

03-7250 (L),
03-7289 (XAP)

United States Court of Appeals
for the
Second Circuit

THOMAS J. SPARGO, JANE McNALLY, AND PETER KERMANI,

Plaintiffs-Appellees-Cross-Appellants,

- against -

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,
GERALD STERN, individually and as Administrator of the State Commission on
Judicial Conduct, and HENRY T. BERGER, individually and as
Chairperson of the New York State Commission on Judicial Conduct,

Defendants-Appellants-Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU
SCHOOL OF LAW *ET AL.* IN SUPPORT OF DEFENDANTS-
APPELLANTS-CROSS-APPELLEES AND SUPPORTING REVERSAL

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NOTICE REGARDING PARTIES' CONSENT TO FILING

Counsel for all parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

RULE 26.1 STATEMENT

Some of the *amici* are organized as not-for-profit corporations. Pursuant to Federal Rule of Appellate Procedure 26.1, those *amici* state that none of them has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a). *Amici curiae* are the Brennan Center for Justice at NYU School of Law and other national and regional organizations that work to promote and preserve judicial fairness and impartiality. *Amici* have an interest in this case because the Plaintiffs-Appellees-Cross-Appellants (collectively, “Justice Spargo”) are attacking canons of judicial conduct (the “Canons”) that safeguard the independence of the courts and protect each litigant’s right to an impartial tribunal. Weakening the Canons would undermine already eroding public confidence in the integrity of state courts. The specific interests of each *amicus* in the questions presented in this case are set forth in greater detail in the appendix to this brief.

SUMMARY OF ARGUMENT

1. The Canons should not be judged under the so-called “strict scrutiny” test. Justice Spargo contends the Canons burden his fundamental rights. Even assuming this is so, the Canons also safeguard equally fundamental rights of the persons who appear before him. The Canons serve at least three interests of constitutional magnitude: the right of litigants to impartial courts; the preservation of liberty through the separation of powers; and public confidence in the courts’ fairness, which is necessary both to the

rights of individual litigants and to the functioning of the judiciary itself. This Court and the United States Supreme Court have held that states may regulate the partisan political conduct of public officials, including judges, in order to guarantee both the fact and the appearance of evenhanded application of the law, and have not applied strict scrutiny in doing so.

2. The Constitution permits New York to prohibit sitting judges from engaging in partisan politics, other than their own re-election campaigns. The belief that justice requires the insulation of judges from considerations of party and politics is enshrined in Article III of the United States Constitution and Article VI of the New York Constitution. It has been a part of every major system of judicial ethics in this country. Similar considerations support the federal Hatch Act, which for decades has restricted the political activity of federal government employees. The Canons recognize that before election to the bench, most judges will have led active public lives. Prior political activity is no bar, and judicial aspirants are permitted to engage in further political activity inherent in their own candidacies for elected judgeships. The Canons also recognize, however, that once on the bench, individuals who were formerly politically active must withdraw from partisan politics if they are to fulfill the duties of judicial office.

3. For that reason, New York’s decision to hold partisan judicial elections does not forfeit the state’s right—or its obligation—to provide fair courts. Judicial impartiality is not a mere policy choice; the Fourteenth Amendment requires it. Direct election of judges has coexisted with independent state judiciaries for nearly two centuries. Even in federal Article III courts, many excellent judges have had to leave behind their previously vigorous partisan lives when they accepted judicial office. They show by example that involvement in politics does not leave an indelible “taint” incompatible with the judicial role. Rather, in both elective and appointive systems, the public rightly expects individuals to disentangle themselves from politics once they become judges. Having adopted a partly elective system, New York can reasonably conclude that allowing party nominations gives voters useful information in making their choices.

ARGUMENT

I.

The Challenged Canons Should Not Be Subjected To “Strict Scrutiny.”

