No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* STATE AND LOCAL JUDICIAL REFORM GROUPS IN SUPPORT OF RESPONDENT

ROGER A. COOPER
PETER FOX
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
racooper@cgsh.com

PAUL TITUS
Counsel of Record
NANCY WINKELMAN
SHANNON L.C. AMMON
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2000
ptitus@schnader.com

Counsel for Amici Curiae State and Local Judicial Reform Groups

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae respectfully submit this brief to the Court to demonstrate and explain how rules similar to Canon 7(C)(1) of the Florida Code of Judicial Conduct promote public confidence in the judiciaries of the states in which *amici* work. The *amici* signatories to this brief are nonpartisan state and local organizations committed to creating and maintaining an ethical judicial system and promoting public confidence in that system. While recognizing that a system of privately-financed judicial elections is not the optimal system for selecting judges, *amici* believe that, as long as such a system exists, it should minimize the appearance of contributors' influence on judicial decisions to the greatest extent possible. A brief description of each *amicus* organization follows.

Chicago Appleseed Fund for Justice is a nonpartisan research and advocacy organization that seeks to identify injustices, conduct research necessary to develop proposed solutions, and then advocate for their implementation. Using a combination of legal research, law practice, and social science research methods, the Chicago Appleseed Fund for Justice collects best practices, assesses the situation

[1] This *amici curiae* brief is filed with the written consent of the parties. Neither a party nor a party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person has contributed money that was intended to fund preparing or submitting this brief.

locally, and proposes solutions tailored to Cook County. Much of the work involves making the courts fairer, as well as more accessible, efficient, and effective. Chicago Appleseed Fund for Justice has administered a Judicial Performance Commission pilot project in Cook County and engaged with the Illinois Supreme Court on issues of judicial elections and recusal in recent years.

Chicago Council of Lawyers is the only public interest bar association in Cook County. Established in 1969 by a group of lawyers who believed that lawyers had obligations beyond those of other professions, it is dedicated to improving the quality of justice in the legal system by advocating for fair and efficient administration of justice. The Chicago Council of Lawyers works for effectiveness, accountability, and equity in the law so that everyone has an equal chance for justice. The Chicago Appleseed Fund for Justice and Chicago Council of Lawyers work together in the Collaboration for Justice, focusing on the areas of courts' administration efficiency (including judicial performance, election, and ethics issues), as well criminal courts reform, domestic relations and community court reforms, and immigration court reform. The Chicago Council of Lawyers works independently of Chicago Appleseed in its efforts to evaluate judges for the purpose of educating voters.

The **Coalition for Impartial Justice** is a broad-based, nonpartisan organization advocating for a constitutional ballot question that allows voters the opportunity to decide how they would like to select

and retain judges in Minnesota. The reforms specifically call for public performance evaluations of judges, merit selection, as well as retention elections. The coalition includes over 30 member organizations that represent business, labor, religious, and other nonprofit organizations.

The **Fund for Modern Courts** ("FMC") is a private, nonprofit, nonpartisan organization dedicated to improving the administration of justice in New York State through advocacy, public education, and in-court programming, which includes an active court-monitoring program. FMC's board of directors includes concerned citizens of New York, faculty members at New York law schools, and attorneys practicing in New York courts. Founded in 1955, FMC is the only organization in New York State devoted exclusively to improving the judicial system. FMC has played a role in almost every significant judicial reform effort in New York State in the last sixty years. In the 1970s, FMC was instrumental in amending the New York Constitution to establish a commission-based appointive system for choosing the judges on New York's highest court, the Court of Appeals. More recently, members of FMC have provided testimony in legislative hearings on judicial selection, and to the recent Commission to Promote Public Confidence in Judicial Elections. FMC also has issued reports on judicial selection processes, including on New York's judicial elections. FMC's mission includes ensuring that the New York judiciary enjoys the public's confidence.

