

No. 13-1499

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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 PROFESSORS OF LAW,  
ECONOMICS, AND POLITICAL SCIENCE AS  
*AMICI CURIAE* IN SUPPORT OF  
RESPONDENT

JESSICA RING AMUNSON  
*Counsel of Record*  
ALEX TREPP\*  
JENNER & BLOCK LLP  
1099 New York Ave, NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
jamunson@jenner.com

*\* Admitted only in NY, not  
admitted in DC. Practicing under  
the supervision of the partnership  
of Jenner & Block LLP.*

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are professors of law, economics, and political science who study the effects of judicial elections on judicial decision-making. *Amici* include scholars recognized for their empirical study of judicial behavior and located at leading research institutions in the United States and Canada. Individual *amici* are specifically identified in the appendix to this brief.

*Amici curiae* are engaged in interdisciplinary research designed to assess empirically the effects of various electoral systems and behaviors on the independence and impartiality of an elected judiciary. On the basis of their research, *amici* believe that Canon 7(C)(1) of the Florida Code of Judicial Conduct helps to ensure that Florida's judges remain impartial, despite the electoral pressures associated with campaigns for judicial office. Moreover, *amici* believe that Canon 7(C)(1) preserves public confidence in Florida's courts by eliminating a significant source of perceived bias, namely, the personal solicitation of campaign contributions by candidates for judicial office.

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<sup>1</sup>Letters from the parties consenting to this filing accompany this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae's* counsel made a monetary contribution to the preparation or submission of this brief.

**SUMMARY OF ARGUMENT**

The State of Florida relies on judicial elections to select or retain all members of its judiciary. The nonpartisan and retention elections on which the State relies are designed to ensure that voters maintain some ability to hold the State’s judges accountable. However, the State has determined that subjecting judges to all of the rigors associated with campaigning for judicial office is ill-advised. Accordingly, Florida has enacted a canon of judicial conduct that insulates judges from the process of personally soliciting campaign contributions. Canon 7(C)(1) of the Florida Code of Judicial Conduct provides in relevant part that “[a] candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds . . . but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate’s campaign.” Fla. Code of Jud. Conduct, Canon 7(C)(1).

In the proceedings below, the Florida Supreme Court rejected a First Amendment challenge to Canon 7(C)(1), holding that the canon is narrowly tailored to advance the State’s compelling interests in preserving the integrity of its judiciary and maintaining public confidence in its court system. *Amici*—professors studying the effect of judicial elections on judicial decision-making—respectfully urge the Court to affirm the Florida Supreme Court, allowing the State to advance its compelling interest in preserving the actual and perceived impartiality of its state courts.

A functioning judiciary must dispense justice independently and impartially. But empirical evidence shows that campaign contributions to candidates for judicial office can be correlated with favorable outcomes in subsequent proceedings before recipient judges. Further study reveals that imminent retention events also affect judicial decision-making and case outcomes. By sheltering candidates for judicial office from the electioneering associated with soliciting campaign contributions, Canon 7(C)(1) addresses a potential source of bias while signaling to the public that the judiciary remains committed to neutral and impassive adjudication. For these reasons, Canon 7(C)(1) advances two compelling interests under the First Amendment, and does so without sacrificing entirely the accountability associated with judicial elections.

## ARGUMENT

### I. Canon 7(C)(1) Advances The State's Compelling Interest In Maintaining The Impartiality Of Its Courts.

“The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.” *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2007) (Kennedy, J., concurring). However, it can be “difficult to reconcile” the need for an independent and unbiased judiciary with required elections for judicial office. *Id.* at 212-13; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting) (“This Court has recognized in the past . . . a fundamental

tension between the ideal character of the judicial office and the real world of electoral politics.” (internal quotation marks omitted)). Indeed, increasingly expensive and contentious campaigns for judicial office pose a verifiable threat to the independence and impartiality of courts. Research shows that campaign contributions to elected judges can be correlated with favorable decisions in subsequent cases. Moreover, research confirms that imminent retention elections affect judicial behavior in several contexts, including criminal sentencing and death penalty appeals.