Strict scrutiny does not and cannot adequately weigh the competing constitutional interests at stake in the regulation of both sitting judges and judicial candidates. The First Amendment interests claimed by Justice Spargo are counterbalanced by the equally—if not more—fundamental

rights of the litigants who appear before him. *See Raab v. State Comm'n on Judicial Conduct*, 2003 WL 21321183, slip op. at 11 (N.Y. Jun. 10, 2003) (“[A] number of competing interests are at stake, almost all of a constitutional magnitude.”).¹ It is thus inappropriate to require the Canons to be the least intrusive possible regulation of Justice Spargo’s conduct, to the detriment of the rights of those over whom he has actively sought to sit in judgment. Strict scrutiny does not apply to regulations that seek to ensure evenhanded application of the law by judges and other officials, even when the regulations burden the officials’ speech and associational rights to some extent. *See U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564 (1973) (upholding restriction on political activities of federal employees by deferring to “balance” struck by Congress between employees’ interest in speech and government’s interest in impartial execution of the law).²

¹ The *Raab* slip opinion is also available at <http://www.courts.state.ny.us/ctapps/decisions/91pc03.pdf>.

² *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), does not require strict scrutiny. First, *White* did not analyze whether the “Announce Clause” of Minnesota’s canons must satisfy strict scrutiny; rather, the parties assumed that strict scrutiny applied. *See id.* at 774. Second, the Supreme Court expressly disavowed any holding that the same constitutional rules must apply to judicial elections as to elections for political office. *Id.* at 783. Finally, and most critically, *White* said nothing at all about regulation of sitting judges (other than those running for re-election). Whatever that case implies for New York’s Canons in the context of a judge’s own campaign, it does not state the standard of review for other judicial conduct and speech.

The vital interests that the Canons protect are so well established as to be beyond dispute. Most obviously, the Canons protect the right of all persons who come before New York's courts to be heard by an independent and impartial tribunal. *See In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”). That states have a compelling interest in maintaining fair courts has never been seriously doubted. “There could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring). Chief Justice Rehnquist has described “an independent judiciary with the final authority to interpret a written constitution” as “one of the crown jewels of our system of government today.” William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 273-74 (1996). Judges “must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or ‘the home crowd’ wants.” Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 Hawaii L. Rev. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 Pepperdine L. Rev. 227, 229-30 (1980)). In fact, providing fair courts is more than an interest of the state; it is a duty: “[L]itigants have a right guaranteed under the Due Process clause to a fair and

impartial magistrate and the State, as steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism.” *Raab*, 2003 WL 21321183, slip. op. at 8-9.

Thus, New York cannot simply ask litigants to put their faith in judges’ striving to do what is legally right; the Constitution guarantees them a judicial system that, to the extent possible, does not tempt judges to do otherwise. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (discussing circumstances in which “the *probability* of actual bias on the part of the judge . . . is too high to be constitutionally tolerable”) (emphasis added); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (“The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.”) (quotation marks omitted). Fairness requires not only that judges remain impartial as between the particular persons appearing before them, but also that they not become so entangled in partisan politics that their independence can be questioned. “It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his

constituents.” *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion).

Litigants’ due process rights are not the only interests of constitutional magnitude served by the Canons. The Canons also safeguard the separation of powers that is the essence of our constitutional order. *See Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) (“While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.”). The District Court noted that the parties had not explained what they meant by “independent,” as distinct from “impartial,” courts. 244 F. Supp. 2d at 87; *see also White*, 536 U.S. at 775 n.6 (stating that, for parties to that case, terms seemed “interchangeable”). Judicial independence means something more than impartiality as to particular parties, or even as to particular legal issues. It means, at least, that the judiciary is neither dominated nor controlled by the political branches, and that it is disentangled from the forces that influence those branches’ policy choices.³ If judges answer to political parties and electoral majorities to the same degree as legislators, the courts risk becoming mere shadow legislatures. They would

³ Judge Hurd erroneously believed that disentangling judges from partisan politics while *on* the bench or in connection with the campaigns of *other* candidates could not be a compelling interest because judicial aspirants are permitted to participate in their *own* campaigns. *Spargo*, 244 F. Supp. 2d at 88. *But see infra* Point III.

lose the distinct character necessary for the non-legislative work of judging and for discharging their constitutional duty of judicial review.⁴

The principle of judicial independence as a crucial component of the separation of powers is enshrined in Article III of the federal Constitution and Article VI of the New York Constitution. For example, the state Constitution forbids judges of the Court of Appeals, the Supreme Court (including the Appellate Division), and other courts of superior jurisdiction from holding office in a political party or being members of the governing or executive agencies of political parties. N.Y. Const. art. VI § 20(b)(3). This and other sections of Article VI “seek to minimize the involvement of the judiciary in the political process and the possible influences such exposure might bring with it. (N.Y. Temp. Comm. on Constitutional Convention, Pamphlet 12 [1967].)” *Hurowitz v. Bd. of Elections*, 426 N.E.2d 746, 748 (N.Y. 1981); *see also West Virginia ex rel. Carenbauer v. Hechler*, 542 S.E.2d 405, 419 (W. Va.

