cert. denied,* 131 S. Ct. 2872 (2011).

The states' interest in judicial independence and fairness necessitates, by definition, a nonpartisan judiciary. *See Mistretta v. United States,* 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *see also Hurles v. Ryan,* 650 F.3d 1301, 1309 (9th Cir. 2011); *Wersal v. Sexton,* 674 F.3d 1010, 1022-23 (8th Cir. 2012).

These interests apply with equal force to sitting judges, as well as judicial candidates:

> We reject the suggestion that judicial candidates ought to enjoy greater freedom to engage in partisan politics than sitting judges. An asymmetrical electoral process for judges is unworkable. Fundamental fairness requires a level playing field among judicial contenders. Candidates for judicial office must abide by the same rules imposed upon the judges they hope to become.

Wolfson v. Brammer, 822 F. Supp. 2d 925, 932 (D. Ariz. 2011) (rejecting First Amendment challenge to the Arizona Code of Judicial Conduct's prohibition of judicial candidates' political activities); *see also* Mont. Code of Jud. Conduct, Canon 4 (2008).

Given the admitted and unequivocally compelling interest that Montana has in maintaining an independent and fair judiciary, the question then becomes whether Section 13-35-231's prohibition of party endorsements of judicial candidates is narrowly tailored to achieve that interest.

B. Narrowly tailored

This Court is not the first to consider whether a state may constitutionally prohibit political parties from endorsing judicial candidates in nonpartisan elections. The Ninth Circuit, sitting en banc, did so more than two decades ago in *Geary v. Renne,* 911 F.2d 280 (9th Cir. 1990) (en banc). There, the en banc

court held that a California statute prohibiting political parties from endorsing candidates for nonpartisan judicial offices violated the First Amendment. *Id.* The court's decision, though, has no precedential effect here because the U.S. Supreme Court vacated the judgment on different grounds – namely, that the matter was not justiciable. *See Renne,* 501 U.S. 312. Nevertheless, while not binding on this court, the en banc court's reasoning has persuasive value.

The *Geary* court assumed, without deciding, that California had a compelling state interest in maintaining an independent, nonpartisan judiciary. 911 F.2d at 284-85. It concluded, though, that California's statute was not narrowly tailored to achieve that interest. *Id.* at 285-86. The court explained:

> [P]olitical parties as well as party adherents possess rights of expression and association under the first amendment, and the mere fact that § 6(b) targets the collective rather than the individual voices of party members does not suffice to render it "precisely drawn."

Id. at 285.

Judge Rymer dissented, with Judges Alarcon and Fernandez joining her. *Id.* at 295-315. She agreed with the majority's conclusion that the mere fact that California's statute targeted the collective rather than the individual voices of party members was not sufficient to render the statute "precisely drawn." *Id.* at 301 (Rymer, J., dissenting). But, she reasoned:

> [T]he fact that [the statute] targets the collective voice only with respect to endorsements for nonpartisan offices may render it drawn as precisely as it can be, for to preclude party endorsements in nonparty elections is the flip side of a candidate's running for nonpartisan office without party identification.

Id.

Judge Rymer's reasoning is persuasive. As she observes, there might not be a way to more narrowly tailor these types of statutes. Here, the Committee conceded this point at the preliminary injunction hearing. If, contrary to Section 13-35-231, political parties were permitted to endorse nonpartisan judicial candidates, then the elections might be nonpartisan only in form. Nonpartisan elections, perhaps, can truly be nonpartisan only if political parties are prohibited from endorsing the candidates.

The U.S. Supreme Court's decision in *Citizens United* supports Judge Rymer's dissenting opinion. In *Citizens United,* the Court observed that it has "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons" where the restrictions "were based on an interest in allowing governmental entities to perform their functions." *Id.* at 899 (collecting cases). As Judge Rymer's dissent suggests, it might not be possible for a nonpartisan judicial election to function if political parties are allowed to endorse the candidates. She explained:

> A nonpartisan election is by definition *not* theirs. The purpose of an election within the nonpartisan structure has nothing to do with settling the internal divisions within a political party. Rather, a nonpartisan structure abandons the political party as a conduit for the electorate's views. Nonpartisanship envisions direct representation of citizens rather than indirect representation through parties as intermediaries.

911 F.2d at 299 (citations and internal quotation marks omitted).

By the Committee's own admission, it wishes to endorse judicial candidates for the very purpose of injecting partisanship into the elections. In its complaint, the Committee writes:

> One of [the Committee's] goals is to promote the election of candidates to public office who share its ideological views. . . . Given the increasing intrusions by left-leaning state judges into areas of policy traditionally reserved to the Legislature, [the Committee] desires to endorse judicial candidates for the primary and general elections in 2012.

The Committee's express objective is to use endorsements to transform Montana's nonpartisan judicial elections into functionally partisan elections and, more specifically, to attack "left-leaning state judges."

The Court agrees with Judge Rymer's well-reasoned analysis and, consequently, concludes that – at this point in the litigation – the Committee is not

likely to prevail on the merits of its claims. Moreover, the remaining three preliminary-injunction elements do not tip the scales in favor of granting an injunction. While the statute prohibits the Committee from endorsing judicial candidates, the public interest and equities counsel against an injunction. "[T]here is an obvious interest to both the public and the Legislature in having judicial candidates free of the appearance of impropriety. An appearance of partisanship will hardly foster public confidence in the courts." *Concerned Democrats of Fla. v. Reno,* 458 F. Supp. 60, 64-65 (S.D. Fla. 1978).