In order to preserve the independence of its courts, without surrendering entirely the accountability associated with electoral competition for judicial office, the State of Florida has prohibited candidates for judicial office from personally soliciting any campaign contributions. As the Florida Supreme Court held, this canon of judicial conduct advances the State’s compelling interest in “preserving the integrity of [its] judiciary.” Pet. App. at 15a. This Court should affirm the decision of the Florida Supreme Court and hold that regulations designed to protect the integrity of the judiciary advance a compelling state interest. *See, e.g., White*, 536 U.S. at 793 (Kennedy, J., concurring) (“The power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments. . . . Judicial integrity is, in consequence, a state interest of the highest order.”).

**A. Empirical Evidence Suggests That Campaign Contributions To Candidates For Judicial Office Can Affect Judicial Decision-Making And Case Outcomes.**

Nationwide, nearly 90 percent of state trial and appellate court judges must stand for election or retention.<sup>2</sup> The pressure to solicit campaign contributions in these elections has risen steadily in recent years because judicial elections have been contested with increasing frequency and success. Competitive and costly judicial elections now force candidates for judicial office to solicit campaign contributions in significant volume and amount.

Between 1990 and 2000, the rate at which partisan elections for judicial office were contested rose from 68 percent to 95 percent.<sup>3</sup> During the same period, the rate at which nonpartisan elections for judicial office were contested rose from 44 percent to 75 percent.<sup>4</sup> The increasing frequency with which elections for judicial office are contested has greatly diminished the value of incumbency. In 1980, only 26 percent of

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<sup>2</sup> Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, American Constitution Society for Law and Policy 2 (June 2013). Retention contests require that judges seeking reelection run unopposed. Typically, judges retain their position if they receive approval from a simple majority of voters. *Id.* at 4.

<sup>3</sup> Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69, 81 (2011).

<sup>4</sup> *Id.*

incumbent judges were defeated in partisan elections to retain their office.<sup>5</sup> By 2000, the loss rate for incumbent judges seeking retention through partisan elections rose to nearly 46 percent.<sup>6</sup> That loss rate far exceeded the loss rates for incumbent members of the U.S. House of Representatives, the U.S. Senate, and state legislatures.<sup>7</sup>

More competitive judicial elections means more money in judicial elections because the judicial candidate with the largest campaign war chest typically wins. Leading fundraisers prevailed in approximately 75 percent of contested state supreme court races in 1997 and 1998, and in 80 percent of contested races in 2001 and 2002.<sup>8</sup> And candidates are spending more to win. Average candidate expenditures in partisan and nonpartisan elections for state supreme courts more than doubled between 1990 and 2004. In such races, the average candidate spent \$364,348 in 1990, but nearly \$900,000 in 2004.<sup>9</sup> Given that fundraising is increasingly

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<sup>5</sup> Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 640 (2009).

<sup>6</sup> *Id.* During the same period, the loss rate for incumbent judges facing nonpartisan elections doubled. Kang & Shepherd, *supra* note 3, at 82.

<sup>7</sup> Between 1990 and 2000, reelection rates for incumbents in the U.S. House of Representatives, U.S. Senate, and state legislatures were 94.1 percent, 89.3 percent, and 85.1 percent, respectively. Shepherd, *supra* note 5, at 647.

<sup>8</sup> Kang & Shepherd, *supra* note 3, at 82.

<sup>9</sup> Shepherd, *supra* note 5, at 640-41.

predictive of success, judges are facing enormous pressure to solicit campaign contributions. Between 1990 and 1999, candidates for judicial office raised approximately \$83.3 million. In the subsequent ten year period, ending in 2009, candidates raised \$206.9 million.<sup>10</sup>

Like judges nationwide, Florida judges have felt the effects of increased electoral competition. In a 2001 poll, 68 percent of Florida judges responded that “they were under pressure to raise money for their campaigns during election years.”<sup>11</sup> And the rigors associated with campaigning for judicial office in Florida are not limited to the State’s local and circuit court judges, who compete in nonpartisan elections. Electoral pressure on Florida judges who run in unopposed retention elections every six years—namely, judges on the State’s Supreme Court and on its District Courts of Appeal—has also increased. Accordingly, the three Florida State Supreme Court justices facing retention elections in 2014 together raised approximately \$1.5 million for their campaigns.<sup>12</sup>

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<sup>10</sup> Shepherd, *supra* note 2, at 1.

<sup>11</sup> American Judicature Society, *History of Reform Efforts: Florida*, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/opinion\\_polls\\_surveys.cfm?state=FL](http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=FL) (last visited Dec. 17, 2014).

<sup>12</sup> American Judicature Society, *Judicial Campaigns and Elections: Florida*, [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state=FL](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=FL) (last visited Dec. 17, 2014).