⁴ Threats to judicial independence threaten the liberty protected by the Due Process Clause, but the problem goes beyond that.

[W]e have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.

Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

2000) (“Critical to understanding the imperative that the judiciary be separated from politics, other than as may be required for the purpose of elections, is an appreciation of the dangers presented by commingling politics with the judiciary.”). The idea of insulating judges from partisan politics did not originate with the Canons. It is how New York law defines the judiciary.

This Court, drawing an analogy to the Incompatibility Clause of the federal Constitution, has recognized the singular importance of New York’s effort to preserve the separation of powers.

By requiring state judges to resign from their positions if they seek election to Congress, New York adopts its own incompatibility principle, protecting the integrity and independence of the judicial branch from the conflicting activities of seeking and holding Congressional office. New York’s concern for the independence of its judiciary serves interests as fundamental to a constitutional democracy as those served by the Framers’ concern for the independence of Congress. These fundamental interests in the structure of government far transcend the interests involved when a state exercises general regulatory authority over non-governmental occupations.

Signorelli v. Evans, 637 F.2d 853, 861 (2d Cir. 1980). The opinion went on to note that New York had “adopt[ed] at the state level one of the Constitution’s devices for protecting the separation of federal powers” and that New York’s Canons, laws, and Constitution “protect the integrity of a branch of state government” *Id.* at 863.

Finally, beyond the fact of judicial impartiality and independence, litigants and the state have a constitutional interest in the judiciary's being seen to be impartial and independent. For the individual litigant, "the appearance of evenhanded justice . . . is at the core of due process." *Mayberry v.*

Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). For the effective functioning of the judiciary itself, the appearance of impartiality and the public's confidence in courts' fairness is almost as important as the reality of fairness. *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."). The government can curtail the political activities of even minor public functionaries to preserve the appearance that the laws are not being administered in partisan fashion, which is "critical" to public confidence in our system of government. *Letter Carriers*, 413 U.S. at 565.

When individuals seek judicial office, they accept the same critical duty to maintain both the reality and the perception of impartiality and independence.

See 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.").

Resolving challenges to the Canons is not a matter of weighing the state's mere policy preferences against Justice Spargo's constitutional rights.

The interests served by the Canons are themselves of constitutional magnitude,

and the standard of review applied to the Canons should reflect this. As Justice Breyer said in the campaign finance context, “constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (judicial canon case) (“Two principles are in conflict and must, to the extent possible, be reconciled. . . . The roots of both principles lie deep in our constitutional heritage.”). The question is not whether the Canons are the least restrictive means of serving the state’s interests, but whether the Canons strike a reasonable balance among the competing constitutional rights of judges, litigants, and the general citizenry.

II.

The Canons’ Limitations On Judges’ Political Activities Are Constitutional.

The “least restrictive means” approach is especially unsuited to addressing the Canons’ restrictions on the political activities of sitting judges, as in Charges 3 and 4, for two reasons. First, the First Amendment interests of sitting judges are not implicated to the same degree as in the election context of *White*; and, second, the case law makes clear that strict scrutiny does not apply

when the government requires officials charged with the impartial application of the laws to refrain from personal involvement in partisan politics.

In *White*, it was assumed that strict scrutiny applied not only because the Announce Clause regulated speech on the basis of its content, but also because it “burdens a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office.” *White*, 536 U.S. at 774 (quotation marks omitted); *see also id.* at 782 (“We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”). Campaign speech serves a critical function in a democratic system: giving voters a basis to decide how to cast their ballots. The partisan activity of sitting judges, who may be years away from reelection, does not serve that function. *See Raab*, 2003 WL 21321183, slip op. at 8 (“Notably, *White* did not involve review of political activity restrictions analogous to those at issue here.”). Justice Spargo’s trip to Florida in particular has little or nothing to do with the First Amendment interests underlying *White*.⁵ “[T]he [*White*] decision was less

⁵ Justice Spargo was a sitting judge, and not a candidate, when he went to Florida in late 2000 as alleged in Charge 3. The conduct involved in Charge 4, in contrast, occurred when he was both a judge and a candidate for higher judicial office. However, the charged conduct—giving the keynote address at a political party function—was partisan activity in support of a political party and all of its candidates generally, and not focused on Justice Spargo’s own
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about the free speech rights of judges and candidates than the information needed by voters when they choose judges.” Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 *Judicature* 163, 163 (Nov.-Dec. 2002).