FMC, in April 2010, released a report titled, "A Heightened Recusal Standard for Elected New York Judges Presiding over Cases, Motions or Other Proceedings Involving Their Campaign Contributors," which recommended that the Administrative Board of the Courts establish a per se rule which would obligate judges to recuse themselves from hearing cases in which any party has made total contributions to the judge above a certain limited amount. Ultimately, the Administrative Board adopted Section 151 of the New York Rules of the Chief Administrative Judge – a "non-assignment of cases" rule for elected judges who received campaign contributions from parties before them, which accomplished the FMC's goal.

Justice Not Politics ("JNP") is Iowa's leading statewide coalition guarding against the politicization of Iowa's judicial system. JNP was formed in 2010 to protect Iowa's courts from the attacks by special interest groups, which waged a successful campaign against the retention of three Supreme Court justices because of the court's decision on marriage equality. JNP led the successful effort in 2012 to protect a fourth Supreme Court justice who was targeted by the religious right. The coalition boasts over 800 members, including 80 statewide and community organizations, and more than 10,000 followers on social media.

The **League of Women Voters of the United States** is a nonpartisan, community-based organization that encourages the informed and active participation of the citizens in government and influences

public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision-making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

The **League of Women Voters of Florida** and its thirty local Leagues have long supported campaign finance reform and the independence of the judiciary.

The **Michigan Campaign Finance Network** ("MCFN") is a nonprofit, nonpartisan organization that conducts research and provides public education on money in Michigan politics. Throughout this century, MCFN has made research on state judicial election campaigns an area of emphasis.

The **Ohio Valley Environmental Coalition** ("OVEC") is a grassroots environmental organization located in Huntington, West Virginia, that was formed in 1987. While OVEC's primary mission is to preserve and protect the environment and communities in the region, since 1997, OVEC also has worked on campaign finance reform issues. OVEC has a special

interest in seeing that the judiciary is as impartial as possible because of the undue influence of the coal industry on election campaigns, especially the state supreme court. OVEC is also a founding member of West Virginian Citizens for Clean Elections.

Pennsylvanians for Modern Courts ("PMC") is a nonpartisan, nonprofit court reform organization dedicated to ensuring that all Pennsylvanians can come to court with confidence that they will be heard by qualified, fair, and impartial judges. PMC functions as a court watchdog, identifying and speaking out on issues that affect public confidence in our justice system. PMC's work focuses on three program issues: judicial selection reform, systemic court reform and improvements, and public education.

West Virginia Citizens for Clean Elections is a coalition of organizations (labor, environmental, policy advocacy, religious, etc.) seeking to promote election reforms in West Virginia, including public financing of state legislative and judicial elections. The coalition recognizes the substantial influence of political contributions on our state's public policy, and the need to give citizens a greater voice. West Virginia Citizens for Clean Elections was prominently involved in the effort to enact state legislation in 2010 that established the West Virginia Supreme Court Public Financing Pilot Project for 2012. This program provided a public financing option for candidates running for the two Supreme Court seats being contested in 2012.

The **West Virginia Citizen Action Group** ("WV-CAG") is a founding member of the West Virginia People's Election Reform Coalition and WV Citizens for Clean Elections. As a leader in these coalitions, WV-CAG has conducted research and issued reports on campaign contributions to state political campaigns. WV-CAG has been actively involved in efforts to establish a system of publicly financed elections in the state, as well as other campaign finance reform efforts. WV-CAG has advocated for better public policy, rights of individuals, a clean environment and a stronger democratic process since 1974. The philosophy of WV-CAG is that full-time citizen participation in the decision-making processes in our state is absolutely essential. WV-CAG's main goal is to increase the voice of the average citizen in public affairs.

The **Wisconsin Democracy Campaign** ("WDC") is a homegrown network of citizens fighting government corruption and working for fair elections, judicial integrity, media democracy, and open and transparent government. WDC pursues these objectives through research, citizen education, community outreach, coalition building, and direct advocacy. WDC was founded in 1995 as a nonprofit, independent coalition of individuals and groups responding to the growing dominance of special interest money in the campaigns of state lawmakers.