In comparison, the State's Supreme Court justices raised just \$7,500 between 2000 and 2010.<sup>13</sup>

In addition to facing greater competition for votes, candidates for judicial office also must contend with the dramatic growth of independent expenditures made to affect judicial elections. In the 2003-2004 election cycle, interest groups spent a then-record \$9.8 million on independent expenditures to elect or oppose candidates for judicial office.<sup>14</sup> By the 2011-2012 election cycle, independent expenditures in judicial elections rose more than 50 percent, to \$15.4 million.<sup>15</sup>

The dramatic expansion of campaign spending in judicial elections has been driven by particular groups, most notably, groups associated with business interests and attorneys. Between 2000 and 2009, business groups accounted for approximately 30 percent of all contributions to candidates for judicial office.<sup>16</sup> During the same period, lawyers and lobbyists accounted for approximately 28 percent of total contributions.<sup>17</sup>

That business interests, lawyers, and lobbyists together account for nearly 60 percent of campaign contributions to candidates for judicial office is

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<sup>13</sup> Alicia Bannon, et al., *The New Politics of Judicial Elections 2011-12* 11 (Laurie Kinney & Peter Hardin eds., 2013), available at <http://newpoliticsreport.org/>.

<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> *Id.*

<sup>16</sup> Shepherd, *supra* note 2, at 1.

<sup>17</sup> *Id.* at 3.



problematic because of the fear that campaign contributions affect judicial decision-making. *See White*, 536 U.S. at 790 (O'Connor, J., concurring) (“[C]ampaign donations may leave judges feeling indebted to certain parties or interest groups.”). This is not to say that all judges are affected, or that any judge is knowingly affected. After all, “[m]any [elected 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.” *Id.* at 796 (Kennedy, J., concurring). But the research shows that the electoral pressures associated with campaigning for judicial office are putting at risk the independence and integrity of the elected judiciary.

Indeed, studies have shown that campaign contributions from business interests, lawyers, and lobbyists can be correlated with favorable decisions in cases before recipient judges. For example, a comprehensive national study of 175,000 campaign contribution records and 2,345 state supreme court opinions—each related to business interests and published between 2010 and 2012—concluded that elected state supreme court justices receiving at least 25 percent of their campaign contributions from business interests voted in favor of business interests in just over 62 percent of cases, whereas elected state supreme court justices receiving no more than 1 percent of their campaign contributions from the business sector voted in favor of business interests in

only 46 percent of cases.<sup>18</sup> Because approximately one-third of cases before state supreme courts involve business litigants, there is much at stake.<sup>19</sup>

Other studies corroborate the connection between campaign contributions and judicial decision-making. One nationwide study of 21,000 state supreme court decisions published between 1995 and 1998 found that campaign contributions from business groups, labor groups, medical groups, and attorney groups were associated with favorable votes in relevant cases before partisan-elected recipient judges.<sup>20</sup> Studies have also identified a relationship between campaign contributions and voting patterns in labor<sup>21</sup> and arbitration<sup>22</sup> cases. Finally, several researchers have verified empirically that campaign contributions from pro-plaintiff donors can affect judicial behavior.<sup>23</sup>

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<sup>18</sup> Shepherd, *supra* note 2, at 1, 13. State supreme court justices elected in partisan elections receive an average of 25.1 percent of their campaign contributions from business-interests, while state supreme court justices elected in nonpartisan elections receive an average of 16.9 percent of their campaign contributions from business interests. *Id.* at 10.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> Shepherd, *supra* note 5, at 652, 669.

<sup>21</sup> Kang & Shepherd, *supra* note 3, at 113-14.

<sup>22</sup> See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & Pol. 645, 684 (1999).

Indeed, one study found that when justices on the Ohio, Kentucky, and Alabama Supreme Courts received a higher amount of campaign contributions from pro-plaintiff donors, those judges were 5.2 times more likely to find for tort claimants than were justices with a smaller amount of contributions from pro-plaintiff sources.<sup>24</sup>

Of course, empirical evidence that the source and amount of campaign contributions can be correlated with subsequent decisions in relevant cases does not establish causality. The source and amount of campaign contributions may affect judicial decision-making directly or, instead, may affect judicial decision-making by selecting for judges with sympathetic dispositions. However, there is certainly evidence that donors *intend* to influence judges directly, as by making significant contributions to candidates for judicial office who are running unopposed,<sup>25</sup> or by making contributions to judges who are not likely to share the contributors' view of the law.<sup>26</sup> In fact, empirical analysis demonstrates that contributions to judges who are not likely to share the contributor's

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<sup>23</sup> See, e.g., Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 Pol. & Pol'y 314, 330 (2003).