What is more, there is no record at this point to guide the Court's decision. Judge Rymer observed the same problem in *Geary*:

> It is particularly troubling in this case that there is virtually no record. There is, for example, no evidence showing whether the relative voice of political parties has been unduly significant or influential in nonpartisan elections where endorsements have occurred. Nor is there any evidence bearing on feasibility of alternate means to aid the state's interest. The absence of a record leads inexorably to judges judging on their own instinct or experience.

911 F.2d at 306.

When *Geary* was before the U.S. Supreme Court, the Court similarly observed:

> The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and illdefined factual record presented to us.

Renne v. Geary, 501 U.S. 312 (1991).

I believe this statement reasonably suggests that the U.S. Supreme Court did not agree with the conclusion reached by the Ninth Circuit en banc majority on the same *Geary* record. That is, the record was insufficient to warrant the relief granted.

Here, the State of Montana has apparently successfully utilized a nonpartisan election system to choose its judges for decades. Here, also, the free speech issues have "fundamental and far-reaching import," which this Court ought not decide without a complete record.

CONCLUSION

Given the above considerations, a preliminary injunction is not appropriate at this point. The Committee might ultimately succeed on the merits in this litigation, but success is unlikely at this point and in the absence of a well-developed record.

IT IS ORDERED that the Sanders County Republican Central Committee's application for a preliminary injunction is DENIED.

IT IS FURTHER ORDERED that this case is set for a bench trial on September 25, 2012, at 10:00 a.m. at the United States Courthouse in Helena, Montana.

IT IS FURTHER ORDERED that the parties shall meet and confer to discuss the schedule for the remainder of this case, including deadlines for discovery, motions, and pretrial conferences. *See* Fed. R. Civ. P. 16(b), 26(f). The parties are ordered to submit a proposed schedule by July 20, 2012. The Court will then issue a final scheduling order.

Dated this 26th day of June 2012.

/s/ Charles C. Lovell
CHARLES C. LOVELL
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff-Appellee, v. TIMOTHY C. FOX, in his official capacity as Attorney General of the State of Montana; JONATHAN MOTL, in his official capacity as Commissioner of Political Practices for the State of Montana, Defendants-Appellants.	No. 12-35816 D.C. No. 6:12-cv-00046-CCL District of Montana, Helena ORDER (Filed Aug. 16, 2013)

Before: SCHROEDER and GOULD, Circuit Judges, and RAKOFF, Senior District Judge.*

Judge Gould voted to deny the petition for rehearing en banc, and Judges Schroeder and Rakoff have so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge has requested

* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Appellants' petition for rehearing en banc is DENIED.

Relevant Constitutional and Statutory Provisions

U.S. Constitution, Article IV, Section 4 provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

U.S. Constitution, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. Constitution, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Montana (1972), Article VII, Section 8 provides:

> **Section**. (1) Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.

Constitution of Montana (1889), Article VIII, Sections 6, 12 provide:

> § 6. The justices of the supreme court shall be elected by the electors of the state at large, as hereinafter provided.
>
> * * *
>
> § 12. The state shall be divided into judicial districts, in each of which there shall be

> elected by the electors thereof one judge of the district court . . .

Mont. Code Ann. § 13-35-231 provides:

> **Unlawful for political party to endorse judicial candidate.** A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate.

Mont. Code Ann. § 13-35-103 provides:

> **Violations as misdemeanor.** A person who knowingly violates a provision of the election laws of this state for which no other penalty is specified is guilty of a misdemeanor.

Mont. Code Ann. § 13-14-111 provides:

> **Application of general laws**. Except as otherwise provided in this chapter, candidates for nonpartisan offices, including judicial offices, must be nominated and elected according to the provisions of this title.

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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiff, v. STEVEN BULLOCK, in his official capacity as Montana's Attorney General; JAMES MURRY, in his official capacity as the Political Practices Commissioner; Defendants.	Case No. _____ **COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF**

PRELIMINARY STATEMENT

1. This is a simple case involving state censorship of core First Amendment speech. Section 13-35-231, MCA, (hereafter, the "Party Censorship Statute" or the "Statute"), prohibits political parties from, *inter*

alia, endorsing judicial candidates. The Sanders County Republican Central Committee (SCRCC) desires to endorse a slate of candidates – including judicial candidates – for both the June 2012 primary election and November 2012 general election.

2. Montana's Commissioner of Political Practices recently informed SCRCC that he and the county attorney will enforce the Statute – a violation of which subjects citizens to, *inter alia,* six months in jail – if SCRCC proceeds with its endorsement.

3. Montana's Party Censorship Statute is patently unconstitutional. Courts throughout the nation have struck down similar state statutes prohibiting political parties from endorsing judicial candidates in so-called "non-partisan" elections.

JURISDICTION AND VENUE

4. This Court has jurisdiction under 28 U.S.C. §§1331, 1343, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

5. Venue for this action properly lies in the Helena Division of the District of Montana because the Defendants reside within the Helena Division and substantially all of the events giving rise to the claims in this action occurred in the Helena Division.