SUMMARY OF THE ARGUMENT

Amici write to demonstrate how rules similar to Canon 7(C)(1) promote public confidence in the judiciaries with which they have experience. Impartiality is uniquely important to the judicial branch and requires regulation of judges and judicial candidates that is not needed for the political branches.

Regulations similar to Canon 7(C)(1) serve an important purpose in the states in which *amici* do their work. As in the federal system, the function of state judicial branches of government is fundamentally different from the political branches. That difference justifies unique state regulation over the judiciary. Rather than animate or execute the public will, the judiciary often serves as a bulwark against it. Judges must enforce the law neutrally, and, to that end, there is a well-recognized public interest in an independent and impartial judiciary. There is also a public interest in maintaining the public's confidence in judicial independence and impartiality. Without the coercive and financial powers possessed by the political branches of government, the judiciary's legitimacy depends almost entirely on its reputation for fairness and the public's confidence in its impartiality and independence.

In the interest of building and protecting this reputation, many states, including those of *amici*, regulate judges and judicial elections differently than they do other public servants and elections in the political branches. For the sake of illustration, this *amici curiae* brief focuses on two specific states,

Pennsylvania and New York. In Pennsylvania and New York, as well as the other states in which *amici* function, these regulations include rules banning judges and judicial candidates from personally soliciting campaign contributions.

Pennsylvania's judicial experience demonstrates the importance of Pennsylvania Code of Judicial Conduct Rule 4.1(7).[2] In Pennsylvania, all judges are selected in partisan elections, the courts have experienced million-dollar elections since the late 1980s, and the state judicial branch has been plagued with ethical problems. This backdrop highlights the importance of Rule 4.1(7) in maintaining the public's confidence in the judiciary.

New York's experience with its similar rule, Section 100.5(A)(5),[3] has been equally positive. In the view of the FMC, the rule has prevented further erosion in public confidence in the judiciary related to privately-financed judicial elections and helped to ensure that the public continues to recognize judges – even elected ones – as fundamentally different from politicians. Section 100.5(A)(5) also prevents a number

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[2] Rule 4.1(7) provides: "A judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." Pa. Code of Judicial Conduct, R. 4.1(7) (2014).

[3] Section 100.5(A)(5) provides: "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate." N.Y. Rules of the Chief Admin. Judge § 100.5(A)(5).

of practical problems for judges that would arise if the State allowed for personal solicitation of campaign funds.

The states of *amici*, as demonstrated by the experiences of Pennsylvania and New York, are well-served by rules similar to Canon 7(C)(1).

ARGUMENT

I. Maintenance of the Appearance of Impartiality is Uniquely Important to the Judicial Branch of Government, and Requires Regulation of Judges and Judicial Candidates Not Needed for the Political Branches.

A. Judges Must Be Independent and Impartial.

As the sole non-political branch of government, the judiciary is uniquely expected to remain independent, operating under principles of impartiality and freedom from outside influence.[4] Politicians are elected to carry out the will of their constituents, and are not called upon to act as dispassionate, objective

[4] To distinguish the judiciary from the legislature as separate branches of government, Funds for Modern Courts ("FMC") in 2010 successfully advocated for the establishment of a Quadrennial Commission on Judicial Compensation to determine fair and equitable compensation for New York state judges and justices, breaking for the first time in decades the link between judicial and legislative salary increases.

arbiters of the law. Judges, by contrast, are tasked with serving as neutral decision-makers whose independence "may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, at 5 (Alexander Hamilton) (McLean's ed., 1788). In designing the independent judiciary, the Framers "believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 265-66 (1995) (Stevens, J., dissenting). Indeed, the independence of the judiciary is one of the most important bases for our system of separation of powers. *See* Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

B. The Public Must Have Confidence in Judges' Independence and Impartiality.

Judges must not only be independent and impartial in fact, but they must also *appear* to be so. It has often been noted that unlike the political branches, the judiciary has "neither FORCE nor WILL," The Federalist No. 78, at 1 (Alexander Hamilton), and so its legitimacy is uniquely tied to its public reputation. As this Court has observed: "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison,* 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 817-18 (2002)

(Ginsburg, J., dissenting) ("[C]ourts control neither the purse nor the sword . . . their authority ultimately rests on public faith in those who don the robe."); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship.").