<sup>24</sup> See Eric N. Waltenburg & Charles S. Lopeman, *Tort Decisions and Campaign Dollars*, 28 Southeastern Pol'y Rev. 241, 255 (2000).

<sup>25</sup> *Id.* at 246.

<sup>26</sup> Shepherd, *supra* note 2, at 14.

view of the law have a much stronger association with subsequent voting patterns than do contributions to more like-minded judges.<sup>27</sup> Empirical analysis also shows that the correlation between campaign contributions and voting patterns tends to disappear when judges face mandatory retirement.<sup>28</sup> These findings suggest that the effect of campaign contributions on judicial decision-making cannot be attributed entirely to donor support for candidates with sympathetic judicial ideologies. Thus, it appears that donors not only intend to influence judges, but may also experience success in doing so.<sup>29</sup>

Judges agree that campaign contributors often intend to buy influence. In a nationwide survey of 2,428 judges, more than 80 percent responded that campaign contributions are intended “to use the courts to shape

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<sup>27</sup> *Id.* (business-related contributions more strongly correlated with favorable votes when justice is ordinarily less likely to receive campaign contributions from business groups, and less likely to render decisions favorable to business groups).

<sup>28</sup> *See, e.g.,* Kang & Shepherd, *supra* note 3, at 104.

<sup>29</sup> *See also* Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys’ Contributions on State Supreme Courts*, 28 *Just. Sys. J.* 135, 153 (2007) (finding evidence that campaign contributions affect the voting patterns of some judges but not others); McCall, *supra* note 23, at 328 (finding evidence that judges ordinarily disposed against plaintiffs’ claims moderate their decisions when contributions from groups that support plaintiffs’ interests exceed contributions from groups that support defendants’ interests).

policy.”<sup>30</sup> Many judges also agree that campaign contributions can, in fact, influence decisions. In the same nationwide survey, more than 26 percent of judges responded that campaign contributions have “great” influence or “some” influence on their decisions, and more than 45 percent responded that campaign contributions have at least a little influence on their decisions.<sup>31</sup>

Such evidence is troubling because judges, “[u]nlike their counterparts in the political branches, . . . are expected to refrain from catering to particular constituencies.” *White*, 536 U.S. at 803-04 (Ginsburg, J., dissenting). Indeed, judges should “decide individual cases and controversies on individual records,” not on perceptions of electoral debt. *Id.* at 804 (Ginsburg, J., dissenting) (internal quotation marks omitted). Judicial elections can ensure that judges are accountable for any departure from their sworn duty to decide each

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<sup>30</sup> Greenberg Quinlan Rosner Research Inc., et al., *Justice At Stake-State Judges Frequency Questionnaire*, 9 (2002), available at [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf). Some judges also have been outspoken about their beliefs that campaign contributors are seeking a quid pro quo. For example, Ohio State Supreme Court Justice Paul Pfeifer has remarked that “[e]veryone interested in contributing [to a candidate for judicial office] has very specific interests. They mean to be buying a vote.” Shira J. Goodman, *The Danger Inherent in the Public Perception that Justice is For Sale*, 60 Drake L. Rev. 807, 817 (2012) (quotation marks omitted).

<sup>31</sup> Greenberg Quinlan Rosner Research Inc., et al., *supra* note 30, at 5. In Florida, 30 percent of judges report that campaign contributions have “at least some influence on their decisions.” American Judicature Society, *supra* note 11.

case on the facts and the law. However, it is critical that attempts to promote this accountability not interfere with the judiciary's ability to render just decisions, irrespective of how those decisions are viewed by particular voters or interest groups.

In sum, the research suggests, and many judges agree, that the source and amount of campaign contributions to candidates for judicial office can affect judicial decision-making and case outcomes. The State of Florida has enacted Canon 7(C)(1) to disrupt this connection between contributions and decisions, and to help ensure that cases in its courts are decided only on the facts and the law. This purpose, to provide independent and impartial courts, is “a state interest of the highest order,” *id.* at 793 (Kennedy, J., concurring), and a compelling interest under the First Amendment.