PARTIES

6. Plaintiff Sanders County Republican Central Committee (SCRCC) is the county central committee for the Republican Party in Sanders County. SCRCC exercises authority in Sanders County on behalf of the Republican Party in accordance with § 13-28-203, MCA, and a copy of its rules of government are on file with the election administrator in accordance with §13-38-105, MCA

7. Defendant Steve Bullock is the Attorney General of Montana and is sued in his official capacity only. Bullock has authority to investigate and prosecute violations of the Party Censorship Statute, (§13-35-231, MCA), by and through the state's county attorneys.

8. Defendant James Murry is the Commissioner of Political Practices for Montana and is sued in his official capacity only. Murray has authority to investigate violations of, enforce the provisions of, and hire attorneys to prosecute violations of the Party Censorship Statute.

FACTUAL ALLEGATIONS

9. SCRCC has long had a keen interest in policy issues affecting both Sanders County and Montana.

10. One of SCRCC's goals is to promote the election of candidates to public office who share its ideological views.

11. Given the increasing intrusions by left-leaning state judges into areas of policy traditionally reserved to the Legislature, SCRCC desires to endorse judicial candidates for the primary and general elections in 2012.

12. SCRCC has hesitated to publicly endorse judicial candidates, however, because Montana outlaws such endorsements.

13. SCRCC committee members have often refrained from even discussing at SCRCC meetings topics relating to judicial candidates so as to avoid even the appearance of endorsing any of them.

14. SCRCC wrote a letter to the Commissioner of Political Practices, Defendant James Murry, in early March 2012 stating that it desired to endorse judicial candidates and believed that it had a right to so based upon *Citizens United.*

15. In a letter dated April 20, 2012, Defendant Murry responded to SCRCC by stating that his office, "in conjunction with the county attorneys, is responsible for enforcing the election laws contained in Title 13, Chapters 35 and 37 of the Montana Code Annotated."

16. Defendant Murry further declared that § 13-35-231, MCA (the statute that prohibits political parties from endorsing or opposing judicial candidates) "is included within those election laws, thus I am obligated to enforce the law."

17. As a result of Defendant Murry's threat, SCRCC has been forced to limit its communications with the public.

18. For example, on May 24, 2012, SCRCC purchased a half-page advertisement in two local newspapers, the *Sanders County Ledger* and the *Valley Press/Mineral Independent*.

19. These advertisements contained SCRCC's endorsements of 30 candidates for various offices for the June primary. SCRCC listed the name of each endorsed candidate next to the public office he or she is seeking.

20. SCRCC has identified specific judicial candidates it desires to endorse. One is a candidate for District Court Judge in the Twentieth Judicial District. The other is a candidate for Justice No. 5 for the Montana Supreme Court.

21. SCRCC did not include endorsements for these judicial candidates in its newspaper advertisements. Instead, SCRCC inserted the phrase "party endorsement prohibited by law" rather than the names of the judicial candidates that it desired to endorse.

22. SCRCC omitted the names of these candidates from its advertisements because of Defendant Murry's threat.

23. In addition to newspaper advertisements, SCRCC intends to utilize its website, electronic mailings, and radio advertisements between now and

the primary election on June 5, 2012, to further publicize its candidate endorsements.

24. If the Court enjoins Defendants from enforcing § 13-35-231, MCA, prior to the primary on June, 5, 2012, SCRCC intends to publicly endorse the two judicial candidates described previously through its website, electronic mailings, and radio advertisements.

25. SCRCC also expects to endorse judicial candidates for the general election in November 2012 if it obtains from this Court the relief it seeks. SCRCC intends to publicize these general election endorsements via newspaper advertisements, its website, electronic mailings, and radio advertisements.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF – 42 U.S.C. § 1983

The Party Censorship Statute Violates the Free Speech Clause of the First Amendment

26. Paragraphs 1 through 25 are incorporated by reference.

27. The Party Censorship Statute imposes monetary and criminal sanctions upon political parties that endorse judicial candidates. §13-35-231, MCA.

28. Laws prohibiting such speech are subject to strict scrutiny. *Citizens United v. F.E.C.,* 130 S. Ct. 876, 898 (2010).

29. The Party Censorship Statute cannot satisfy strict scrutiny because the State has no compelling interest in prohibiting endorsements of judicial candidates. The Statute therefore violates the Free Speech Clause of the First Amendment to the United States Constitution as made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment.

30. SCRCC has suffered a violation of its right to freedom of speech under the First Amendment because it has been prevented from endorsing judicial candidates that it desires to endorse.

31. SCRCC will continue to have its rights violated until this Court grants relief.

WHEREFORE, SCRCC prays for relief against all Defendants as set forth below.

SECOND CLAIM FOR RELIEF –
42 U.S.C. § 1983

The Party Censorship Statute Violates the Associational Rights Guaranteed by the First Amendment

32. Paragraphs 1 through 31 are incorporated by reference.

33. SCRCC desires to have its members be able to gather together and promote the activities of

SCRCC, including, but not limited to, endorsing candidates for public office. This includes judicial candidates.

34. Defendants have hindered SCRCC and its members from organizing and endorsing judicial candidates by threatening them with enforcement of §13-35-231, MCA.

35. Accordingly, Defendants have violated and are violating the right of free association guaranteed by the First Amendment to the United States Constitution, made applicable to state and local government through the Due Process Clause of the Fourteenth Amendment.