The question of reputation does not only concern whether the public will accept judicial decisions or submit their disputes to the court; it reaches the judiciary's function directly. As Professor Briffault recognizes, an important argument in support of the canons is "for judges to take their role seriously and apply the law impartially, protect rights, and defend minorities, they need to enjoy a special degree of public respect." Richard Briffault, *New Issues in the Law of Democracy: Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. Pa. L. Rev. 181, 199 (2004). Without that respect, and the public confidence on which it is based, the judicial function itself risks breaking down.

C. Judges and Judicial Candidates Are Regulated to Protect the Judiciary's Competence, Independence, and Reputation.

This Court has made clear that "[a] State may . . . properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana,* 379 U.S. 559, 565 (1965). One of the ways states

do so is through special regulation of the conduct of judges and judicial candidates. Some of these regulations are broad standards. For example, in New York, judges are required to "respect and comply with the law and . . . act at all times in a manner that promotes public confidence and the integrity and impartiality of the judiciary." Rules of the Chief Admin. Judge § 100.2(A). Others reflect more specific limitations, such as New York's rule prohibiting most judges from serving "as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity." *Id.* § 100.4(D)(3).

Notably, many of these regulations, which are unique to the judiciary and its function, would be at odds with the purpose and function of the political branches. For example, again in New York, to preserve the appearance of impartiality, judges are required to disqualify themselves from proceedings "in which the judge's impartiality might reasonably be questioned." *Id.* § 100.3(E). There is no comparable rule for state legislators, who are, of course, free (and expected) to introduce bills and vote on matters in which they have a non-financial interest. In addition, New York judges are not to be "swayed by partisan interests, public clamor or fear of criticism." *Id.* § 100.3(B)(1). Such a restriction on members of the political branches would be inconsistent with their roles in voicing and implementing the public's will; as would any regulation similar to New York's rule curtailing ex parte communications between judges

and parties with matters before them. *Cf. id.* § 100.3(B)(6).

Many states have also deemed it necessary to impose special regulations on judicial elections. These rules are consistent with the notion that some campaign activity that is proper in political-branch elections is inappropriate in judicial elections. Almost all states, for example, prohibit candidates from making pledges or promises of conduct if elected, other than the impartial performance of the office's duties. *See, e.g.*, Ill. Code of Judicial Conduct, Canon 7A(3)(d); Mich. Code of Judicial Conduct, Canon 7B(1)(c); Minn. Code of Judicial Conduct, Canon 4.1(A)(11); Kan. Code of Judicial Conduct, Canon 4.1(A)(6); Ark. Code of Judicial Conduct, Canon 4.1(A)(13); Tenn. Code of Judicial Conduct, Canon 4.1(A)(13). Most states also prevent judges and judicial candidates from engaging in partisan activity, such as making speeches on behalf of political organizations or publicly endorsing a candidate for public office. *See, e.g.*, Minn. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); Kan. Code of Judicial Conduct, Canon 4.1(A)(1), (B)(2); Ark. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); Tenn. Code of Judicial Conduct, Canon 4.1(A)(2)-(3).