**B. Studies Show That The Pressures Associated With Reelection To Judicial Office Can Affect Judicial Decision-Making And Case Outcomes.**

“It is the business of judges to be indifferent to popularity.” *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991) (quotation marks omitted). However, candidates for judicial office face significant electoral pressures, including the need to attract and mobilize voters and to navigate interest group politics. The competitiveness and cost of judicial elections have in recent years compounded these pressures.

Studies have shown that the rigors of running for judicial office can affect judicial decision-making across a broad range of cases. A study of death penalty appeals—each of which was heard in one of four state supreme courts over a five-year period—found that

where judges were required to run for reelection, the likelihood that they would affirm imposition of the death penalty greatly increased.<sup>32</sup> The study also found that the effect of running for reelection was magnified by previous experience with electoral politics and by more competitive elections.<sup>33</sup> Anecdotal evidence underscores that electoral pressures can affect how state supreme court justices adjudicate death penalty appeals. Recounting his perception of voter preferences, one Louisiana State Supreme Court justice asserted that “his constituents . . . clearly preferred the death penalty as a punishment for murder and . . . would retaliate against him at election time if [he] did not reflect constituent preferences” in his death penalty decisions.<sup>34</sup>

Researchers have also demonstrated empirically that reelection events can affect judicial decision-making with respect to sentencing and tort claims. One study of 22,000 cases from Pennsylvania trial courts found that the sentences imposed in aggravated assault, rape, and robbery cases were considerably longer when judges were “close[ ] . . . to standing for

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<sup>32</sup> Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427, 436-37, 442 (1992).

<sup>33</sup> *Id.* at 442.

<sup>34</sup> Shepherd, *supra* note 5, at 648 (quotation marks omitted). Similar evidence of “[s]trategic voting” has been found when conservative judges must interpret abortion statutes in states with liberal abortion laws. See Melinda Gann Hall, *The Controversy Over Electing Judges and Advocacy in Political Science*, 30 Just. Sys. J. 284, 286 (2009).

reelection.”<sup>35</sup> Indeed, that same study found that “[a]ll else equal, the sentence imposed by a judge whose election is imminent is likely to be about three to four-and-one-fourth months longer . . . than if the judge were recently elected or retained.”<sup>36</sup> The study further found that even judges ordinarily disposed to impose harsh sentences increased the severity of the sentences they imposed when approaching reelection.<sup>37</sup> And similar trends were apparent in tort cases, where judges typically sympathetic to defendants were 11 percent more likely to find for defendants during “electorally salient years.”<sup>38</sup>

The dynamics of reelection can affect judicial decision-making because, in order to secure reelection, judges must account for the political preferences of interest groups and voters. Indeed, evidence indicates that elected judges may adjust their decision-making to ascendant political views, as by moderating their decision-making when control of the political branches shifts from one political party to another.<sup>39</sup> By way of contrast, judges sheltered from electoral pressures because they intend to retire rather than seek

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<sup>35</sup> Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 Am. J. Pol. Sci. 247, 248 (2004).

<sup>36</sup> *Id.* at 255.

<sup>37</sup> *Id.* at 258.

<sup>38</sup> Waltenburg & Lopeman, *supra* note 24, at 242, 250-51.

<sup>39</sup> Shepherd, *supra* note 5, at 629, 665-66.



reelection show no evidence of being influenced by popular opinion.<sup>40</sup>

Although electoral pressures can affect judges who intend imminently to run for reelection, evidence suggests that states can promote impartiality without abandoning their pursuit of judicial accountability. This is so because the effect of electoral pressure on judicial decision-making varies across retention systems: Partisan campaigns for reelection have a more significant impact on judicial behavior than do nonpartisan elections or retention elections. Indeed, one study of 28,000 cases involving 470 state supreme court justices found that, as compared to nonpartisan and retention reelections, partisan reelections are much more likely to yield a correlation between decisions and campaign contributions in labor cases, medical malpractice cases, and products liability cases.<sup>41</sup> Another study—of 7,000 tort cases across 48 states—concluded that partisan elections have the most significant effect on judicial decision-making, finding that the average tort award entered against an out-of-state business was \$332,800 larger in states that relied on partisan rather than nonpartisan elections to select judges.<sup>42</sup>

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<sup>40</sup> *Id.* at 663-64.

<sup>41</sup> *Id.* at 661-62.

<sup>42</sup> Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 *J.L. & Econ.* 157, 157, 168 (1999). The studies' authors reasoned that elected judges have electoral incentives to redistribute wealth from outside the state to within it. *Id.* at 166.