WHEREFORE, SCRCC prays for relief against all Defendants as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff SCRCC prays for relief from this Court as follows:

a) Declare that the Party Censorship Statute is unconstitutional;

b) Enjoin Defendants from enforcing the Party Censorship Statute;

c) Award SCRCC nominal damages against Defendants;

e) [sic] Award SCRCC its costs of litigation, including reasonable attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988; and

f) [sic] Grant such other relief to which SCRCC may be entitled, or as this Court deems necessary and proper.

REQUEST FOR JURY TRIAL

Plaintiff SCRCC requests a jury trial as to all issues so triable.

DATED: May 29, 2012 /s/ Matthew G. Monforton

Attorney for Plaintiff SCRCC

MONTANA CONSTITUTIONAL CONVENTION
1971-1972

Verbatim Transcript
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Volume IV

* * *

[1086] **CHAIRMAN GRAYBILL:** Mr. Holland.

DELEGATE HOLLAND: Mr. Chairman. I have a substitute motion. Substitute motion is in the Judiciary Committee Proposal dated February 26, 1972, and the substance is in the second paragraph thereof. The clerk has it. I move that – will the clerk please read the second paragraph of the proposed amendment I have up there.

CLERK HANSON: "Mr. Chairman. I move to amend Section 7 of the Judiciary Committee minority proposal, being page 42, lines 10 through 30, and page 43, lines 1 through 8, by deleting the section in its entirety and inserting in lieu thereof the following material: 'The justices of the Supreme Court shall be elected by the electors of the state at large, and the term of the office of the judges of the Supreme Court, except as in this Constitution otherwise provided, shall be six years. There they shall be elected by the electors of each judicial district one or more judges of the District Court, as provided by law, whose term of office shall be four years'. Signed: Holland."

DELEGATE HOLLAND: On the second line of that amendment, I think you made a mistake. You

read "judges of the Supreme Court", rather than "justices of Supreme Court". The record so indicate?

CHAIRMAN GRAYBILL: It says "justices", yes.

DELEGATE HOLLAND: Mr. Chairman.

CHAIRMAN GRAYBILL: Mr. Holland.

DELEGATE HOLLAND: Like Mr. Berg, I spoke about the majority proposal the other day. This is the majority proposal for the election of the Supreme Court judges and the election of the District Court judges. I'm not going to speak at length about this. I do wish to point out that, historically, the State of Montana – the people of the State of Montana – have had control of their Judiciary through the election of the judicial officers. But, there is no – The testimony before the committee was to the effect that the present Judiciary is superior; its courts are current, and it's working fine. I believe that, overwhelmingly, the people of the State of Montana want to retain their right to vote for judges. I sincerely urge this committee not to give up this valuable right and to retain the full election of your Supreme Court and your District Court judges.

CHAIRMAN GRAYBILL: Where is Mr. Kelleher? Is Mr. Kelleher in the chamber? Very well.

Mr. Schiltz. Just a moment.

Mr. Kelleher, the situation now is that we have a minority report moved by Mr. Berg. We have an

amendment to the minority report by Mr. Melvin, giving a second alternative. We have a substitute motion by Mr. Holland for the election of judges. Now, Mr. Kelleher, you are – it is not in order for you to add another amendment. However, if you wish to explain the amendment you will make if the time ever arises, then I will let you do so, and then we'll have the four plans before the body.

Mr. Kelleher.

DELEGATE KELLEHER: I'll speak on my proposal to appoint judges rather than elect judges whenever the Chair deems it appropriate.

[1087] **CHAIRMAN GRAYBILL:** I think it would be appropriate for you to explain that alternative now, so that the body will have all four items in mind when they go to decide.

DELEGATE KELLEHER: Is it the Chair's desire merely that I explain how it operates, rather than argue for it?

CHAIRMAN GRAYBILL: Yes, the motion is not in order, but you may explain the motion you would make if a motion were in order.

DELEGATE KELLEHER: But I will be allowed to argue later on in support of my motion?

CHAIRMAN GRAYBILL: If we ever get to that point. The point is, we really have four plans. We have two minority plans. We have the majority or the – at least, Mr. Holland's plan to elect, and I take it

you want to move the Montana Plan of appointive judges. Now, I don't know whether you want to move it, but I want to get all of those ideas before the body, and then the body will act. Whether or not you have an opportunity to amend or not will depend on how they act.

DELEGATE KELLEHER: Well then, I better say – make my comments now. They're very little.

CHAIRMAN GRAYBILL: Keep them brief, please, as the others have –

DELEGATE KELLEHER: Yes, sir, I plan to. Fellow delegates. In short, my proposal that you have before you would provide that the Governor of Montana would get two or four names – say from a commission as it appears later in the minority plan – and appoint one of those four lawyers, or two lawyers, as a judge. And this judge would serve during good behavior. Now, this is nothing new; it's nothing but the federal plan, really. And the federal Judiciary has used it for – well, close to 200 years, since the days of [the] Revolution. Our Supreme Court judges and our District Court judges are appointed according to that plan. Now, this plan that I have here has – Professor, can I have your attention please? You're now in my class – has two advantages over the federal system. It catches the nominees coming in – it screens them coming in, which we don't have under the federal plan, right? And it screens them or gets rid of them on going out, right? Both ways. Now, under the federal system, Harry Truman could appoint one of his own