New York likewise prohibits judges from making "pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office," or, "with respect to cases, controversies or issues that are likely to come before the court . . . commitments" that are inconsistent

with those duties. N.Y. Rules of the Chief Admin. Judge § 100.3(B)(9)(a)-(b). Pennsylvania has comparable prohibitions. *See* Pa. Code of Judicial Conduct, Canon 4.1(A)(11). Many states also prohibit judges and judicial candidates from making speeches on behalf of political organizations and the public endorsement of candidates for public office. *See, e.g.*, Iowa Code of Judicial Conduct, Canon 4.1(A)(2)-(3); N.Y. Rules of the Chief Admin. Judge § 100.5(A)(1)(e)-(f); Pa. Code of Judicial Conduct, Canon 4.1(A)(2)-(3); W. Va. Code of Judicial Conduct, Canon 5.1(A)(b)-(c).

II. The Experiences of Pennsylvania and New York.

Many states, including those in which *amici* function, also impose special regulations on fundraising for judicial elections, including bans on personal solicitation of campaign funds by judges and judicial candidates. Such regulations promote the public's confidence in the judiciaries of these states, as the experiences of Pennsylvania and New York amply show.

A. The Pennsylvania Experience.

As a state electing all its judges in partisan elections[5] in the oldest court system in the nation,

[5] Pennsylvania judges for courts other than the state appellate courts can "cross-file" and be listed on both the Republican and Democratic primary ballots.

Pennsylvania presents a unique perspective on bans on personal solicitations of campaign funds. *See* Pa. Const. art. V § 13.

Pennsylvania's state court system dates back to the first supreme court created in 1684. Under the 1776 Pennsylvania Constitution, judges were appointed by the Executive Council for seven-year terms and eligible for reappointment at the end of each term. Pa. Const. of 1776, ch. II §§ 20, 23. Under the 1790 Constitution, judges were appointed by the governor and eligible to serve indefinitely, subject to good behavior. Pa. Const. of 1790, art. V § 2. In the 1830s, citizens were dissatisfied with what they deemed "excessive patronage" by the governor. Charles M. Snyder, *The Jacksonian Heritage Pennsylvania Politics 1833-1848*, 96 (1958). Then, in 1850, in conjunction with a nationwide movement attributable to both "Jacksonian Democracy" and a desire "to increase judicial independence and stature," Pennsylvanians instituted popular elections at all levels of the judiciary. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 Williamette L. Rev. 1397, 1399-1400 (2003); Pa. Const. of 1838, art. V § 2.

Pennsylvania has had a fully elected judiciary that has now endured for 164 years. For a short time, judicial candidates were elected through nonpartisan ballots, but that law was repealed only eight years after it was enacted. *See* Darren M. Breslin, *Judicial Merit-Retention Elections in Pennsylvania*, 48 Duq. L. Rev. 891, 896 (Fall 2010). At the

1967-1968 Pennsylvania Constitutional Convention, the state constitution was amended to have partisan elections followed by nonpartisan merit retention elections for all trial and appellate judges. A ballot vote submitted to the citizens of Pennsylvania in 1969 as to whether appellate court judges should be selected by the governor from a list of names submitted by a judicial nominating commission failed by fewer than 20,000 votes. Robert E. Woodside, *Pennsylvania Constitutional Law* 558 (1985).

Judicial candidates in Pennsylvania may raise money only through the use of campaign committees. Pa. Code of Judicial Conduct, R. 4.1(7) (2014). These campaign committees provide an important buffer between the judicial candidates and their supporters which preserves the appearance of judicial impartiality and limits the appearance or actuality of either an express or implied *quid pro quo* expectation.

Pennsylvania utilizes a *laissez faire* campaign finance system with very few limits on donations, including for judicial elections. While most states did not see million-dollar elections for their high courts until 2000, Pennsylvania experienced them as early as 1989. Malia Reddick & James R. DeBuse, *Campaign Contributors and the Pennsylvania Supreme Court*, 93 Judicature 164 (2009-2010). "[A]verage citizens hardly ever give" to Pennsylvania judicial campaigns, with nearly 78% of donations being contributions of $250 or greater. James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 Judicature 10, 12-13 (2000-2001) ("Though a

number of better-off citizens could afford to give between $50 and $250, less than 20 percent of all funds came in this amount."). Additionally, the legal profession accounts for more than half of all money received. *Id*. at 12. Judicial campaign fundraising reached an all-time high in Pennsylvania in 2007, when general-election candidates for two supreme court seats brought in more than $7.75 million. Reddick & DeBuse, *supra*, at 164.