Research on the relative effects that different election systems have on judicial decision-making indicates that insulation from partisan politics can diminish the impact of reelection events on judicial behavior. Studies suggesting that judges appointed for life are far more independent than judges required to stand for reelection underscore that insulating judges from political competition has a salutary effect. Such studies show that appointed judges are more likely than their elected colleagues to subject administrative agency action to rigorous review,<sup>43</sup> and more likely to identify case-sensitive factors that can determine the outcome of litigation.<sup>44</sup>

It should be true that “judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.” *White*, 536 U.S. at 806 (Ginsburg, J., dissenting); *see also id.* (Ginsburg, J., dissenting) (“One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” (quoting *W. Va. Bd. of Educ. v. Barnette*, 319

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<sup>43</sup> *See generally* F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. Econ. & Org. 534 (2000).

<sup>44</sup> *See generally* F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. Legal Stud. 205 (1999) (finding greater volume of litigation in states with appointed rather than elected judiciaries and attributing difference to greater decisional uncertainty associated with appointed, more independent, adjudicators).

U.S. 624, 638 (1943)). But the evidence shows that subjecting judges to electoral politics can affect judicial decision-making and case outcomes. The impact that imminent campaigns for reelection can have on judicial decision-making is most plain with respect to decisions that concern criminal issues, like death penalty appeals and sentencing. But imminent retention events can also affect judicial decision-making on less visible issues, including products liability and medical malpractice cases.

Firmly grounded in empirical evidence that confirms the salutary effect of insulation, Canon 7(C)(1) shelters judges from the influence that personally politicking for campaign contributions might have on their decision-making. In short, Canon 7(C)(1) promotes judicial independence and integrity without sacrificing entirely the accountability associated with judicial elections. This purpose is compelling under the First Amendment.

## **II. Canon 7(C)(1) Advances Florida's Compelling Interest In Maintaining Public Confidence In The Impartiality Of Its Courts.**

Although research suggests that judicial decision-making is affected by campaign contributions to candidates for judicial office, and by the electoral pressure associated with standing for reelection to judicial office, it would be error to assume that any judge is knowingly partial. Many state judges maintain their independence and impartiality despite the rigors associated with campaigning for judicial office, *see White*, 536 U.S. at 796 (Kennedy, J., concurring), and this Court has rightly emphasized that there is a

“presumption of honesty and integrity in those serving as adjudicators,” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). But independence and impartiality, however critical to the dispensation of justice, are not sufficient to ensure a functioning judiciary. Rather, a functioning judiciary requires the respect of the litigants that appear in its courts, and the respect of the communities that are affected by its judgments. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Absent public confidence in the independence and impartiality of its judges, an elected judiciary lacks the legitimacy required to continue making the hard decisions sometimes compelled by the facts and the law.

Mindful that the judicial function is uniquely dependent on popular perceptions of independence and impartiality, Florida enacted Canon 7(C)(1) in order to insulate candidates for judicial office from the sometimes indecorous process of raising funds for judicial elections. As the Florida Supreme Court held, this purpose advances the State’s compelling interest in preserving public confidence in its judiciary. Pet. App. at 15a.

This Court has recognized that preserving public confidence in the independence, impartiality, and integrity of the judiciary is a state interest of the highest order. *Caperton*, 556 U.S. at 889 (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)); *see also, e.g., Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (“A State may . . . properly protect the judicial process from being misjudged in the minds of the public.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[T]o perform its high function in the best way[,] justice must satisfy the

appearance of justice.” (internal quotation marks omitted)). In this case, the Court should recognize that the State of Florida’s interest in preserving public confidence in its courts is compelling under the First Amendment.

**A. The Enduring Impartiality Of The Judiciary Depends On Public Confidence In The Judiciary.**

“The power and the prerogative of a court to [resolve disputes] rest[s], in the end, upon the respect accorded to its judgments.” *Caperton*, 556 U.S. at 889 (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)). Public confidence in the independence and impartiality of the judiciary is critical because judgments made on the facts and the law cannot satisfy all litigants, and will certainly dismay some members of the public. *See, e.g., White*, 536 U.S. at 798 (Stevens, J., dissenting) (“[C]ountless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them.”).