Courts routinely apply less than strict scrutiny to measures that restrict the partisan activities of public officials, including judges. This is seen perhaps most notably in unsuccessful challenges to the Hatch Act, and to the “mini-Hatch Acts” adopted by all 50 states. The Supreme Court’s first case upholding the Hatch Act rejected a least-restrictive-means test: “The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible.” *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100 (1947); *see also id.* at 102 (“The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.”). The Court reaffirmed this holding a quarter-century later: “Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on

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campaign. It is thus properly analyzed as the conduct of a sitting judge, rather than that of a campaigning candidate.

partisan political activities now contained in the Hatch Act.” *Letter Carriers*, 413 U.S. at 564;⁶ *see also Fletcher v. Marino*, 882 F.2d 605, 610-12 (2d Cir. 1989) (applying lesser scrutiny to statute precluding elected officials and most holders of party positions from becoming members of community school boards).

This Court has remarked that the Hatch Act “carefully distinguishes between partisan political activities and mere expressions of views.” *Biller v. United States Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir. 1988). The Court’s distinction underscores the inapplicability of *White* to Justice Spargo’s conduct. “The very purposes of the Hatch Act and the evils it sought to eliminate demonstrate, in fact, that it is engaging in organized political activity by federal employees that threatens government integrity and

⁶ In light of the specific charges against Justice Spargo, the Supreme Court’s enumeration of prohibitions that “would in our view unquestionably be valid” is illuminating:

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

Letter Carriers, 413 U.S. at 556; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973) (enumerating similar list).

efficiency.” *Id.* at 1090. *White*, which addressed the “mere expressions of views” by a candidate in the context of his own campaign, cannot simply be imported into the different context of “organized political activity” by a sitting public official, particularly one whose very function is defined by independence and impartiality. The level of scrutiny applied in *White* should not apply here.

But even if strict scrutiny did apply, the Canons would pass muster. The state’s interest in curtailing partisan activity by sitting judges is of paramount importance. Party discipline is “repugnant to the . . . functioning of an independent judiciary.” *Rosenthal v. Harwood*, 323 N.E.2d 179, 183 (N.Y. 1974). Even before a judicial aspirant ascends to the bench, “[p]olitical organization leaders ought not exact a promise of party loyalty from candidates for judicial office as a condition of support, and such candidates should not make these promises in exchange for support.” *Donovan v. Bd. of Elections*, 276 N.E.2d 225 (N.Y. 1971) (mem.). “A more precise choice of words would have replaced ‘ought not’ with the more accurate ‘may not.’” *Rosenthal*, 323 N.E.2d at 182 at 473. Loyalty to party is by definition a loss of impartiality, an assault on the most elemental quality of a judge. *See White*, 536 U.S. at 775 (lack of bias toward party is “root meaning” of impartiality in judicial context).

Something so fundamental has naturally been part of every major attempt to systematize judicial ethics. The American Bar Association explained, a decade after adopting its first set of model canons, that

[a] judge is entitled to entertain his personal views of political questions, but should not directly nor indirectly participate in partisan political activities. It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise he might enjoy. When he accepts a judicial position, *ex necessitate rei*, he thereby voluntarily places certain well recognized limitations upon his activities.

ABA Formal Op. 113 (1934). The principle that judges, when they are not running for office themselves, should dissociate themselves from political parties and the campaigns of other candidates has been applied time and again over the succeeding decades by high courts and ethical authorities throughout the country.⁷ Politicians may become judges, as President Taft did when he