Between 2008 and 2009, 67% of the civil cases heard by the Pennsylvania Supreme Court involved at least one litigant, attorney, or firm that had donated to at least one justice. *Id.* at 164-65. In 46% of civil cases, a single litigant, attorney, or firm had contributed to at least four of the six justices who ran in contested elections. *Id.* at 165. Not surprisingly, 76% of Pennsylvanians believe that campaign contributions made to judges have a "great deal to some" influence on their decisions. Pennsylvanians for Modern Courts, *Poll Shows Pennsylvanians Favor Merit Selection for Appellate Courts* (2010), *available at* http://www.pmconline.org/files/one%20pager%20on%20poll_0.pdf.

Thus, based simply on the frequency with which contributors to the justices' election campaigns later appear before them, citizens and litigants already have a legitimate reason to question the fairness and impartiality of the court's decisions. This concern is heightened at present because in the fall of 2015, three seats will be vacant and available on the state supreme court, the largest number ever at stake in

one election. The strictly partisan election is already drawing speculation as to the influence of out-of-state interests and special-interest spending. *See, e.g.*, James P. O'Toole, *State Supreme Court Races Will Sizzle in 2015*, Pittsburgh Post-Gazette, Dec. 7, 2014.

Pennsylvania also has had ethical issues plaguing its courts, demonstrating its need to maintain and restore public confidence in the system. In the last two years, one state supreme court justice was convicted for public corruption for using state-paid lower court staffers to work on her supreme court campaigns. Another justice was suspended and thereafter resigned after disclosure that he sent and received sexually explicit e-mails through his state government account.

In September 2014, a Philadelphia municipal court judge pleaded guilty to federal mail and wire fraud charges resulting from helping a political donor who was a defendant in a lawsuit by calling other judges, seeking favorable treatment for the donor. The conviction was also based on a Federal Bureau of Investigation sting operation where the judge received $1,000 cash from a witness interested in a fictitious gun possession case to help the judge pay down his campaign debt. After receiving another $1,000 cash donation from the witness, the judge told the witness to call him anytime for "[a]nything you need. Anything I can do to help you or anybody that you're interested in." The judge did not report either of these donations. P.J. D'Annunzio, *Former Phila.*

Judge Waters Pleads Guilty to Case-Fixing, Legal Intelligencer, Sept. 25, 2014.

Rule 4.1(7), which provides that "a judge or judicial candidate shall not . . . personally solicit . . . campaign contributions," serves as a barrier against further erosion of the public's confidence in the judiciary. The only reported violation of Rule 4.1(7) demonstrates the harm that would ensue if Rule 4.1(7) was not in place. In *In re Singletary*, 967 A.2d 1094 (Pa. 2009), a case upholding Pennsylvania's comparable canon, a traffic court judge attended a motorcycle club rally while campaigning for reelection during the primary. The judge personally solicited funds from the members in attendance, in violation of the canon, asking

> You're all going to help me out? . . . There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you're going to need me in Traffic Court, am I right about that? . . . Now you all want me to get there, you're all going to need my hook-up, right?

Id. at 1096.[6]

[6] The judge was later convicted of making false statements to the FBI regarding whether ticket fixing was occurring in traffic court. Gina Passarella, *Judge Denies Post-Trial Motions in Traffic Court Case*, Legal Intelligencer, Nov. 10, 2014.