There is widespread concern that campaigns for judicial office necessarily erode public confidence in the judiciary. “When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception . . . of judicial independence and judicial excellence.” *Lopez Torres*, 552 U.S. at 212 (Kennedy, J., concurring). Research has demonstrated that this concern has merit. Public confidence in the

independence and impartiality of elected judges is diminished substantially when incumbent and aspiring judges must rely on campaign contributions to stand for office.

For this reason, the American Bar Association has recommended, and the State of Florida has adopted, a prophylactic rule requiring that judges “[a]void . . . the [a]pppearance of [i]mpropriety.” Fla. Code of Jud. Conduct, Canon 2; ABA Model Code of Jud. Conduct, Canon 2 & Canon 2.4 cmt. The rule promotes public confidence in the judiciary by assuring the public that judges are required to comport themselves with the integrity characteristic of independent and impartial adjudicators. However, the rule also promotes public confidence in the judiciary by ensuring that the State’s judiciary “functions independently of the executive and legislative branches.” Fla. Code of Jud. Conduct, Canon 2b cmt. The State has recognized that public confidence in its courts is critical to the maintenance of a judiciary that can resolve disputes impassively, and enforce the separation of powers. It is for these same reasons that the maintenance of public confidence in the independence and impartiality of courts is a compelling interest under the First Amendment.

**B. Fundraising Associated With Campaigns For  
Judicial Office Has Diminished Public  
Confidence In The Impartiality Of The  
Courts.**

Fundraising associated with campaigns for judicial office has diminished the public’s confidence that courts

are independent and impartial.<sup>45</sup> In surveys conducted over the past thirteen years, an overwhelming majority of voters have reported that they believe campaign contributions are inconsistent with judicial independence. For example, in 2001, 76 percent of voters reported believing that campaign contributions have at least “some influence” on judicial decision-making.<sup>46</sup> By 2011, the number of voters who reported believing that campaign contributions have at least “some influence” on judicial decision-making rose to 83 percent,<sup>47</sup> and, in 2013, that figure rose to 87 percent.<sup>48</sup> According to recent studies, a majority of citizens also believe that candidates for judicial office cannot be impartial if they have accepted campaign contributions.<sup>49</sup>

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<sup>45</sup> See, e.g., James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New-Style’ Judicial Campaigns*, 102 *Am. Pol. Sci. Rev.* 59, 72 (2008).

<sup>46</sup> Greenberg Quinlan Rosner Research Inc., et al., *2001 National Bipartisan Survey*, 4 (2001), available at [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

<sup>47</sup> 20/20 Insight LLC, *National Registered Voters Frequency Questionnaire*, 2 (2011), available at [http://www.justiceatstake.org/media/cms/NPJE2011poll\\_7FE4917006019.pdf](http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf).

<sup>48</sup> 20/20 Insight LLC, *Public Opinion Poll*, 3 (2014), available at [http://www.justiceatstake.org/file.cfm/media/news/toplines337\\_B2D51323DC5D0.pdf](http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf).

<sup>49</sup> See James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 *J. Empirical Legal Stud.* 76, 85 (2013)

That campaign contributions to candidates for judicial office have in recent years alienated an increasing number of citizens is not surprising. During this period, fundraising in connection with campaigns for judicial office has risen significantly.<sup>50</sup> Moreover, this significant rise in fundraising largely has been driven by discrete groups, many of which are repeat players in the legal process.<sup>51</sup> As more campaign contributors appear before recipient judges in court, accusations of bias become more resonant.<sup>52</sup>

This Court has recognized that allowing candidates for judicial office to accept campaign contributions can diminish public confidence in the impartiality of the judiciary. *See, e.g., Caperton*, 556 U.S. at 886 (noting

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[hereinafter *Judicial Impartiality*] (54 percent of respondents believe that a judge who accepts campaign contributions cannot be impartial); James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of State Courts*, 74 J. Pol. 18, 26 (2012) [hereinafter *Campaign Support*] (58 percent of respondents believe that a judge who accepted campaign contributions cannot be impartial).

<sup>50</sup> Between 2000 and 2009, the amount of campaign contributions made to candidates for judicial office exceeded the amount of the same campaign contributions made in the decade prior by nearly 150 percent. Shepherd, *supra* note 2, at 1.

<sup>51</sup> *See supra* Part I(A) at 7.