cronies from the Pendergast machine down in Kansas City as a federal judge. He might or might not ask the American Bar. You know what trouble Mr. Nixon had with the American Bar Association. I don't know whether he's going to ask their opinion anymore. After these people have been screened, their names would go to the Governor. The Governor [would] appoint one and then they would go to the Senate for approval, for additional screening. How long would they serve? They would serve during good behavior. Now, there were two proposals that I talked to a lay delegate here about it. I asked him about two other matters, and that was the age limitation. I was going to put in an age limitation of 65, and I decided not to. He's thought it should be there. I'm going to still leave that out. And one district judge told me that he thought age 60 for a trial judge was a good cut-off date, and I'm not so sure he's wrong. Because those of you – most of you are trial lawyers – know that the strain on trial judges to make decisions like that is very hard and very difficult, especially in the larger communities. Another change I would have – plan to make if you accept my proposal when we get to the commission, I do not want any lawyers on the commission – just lay people. In that way, it would not be suspect. Let's face it, the lay people in this Convention Hall are no different than the lay people on the outside. You distrust lawyers. That's a fact of life. You distrust us as a profession. And I see the professor nodding concurrence. (Laughter) Now, as far as appointing judges rather than electing – Oh, I told you how we would screen them going out. We'll have the

minority's report for screening them, to get rid of them at the tail end.

CHAIRMAN GRAYBILL: That's repetitious, Mr. Kelleher. Keep going.

DELEGATE KELLEHER: All right, thank you. Now, what is the difference between electing judges and electing legislative candidates? A legislative candidate is a partisan politician. He's concerned with taxes, the type of taxes, where revenue is coming from. He is concerned with spending, and this is a very important matter. What are you going to do with your money after you've collected it? Whether it goes for schools or roads. He's concerned with spending money for environment or not spending it, and so on. A judicial candidate – I have run for Congress twice. I think there's only one other member in this chamber that can say that. We're both losers. (Laughter)

[1088] **CHAIRMAN GRAYBILL:** You're out of order, Mr. Kelleher. You're badly out of order. Now, come on.

DELEGATE KELLEHER: – Supreme Court justices and candidates for Supreme Court justice, and I've always felt so sorry for them. At least, we had something to say. We might not have got elected, but we had something to say. But the judicial candidate, what can he say to you? "I'm going to give you Republican justice." "I'm going to give you Democratic justice." Is he going to say, "I'm going to rule for Montana Power if you have a suit against them"? Is he going to say, "I'm always going to rule for widows

and orphans"? What can he say? So, this nonsense about electing judges, I say we're just trying to kid ourselves. The people know that they don't elect judges. My clients call me, your clients call you and say, "Who should I vote for, Judge X or Judge Y"? They don't know. Finances – or a proposal has been made that we appropriate money for these judges to run, so we don't need to worry about "bi" judges – a very real concern and worry. You will recall, the members of the Finance Committee and the Legislative Committee, that I put in two proposals to appropriate – to allow taxpayers to adopt a new federal plan, where they could –

CHAIRMAN GRAYBILL: Now, Mr. Kelleher, I do want you to stick to the issue of appointing judges. I'm not interested in your other proposals. I'm going to give you time to make your speech, but I'm not going to have an hour speech. You're either going to limit yourself to that, or you're going to be out of order.

DELEGATE KELLEHER: I just want to talk about –

CHAIRMAN GRAYBILL: You can talk about appointing judges or else sit down. Your motion is out of order. You may explain the motion you would make if you had the chance. That's all you may do. Now, we're going to get this decision decided this morning, and you're not going to talk about everything else. So, either decide to talk on the issue or please sit down.

DELEGATE KELLEHER: The judge who is elected is going to be the popular judge. He not necessarily will be the best judge, but he will be the most popular judge. There are many examples of that, and in view of the Chair's ruling, I'm not going to go through those. Under the present system, a senile judge may be elected, and I think even the lay people know of senile judges who have been returned to the bench because they were popular judges. A judge very often must make an unpopular decision. Every time a judge makes a decision, you must understand that there must be a loser. That's the nature of the judging business. If he makes an unpopular decision in connection with a criminal case, this may cost him election. Judge Bottomley, in 1954, almost was defeated – lost many votes over an unpopular decision. In Oklahoma, they elect judges, and they had a very unfortunate situation down there with two associate justices and, I believe, the Chief Justice, involving bribery. If you elect judges that don't – I mean, appoint judges that don't need to run for reelection every four years or six years or worry about [where] their money's coming from, you've got a true independent Judiciary that you don't need to worry about. And we talk about humbling judges – there's a lot of difference between humbling a man and humiliating him and requiring him to go down and to beg for money. And I think when you do require a candidate for a judicial office to beg for money, that you're opening up the door to many abuses. Finally, the last argument is that the lay people do not want elected judges. I say that we should have the courage to make a decision and then

let the people in June decide whether they want elected judges or appointed judges, when they accept or reject the Constitution. It is time that we had the courage to make a decision on the floor of this chamber. Our people do not necessarily want elected or appointed judges. What they want are the best judges and the most competent judges, and the only way we're going to get them is by appointing them. Thank you, Mr. Chairman.