In June 2014, the Supreme Court of Pennsylvania enacted a revised Code of Judicial Conduct. This revised Code was the result of two years of intensive study, including consideration of the rules regulating judicial candidate conduct. The provision prohibiting personal solicitation by judicial candidates was reaffirmed in the revised Code.

In Pennsylvania, Rule 4.1(7) is essential to maintaining the appearance, and reality, of an impartial judiciary and the public's confidence in that judiciary. Without the Rule, it is not difficult to imagine the resulting stain on the judiciary and appearance of impropriety calling into question the public's confidence in the judicial branch.

B. The New York Experience

Section 100.5(A)(5) of the New York Rules of the Chief Administrative Judge provides in relevant part: "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions." The rule reflects the State's determination that the appearance of a judge or judicial candidate personally soliciting money is incompatible with the standard of an impartial and independent decision-maker, and helps to maintain in the eyes of New Yorkers the important distinction between politicians and judges.

This rule operates against a context in which New Yorkers, like residents of other states, already hold a negative perception of the role private campaign

donations play in the judicial process. Specifically, the Marist College Institute for Public Opinion found that "[e]ighty-three percent of registered voters in the state indicate[d] that having to raise money for election campaigns has at least some influence on the decisions made by judges." Commission to Promote Public Confidence in Judicial Elections, *Public Opinion and Judicial Elections: A Survey of New York State Registered Voters*, 14 (2003).

These results track those of other studies. In addition to the Pennsylvania poll discussed above, a national survey found that seventy-six percent of those polled said that they think campaign contributions to judges have either some or a great deal of influence on the judges' decisions. Justice at Stake, *Frequency Questionnaire*, 4 (2001). And a 2007 poll by Zogby International found that seventy-nine percent of American business leaders thought that campaign contributions made to judges had some or a great deal of influence on those judges' decisions. Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges*, 4. From a controlled experiment conducted on a representative sample of Kentuckians, researchers found that, where participants were told that contributions to state supreme court candidates were made by those with direct business before the court, only forty-seven percent of those surveyed believed that the judge could be fair. *See* James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy*

Theory and "New-Style" Judicial Campaigns, 102 Am. Pol. Sci. Rev. 59, 69 (2008). Even when they were told that the contributions were made by interest groups without direct business before the judge, still only slightly more than fifty-seven percent believed the judge could be fair. *Id.*

Section 100.5(A)(5) thus promotes the public's confidence in the independence and impartiality of the judiciary. Without that Section, New Yorkers' perception that money is undermining the independence of the judiciary would likely increase. If campaign contributions generally are believed to imperil the independence of judicial candidates,[7] personal solicitation of those contributions is likely to only increase those concerns. As Professor Briffault explains:

> [P]ersonal solicitation highlights the dangers of abuse by focusing on the potentially coercive nature of the request for contributions aimed at the potential donor who has or is

[7] It is not only the New York public that recognizes the potential for actual and apparent corruption inherent in campaign contributions. The Court has recognized this potential on numerous occasions. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (recognizing "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

> likely to have business before the judge seeking the contribution. Personal solicitation, thus, particularly threatens the appearance of impropriety and undermines the appearance of evenhanded treatment essential to the judicial role.

Briffault, *supra*, at 225. Courts have agreed. *See*, *e.g.*, *Siefert v. Alexander*, 608 F.3d 974, 989-90 (7th Cir. 2010) (observing that "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means"); *In re Fadeley*, 310 Or. 548, 563 (1990) ("A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so."); *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137, 142 (3d Cir. 1991) (remarking, "we cannot say that the state may not draw a line at the point where the coercive effect [of the raising of campaign funds], or its appearance, is at its most intense – personal solicitation by the candidate").

Personal solicitation of contributions by judges would also risk undermining the critical distinction between judges and politicians. If judges raise campaign funds in the same way as do politicians, judges are more likely to be thought of by the public as politicians and enjoy less of the "special degree of public respect" that they require to do their jobs well. *See* Briffault *supra*, 199; *cf.* Justice Sandra Day O'Connor, Remarks at Elmhurst College (May 30, 2013) (regretting the fact "there are many who think

of judges as politicians in robes" and that "[i]n many states, that's what they are").