<sup>52</sup> *See, e.g., Kang & Shepherd, supra* note 3, at 85 (finding that nearly one-third of state supreme court cases involve business interests); Goodman, *supra* note 30, at 815 (finding that 60 percent of cases before Pennsylvania Supreme Court involved campaign contributors during 2008 and 2009 terms).



that “fears of bias can arise when—without the consent of the other parties—a man choose[s] the judge in his own cause,” as by making campaign contributions to a judge who will review his case); *see also White*, 536 U.S. at 790 (O’Connor, J., concurring) (“Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.”) But research indicates that campaign contributions reduce public confidence in the impartiality of the judiciary even when the contributions are rejected. Indeed, a significant percentage of voters believe that judges cannot remain impartial when adjudicating the claims of entities and parties who have offered to make campaign contributions, even when the offered contribution has been refused.<sup>53</sup> The perceived relationship between potential contributors and candidates for judicial office is apparently sufficient to imperil public confidence in the courts.<sup>54</sup>

The diminished public confidence in courts that is associated with fundraising for judicial elections cannot be addressed through recusal. Although recusal rehabilitates the perceived independence and impartiality of courts, it does not restore public confidence to levels that obtain before candidates for

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<sup>53</sup> *See, e.g.,* Gibson and Caldeira, *Judicial Impartiality*, *supra* note 49, at 85 (22.8 percent of respondents believe judge cannot be impartial even after rejecting campaign contributions).

<sup>54</sup> *See* Gibson and Caldeira, *Campaign Support*, *supra* note 49, at 32.

judicial office are forced to raise funds for their campaigns.<sup>55</sup> Accordingly, states cannot arrest the decline of public confidence in their courts without addressing directly the fundraising associated with campaigning for judicial office. Canon 7(C)(1) does just that.

### CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

JESSICA RING AMUNSON

*Counsel of Record*

ALEX TREPP\*

JENNER & BLOCK LLP

1099 New York Ave, NW

Suite 900

Washington, DC 20001

(202) 639-6000

jamunson@jenner.com

*\* Admitted only in NY, not admitted in DC. Practicing under the supervision of the partnership of Jenner & Block LLP.*

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<sup>55</sup> *Id.* at 32-33.

## **APPENDIX**

## APPENDIX

## IDENTIFICATION OF AMICI

**Lee Epstein**, PhD, is the Ethan A.H. Shepley Distinguished University Professor, Washington University in St. Louis, and the Co-Director of the Center for Empirical Research in the Law.

**Tracey E. George**, JD, MA, is the Charles B. Cox III and Lucy D. Cox Family Chair in Law and Liberty and Professor of Political Science, Vanderbilt University, and the Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program.

**Charles Geyh**, JD, is the John F. Kimberling Professor of Law, Indiana University Maurer School of Law. He has authored or co-authored several books and articles concerning the effect of judicial elections on judicial behavior, including *Can the Rule of Law Survive Judicial Politics?*, published in the Cornell University Law Review.

**G. Mitu Gulati**, JD, MA, is Professor of Law, Duke University School of Law. He is the co-author of *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*.

**Gbemende Johnson**, PhD, is Assistant Professor of Government, Hamilton University. Her research interests include judicial politics.

**Michael Kang**, JD, PhD, is Professor of Law, Emory University School of Law. He has authored or co-authored several articles concerning the effect of

judicial elections on judicial behavior, including *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, cited herein.

**Jeffrey Rachlinski**, JD, PhD, is Professor of Law, Cornell University School of Law. His research interests include the effect of human psychology on judicial behavior.

**Joanna Shepherd**, JD, PhD, is Professor of Law, Emory University School of Law. She has authored or co-authored several articles concerning the effect of judicial elections on judicial behavior, including three articles cited herein.

**Rorie Spill Solberg**, PhD, is Associate Professor of Political Science, Oregon State University School of Public Policy. She also serves as an Editor for *Judicature*.

**Alex Tabarrok**, PhD, is the Bartley J. Madden Chair in Economics at the Mercatus Center at George Mason University. He has authored or co-authored several articles concerning the effect of judicial elections on judicial behavior, including *Court Politics: The Political Economy of Tort Awards*, cited herein.

**Jeffrey L. Yates**, JD, PhD, is Professor of Political Science, Binghamton University. His research interests include state courts and state politics.

**Albert Yoon**, JD, PhD, is Professor of Law and Political Science, University of Toronto. His research interests include judicial politics.

**Christopher Zorn**, PhD, is the Liberal Arts Research Professor of Political Science and Sociology and Affiliate Law Faculty, The Pennsylvania State University. His research interests include judicial politics.