CHAIRMAN GRAYBILL: Very well. Ladies and gentlemen of the body, you may wish to take your pencils and jot down some notes on where we stand. Mr. Berg moved a minority report on page 43 – 42, rather, and 43 of Section 7. The purpose of the minority report is to have a commission set up by the Legislature that would give the Governor nominees, and the Governor would nominate from the commission, or from whatever method the Legislature has determined, I should say. Now, at the first primary, there would be a contested, nonpartisan election. Later on, if that judge passed that test, he would only have to stand for approval or rejection. And until he was rejected, he would continue to serve. And if he was rejected, we'd go back through and the Governor would appoint somebody else and we'd have [1089] another contested, nonpartisan election – the point being that once he passes his first contested, nonpartisan election, he only runs on approval or rejection. Now, Mr. Melvin moved an amendment. That's number two plan. The purpose of the amendment is to say that at each succeeding election, this man that's been

appointed in the manner we've just said and has run must always run at a contested, nonpartisan election. At each succeeding primary, we go right back through and his name is automatically on, but others can come on if they want to. Mr. Melvin's plan amounts to changing considerably the method of selection; that is, it uses the minority plan's method of selecting but it does require regular elections. Then, Mr. Holland moved a substitute motion, which is essentially the majority report boiled down, and it requires the election of judges – the Supreme Court for six years and the District Court for four years. So, we have those three plans before us. Now, because of the rules where we only allow one substitute and two amendments, Mr. Kelleher did not have a motion available. I had him explain to you that if a motion were available, he might make the motion to have judges appointed to serve on good behavior. That alternative might become available, depending on what you do with the upper three. Now, the argument is on Mr. Holland's motion for the election of judges. That's the last substitute amendment. So the debate will be on Mr. Holland's substitute motion that judges be elected, instead of the manner provided by the minority or Mr. Melvin's amendment. Is there discussion?

Mr. Swanberg.

DELEGATE SWANBERG: Is another motion in order at this time?

CHAIRMAN GRAYBILL: No motion's in order. You may explain another position if you want to.

DELEGATE SWANBERG: Mr. President and fellow delegates. I think we have arrived at one of those other major turning points in this whole Convention. Certainly, the problems in the Legislature have been met and dealt with, I think, very adequately by this body. I now submit that the time has come to deal with this other major problem, and that has to do with the election of the membership of our Supreme Court. We heard last Saturday the rather moving and half-comic description by Delegate Schiltz of the travail and turmoil that he went through in the process of running for office on the Supreme Court. And I think we can all agree that it's a rather pointless process. The electors at large do not really know the qualifications of the man they're voting for. The candidate runs nonpartisan. He's compelled to rely on his own resources unless he wants to take money from some, no doubt, interested donor. The process has to be changed. The thrust of the minority proposal is to change this by a commission elected by the Governor. The thrust of the majority proposal is to leave it as it is. You have been given these two choices, in essence. And I submit that there is a third alternative, which is simple and quite workable. When Delegate Schiltz spoke about his problems of election to the Supreme Court, we did not hear any comment at all from Delegate Berg, who is a district judge in Bozeman, about any difficulties that he had had. We can only assume, and I think it's common knowledge, that the public at large is generally satisfied with the method of the election of the District Court judges. Some attempts have been made here by

the fact that, in many instances, these District Court judges run unopposed. And I would submit, for your consideration, that this applies in many other offices. And the reason is not because of a lack of interest in the job. The reason is simply because the man in office is doing a good job, and no one will run against him. This is pretty much the case in our county, not only in the case of the district judges, but I'm happy to be able to say, in the case of our sheriff. He's held office, I believe, for something like 20 years, and at no time, to my recollection, has he ever been opposed. Is that because he's inefficient or no one is interested in the office? No, it's because he's doing an outstanding job. I would submit, then, that we leave the election of our District Court judges as they are. The system is working admirably. We're getting generally good people, with an occasional person who may not be quite as qualified as someone else. But as a general proposition and taking the elective process for what it is, we get pretty good district judges in our District Courts. I don't think anybody here in the body would disagree with that. Now then, having gone that far, having provided in the Constitution for the election of our District Court judges, I submit that, having done this, we will have also created a very admirable commission for the selection of our Supreme Court justices. The District Court judges, as a body, 28 of them, would themselves be a commission for the selection of the membership of the Supreme Court. Where else could you find a commission as able as [1090] this one? All of them judges, all of them as free from politics as you could possibly get it, all of them

elected by the people – none of this appointment by the Governor bit – and you would, at one stroke, have eliminated the problem of the election of the Supreme Court justices by the people in an inadequate manner and also have provided a very good commission for the handling of the Supreme Court personnel. I have submitted a substitute motion to all of these motions, which would provide that the District Court judges be elected as they are now and that this group, acting as a body, under such terms as may he prescribed by the Legislature, would appoint and fill vacancies in the Supreme Court. Third, there is precedent for this. I don't know of any other state that has the system, but we get into some other fields. I would like to point out that the Pope of the Catholic Church is elected in this manner. I would rather suspect that the heads of all the other churches are probably elected in the same manner. The system has worked for centuries, and I think it would make a very admirable solution to our difficulties here. It lies in between both proposals.