In New York, a lack of public confidence in the impartiality and independence of certain judges would risk undermining the public's confidence in the entire judiciary, not just in specific judges, or even just elected judges. The Commission to Promote Public Confidence in Judicial Elections found that New Yorkers are relatively uninformed about their judiciary. Commission to Promote Public Confidence in Judicial Elections, *Judicial Elections Report*, 38 (2006). In this context, New Yorkers are likely to generalize, attributing the conduct of some judges to all judges. This was the case in Kentucky, where researchers found that, "[p]erhaps reflecting some degree of cynicism, roughly one-third of respondents who were told that the judge rejected campaign contributions nonetheless were certain to some degree that he in fact had received them." Gibson, *supra*, at 66. Further complicating matters is the fact that New York employs a mixed system of judicial selection, in which some judges are elected and others are appointed. The appearance of bias arising from judicial elections threatens to permeate the entire system, tainting the elected and appointed alike.

New York's recusal rules would provide no adequate substitute for Section 100.5(A)(5). Although a judge is required to recuse herself under a variety of different circumstances – most notably when "the judge's impartiality may reasonably be questioned," Rules of the Chief Admin. Judge § 100.3(E) – the

rules are primarily designed to combat the perception of bias in eyes of the *parties* to that dispute, not the public at large, who are not made aware of the recusal. The recusal rules thus do not aim to address the issues that Section 100.5(A)(5) address regarding the critical importance of the public's perception of the impartiality of the judiciary.

Finally, in New York, allowing judges and judicial candidates to personally solicit contributions would likely have negative practical consequences, essentially forcing all judicial candidates to personally solicit campaign funds regardless of their comfort with the practice and disadvantaging incumbent judges. As is the case with respect to the political branches of government, if personal solicitation were permitted, there is good reason to believe it would soon become the dominant and unavoidable campaign fundraising model. The pressure to personally solicit campaign funds would quickly become substantial because the practice would surely raise more money, and those who declined to do so would therefore render themselves electorally uncompetitive. In this "race to the bottom," even those judicial candidates who are opposed to or uncomfortable with personal solicitation would likely have no choice to but engage in the practice if they are to remain electorally competitive.

Incumbents could find themselves at a substantial disadvantage. The practice would require individual judges themselves to dedicate substantial time to personally fundraising, which would have to be

balanced with already busy dockets and heavy case workloads. In addition, Part 151 of New York's Rules of the Chief Administrator restricts the assignment of cases to judges where a party, counsel, or counsel's firm made campaign contributions of $2,500 or more to the judge during a given period. § 151.1. Incumbents with large dockets would need to spend substantial time and effort determining from whom they could properly solicit contributions and, inevitably, would have access to a smaller pool of contributors from which to draw. None of these increased burdens on sitting judges, or disadvantages in contested elections, is reasonable or justified.

CONCLUSION

The canons in the states of *amici* help maintain public confidence in these states' judiciaries, which is essential to the effective functioning of the judicial branch. Impartiality, and the appearance of impartiality, are uniquely important to the judicial branch and require regulation of judges and judicial candidates that is not needed for the two political branches. This case presents an important issue, the outcome of which will impact states throughout the country that have found rules like Canon 7(C)(1)

to be important tools for promoting the public's confidence in that judiciary.

Respectfully submitted,

ROGER A. COOPER
PETER FOX
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
One Liberty Plaza
New York, NY 10006
(212) 225-2000
racooper@cgsh.com

PAUL TITUS
Counsel of Record
NANCY WINKELMAN
SHANNON L.C. AMMON
SCHNADER HARRISON
SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2000
ptitus@schnader.com

Counsel for Amici Curiae State and Local Judicial Reform Groups