CHAIRMAN GRAYBILL: Very well. Mr. Swanberg has explained another proposal, which you could add as a fifth point; namely, that the Supreme Court would be appointed by District Court judges, but the District Court judges would be elected. Now, ladies and gentlemen, the discussion is on Mr. Holland's substitute motion that "the justices of the Supreme Court shall he elected by the electors of the state at large, and the terms of the office of the justices of the Supreme Court, except as in this Constitution otherwise provided, shall be six years. There shall be

elected by the electors of each judicial district one or more judges of the judicial district – of the District Court – as provided by law, whose terms shall be four years." That's the issue before us.

Mr. Schiltz.

DELEGATE SCHILTZ: Mr. Chairman, I would like to speak in behalf of Mr. Holland's amendment. I said most of what I had to say the other day. I didn't intend it to be all that comic, but I was very serious about it. I would like to make a couple responses that bear answering. Mr. Garlington talked the other day about the problem of 33 judges and how we get them and what an imposition it is upon them to require them to run for reelection and possibly he defeated and have lost their practice in the meantime. I believe, for those judges – and I know it's an imperfection in the system. However, I'm more concerned about 700,000 people than I am 33 judges. I think Montana is unique. I think we can't adopt the plan or program that we find in Missouri or some other state, because Montana has more corporate influences than any of those states. I inquired specifically of the President of the American Judicature Society, who responded about the State of Wyoming. He said, "Well, they have a railroad." They have a railroad that has an influence. We have a railroad plus. As to Mr. Swanberg's comments, I think, personally, that it's more important to elect the Supreme Court judges than it is the District Court judges. The District Court judges aren't making policy. And it's the policy that the Supreme Court makes that should be rejected or

adopted by the electorate. I think also that – I can't resist throwing in something every now and then, Bill – but, your thing about the Pope in Rome being elected in this fashion. The fallacy in that is the Pope doesn't have a bunch of Baptists helping in on the election either. (Laughter) So far as Mr. Berg's proposition is concerned, it has the terrible fault that always we start with an incumbent, and the same is true with Mr. Melvin's. The incumbent system in the State of Montana has been the real problem. It has insured the election of anybody who was appointed by the Governor. But, finally, I must urge you that we have, with Mr. Holland's plan, absolutely the best screening process in the world, and that is the electorate. Thank you.

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Laws, Resolutions and Memorials

OF THE

STATE OF MONTANA

PASSED BY THE

Twenty-fourth Legislative Assembly
In Regular Session

Held at Helena, the Seat of Government of Said State, Commencing January 7th, 1935, and Ending March 7th, 1935

Including Constitutional Amendments Voted Upon by the People at the General Election held November 6th, 1934

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[389] **CHAPTER 182**

An Act to Regulate the Nomination and Election of Justices of the Supreme Court and Judges of the District Court of the State of Montana: Abolishing Certain Existing Methods in Such Cases and the Use of Party or Political Designations at Elections to Such Offices; Imposing Certain Duties Upon the Secretary of State and County Officers Having Charge of Election Affairs and Judges and Clerks of Election, and Adapting the Provisions of the Laws as They Now Exist to the Non-partisan Election of Judges of Courts of the State.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That hereafter all candidates for the office of Justice of the Supreme Court of the State of Montana or Judge of the District Court in any judicial district of the State of Montana, shall be nominated and elected [390] in accordance with the provisions of this Act and in no other manner.

Section 2. Candidates for any office within the provisions of this Act, to be filled at any election to be held in the State of Montana, shall be nominated in the manner herein provided at the regular primary nominating election provided by law for the nomination of other candidates for other offices to be filled at such election, and all laws relating to such primaries shall continue to be in force and to be applicable to the said offices in so far as may be consistent with the provisions of this Act.

Section 3. All persons who shall desire to become candidates for nomination to any office within the provisions of this Act shall prepare, sign and file petitions for nomination in compliance with the requirements of the primary election laws, which petition for nomination shall be substantially in the following form: To _____ (Name and title of officer with whom the petition is to be filed), and to the electors of the _____ (State or counties of _____ comprising the district or county as the case may be) in the State of Montana:

I, _____, reside at _____and my post-office [sic] address is _____ I am a candidate on the non-partisan judicial ticket for the nomination for

the office of _____ at the primary nominating election to be held in the _____ (State of Montana or district or county), on the _____ day of _____, 19 ___, and if I am nominated as a candidate for such office I will accept the nomination and will not withdraw, and if I am elected, I will qualify as such officer.

Provided, however, that no such petition for judicial office shall indicate the political party or political affiliations of the candidate, and provided farther that no candidate for judicial office may in his petition for nomination state any measures or principles he advocates, or have any statement of measure or principles which he advocates, or any slogans, after his name on the nominating ballot as permitted by Section 641, as amended by Chapter 133 of the Laws of the Eighteenth Session of the Legislative Assembly of Montana of 1923.

[391] Each person so filing a petition for nomination shall pay or remit therewith the fee prescribed by law for the filing of such a petition for the particular judicial position for which he aspires for nomination. All such petitions for Justices of the Supreme Court and Judges of the several district courts of the state shall be filed with the Secretary of State.

Section 4. On receipt of each of such petitions the Secretary of State shall make corresponding entries in the "Register of Candidates for Nomination" as

now provided by law, but on a page or pages of such register apart from entries made with reference to the district candidates of political parties.

Section 5. At the same time and in the same manner as by law he is required to arrange and certify the names of candidates for other state offices the Secretary of State shall separately arrange and certify and file as required by law, the names of all candidates for judicial office, certifying to each County Clerk of the state the names of all candidates for judicial, office entitled to appear on the primary ballot in his county, with all other information required by law to appear upon the ballot, which lists of judicial candidates shall be made upon separate sheets of paper from the lists of candidates to appear under party or political headings.

Section 6. At the same time and in the same manner as he is by law required to prepare the primary election ballots for the several political parties, the County Clerk of each county shall arrange, prepare and distribute official primary ballots for judicial offices which shall be known and designated and entitled "Judicial Primary Ballots", which shall be arranged as are other primary ballots, except that the name of no political party shall appear thereon. The same number of official judicial primary ballots and sample ballots shall be furnished for each election precinct, as in the case of other primary election ballots.

Section 7. Each elector having the right to vote at a primary election shall be furnished with a separate "Judicial Primary Ballot" at the same time and in the same manner as he or she is furnished with other ballots provided by law and each elector, without regard to [392] political party, may mark such "Judicial Primary Ballot" for one or more persons of his choice for judicial nominations, depending on the number to be nominated and elected, which shall be deposited in the general ballot box provided. The official number of such judicial primary ballot so delivered and voted shall correspond to the official number of the regular ballot of the elector. Every elector shall be entitled to vote, without regard to politics, for one or more persons of his choice for nomination for judicial office, depending on the number of places to be filled at the succeeding general election. Different terms of office for the same position shall be considered as separate offices.

Section 8. After the closing of the polls at a primary election, the election officers shall separately count and canvass the judicial primary ballots and make record thereof, and certify to the same, showing the number of votes cast for each person upon the judicial primary ballot, in addition to certifying the party vote or other matters voted upon as required by law. Judicial ballots, their stubs, and unused ballots, shall be disposed of in the same manner as other ballots, stubs and unused ballots, and all returns made in the same manner now provided by law.

Section 9. The candidates for nomination at any primary election for any office within the provisions of this Act, to be filled at the succeeding general election, equal in number to twice the number to be elected at the succeeding general election, who shall have received at such primary election the highest number of votes cast for nomination to the office for which they are candidates (or if the number of all of the candidates voted for as aforesaid be not more than twice the number to be elected, then all the candidates) shall be the nominees for such office: and their names, and none other, except as hereinafter provided, shall be printed as candidates for such respective offices upon the official ballots which are provided according to law for use at such succeeding primary or general election; provided that no candidate shall be entitled to have his name placed on the judicial ballot at the general election, in any form, unless he shall have been a successful candidate at the primary election.

[393] Section 10. In case of a tie vote, candidates receiving tie vote for Justice of the Supreme Court or Judge of the District Courts shall appear and cast lots before the Secretary of State on the fifth day after such vote is officially canvassed. In case any such candidate or candidates shall fail to appear either in person or by proxy in writing, before twelve o'clock noon of the day appointed, the Secretary of State shall by lot determine the candidate whose name will be certified for the general election and printed on the official ballot.

Section 11. If after any primary election, and before the succeeding general election, any candidate nominated pursuant to the provisions of this Act, shall die or by virtue of any present or future law become disqualified from or disentitled to have his name printed on the ballot for the election, a vacancy shall be deemed to exist which shall be filled by the otherwise unnominated and not disentitled candidate for the same office next in rank with respect to the number of votes received in such primary election. If after the primary, and before the general election, there should not be any candidate nominated and living and entitled to have his name printed on the ballot for any office which is within the provisions of this Act, or not enough of such candidates to equal the number of persons to be elected to such office, then the Governor in the case of Justices of the Supreme Court and Judges of the District Courts is authorized and empowered to certify to the Secretary of State the names of persons qualified for such office or offices equal in number to twice the number to be elected at the general election, and the names of the persons so nominated shall thereupon be printed on the official ballot in the same manner as though regularly nominated at the judicial primary election. Nominations so made by the Governor to fill a vacancy shall not be deemed filed too late if filed within ten days after the vacancy occurs, and in case the ballots for the election have already been printed, stickers may be used to place the names of such candidate upon the ballot.

Section 12. At every general election at which any candidate for judicial office is to be voted upon the elector shall be provided with a separate official ballot having the same identification upon the stub thereof as [394] the regular ballot plainly marked "Judicial Ballot", and the count and canvass of such votes shall be separate from the regular ballots of political parties. For the guidance of voters, the ballot shall make suitable designation of the number of persons the elector may vote for, for each particular office to be filled at such election.

Section 13. It shall be unlawful for any political party to endorse any candidate for the office of Justice of the Supreme Court or Judge of a District Court, and anyone who in any way participates in such endorsement by any political party, or who purports to act on behalf of any political party in endorsing any candidate, shall be guilty of a misdemeanor.

Section 14. In all counties of the state where voting machines are now, or may hereafter be used in any elections, it shall be the duty of the Clerk and Recorder to arrange the judicial ballot in both the primary and general elections in the vertical column or horizontal row or space, immediately following the column, row or space assigned the first major political party and immediately preceding the column, row or space assigned the second major political party.

Section 15. All Acts and parts of Acts in conflict herewith are hereby repealed, and all laws pertaining

to elections, both primary and general, and to special elections, not in conflict herewith are hereby declared applicable to the nomination and election of the officers herein referred to.

Approved March 14, 1935.