⁷ *E.g.*, *In re McCormick*, 639 N.W.2d 12 (Iowa 2002) (publicly supporting another's candidacy for political office); *Carenbauer*, 542 S.E.2d 405 (running for different seat on same court); *In re Hill*, 8 S.W.3d 578 (Mo. 2000) (writing letter to newspaper criticizing mayor and praising police chief); *In re Glickstein*, 620 So.2d 1000 (Fla. 1993) (per curiam) (endorsing another judge for retention); *In re Buckson*, 610 A.2d 203 (Del. 1992) (seeking party's nomination for political office); *In re Katic*, 549 N.E.2d 1039 (Ind. 1990) (per curiam) (participating in selection of party's nominee for nonjudicial office); *Miss. Judicial Performance Comm'n v. Peyton*, 555 So.2d 1036 (Miss. 1990) (serving on party's executive committee and participating as delegate to party's national convention); *In re Kaiser*, 759 P.2d 392, 395 (Wash. 1988) (identifying family as "lifelong Democrats" in state with nonpartisan judicial elections); *In* (cont'd)

was appointed Chief Justice; and judges may become politicians, as Taft's appointee Justice Hughes did when he left the Court to run for President in 1916 (later being reappointed to the Court as Chief Justice); but judges may not *be* politicians. Indeed, Chief Justice Taft himself headed the ABA committee that drafted the first model canons, which incorporated the principle that judges should not take part in partisan politics. *See In re Pagliughi*, 189 A.2d 218, 221 (N.J. 1963).

Recognizing that judges should be drawn from people who have led active public lives, the Canons require citizens to refrain from partisan activity only when they serve on the bench. In this respect, the Canons are narrowly tailored to disentangle the function of judging from politics; thus, even if strict scrutiny applied, the Canons would survive. A rule against partisan activity is "directed primarily at the suspicion that may arise when a

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re Wright, 329 S.E.2d 668 (N.C. 1985) (making political contributions); *In re Davis*, 291 S.E.2d 547 (Ga. 1982) (per curiam) (participating in effort to recall mayor); *In re Bennett*, 267 N.W.2d 914, 920 (Mich. 1978) (participating in another's campaign for legislative office); *Alex v. County of Los Angeles*, 111 Cal. Rptr. 285 (Cal. Ct. App. 1974) (running for political office); *In re Pagliughi*, 189 A.2d 218 (N.J. 1963) (acting as party's ward leader, joining political club, and signing and notarizing petitions for party executive committee candidates); *Mahoning County Bar Ass'n v. Franko*, 151 N.E.2d 17 (Ohio 1958) (running for political office); *State v. McCarthy*, 38 N.W.2d 679 (Wis. 1949) (per curiam) (running for political office); ABA Formal Op. 113 (1934) (stating judge may not appear at public gathering whose purpose is to advance another's candidacy for nonjudicial office).

judge performs judicial service and at the same time engages in political activity. It does not prohibit one who has engaged in such activity in the past from accepting judicial office.” ABA Formal Op. 193 (1939). This is in keeping with the essential ethical principles of the legal profession. Lawyers are expected to act zealously for each client they represent in their careers, even as they move from role to role with each engagement, but they cannot simultaneously play incompatible roles by representing clients with conflicting interests. The sin is not having once been involved in politics, but failing to abandon that role when ascending to the bench. *See In re Maney*, 510 N.E.2d 312, 313 (N.Y. 1987) (per curiam) (“[P]etitioner never really terminated his intense political involvement after his election to judicial office . . .”).

The Canons are also narrowly tailored in permitting exceptions to the general rule when necessary to account for New York’s system of electing some judges. The New York Court of Appeals has repeatedly noted that a judge may engage only in political activity that is “necessary” and “essential” to his or her candidacy. *E.g., id.; Rosenthal*, 323 N.E.2d at 182. The exceptions “permit this limited type of activity (1) only in connection with the partisan nomination as a result of which he is to become a candidate, and (2) only during the election campaign in which he is a partisan candidate.” ABA Formal Op. 312 (1964); *see also* ABA Informal Op. 85-1513 (1985) (stating lawyers

applying for appointive judgeships are barred from partisan political activity and making exceptions for elected judges “in recognition of the political realities involved in public elections”). Unlike the underinclusive Announce Clause struck down in *White*, the ban on partisan political activity is tailored to reach precisely the behavior that creates the problem and to permit no more than is necessary. *See White*, 536 U.S. at 780. As New York’s highest court explained: “[Judges] are, in short, to be as nonpartisan as the selection of Judges by election permits.” *Rosenthal*, 323 N.E.2d at 182.

III.

New York’s Holding Partisan Elections For Some Judicial Offices Does Not Vitate Litigants’ Due Process Rights Or The State’s Interest In Maintaining An Impartial And Independent Judiciary.

The District Court repeatedly implied that New York forfeited at least part of its power to regulate judges’ conduct when it instituted the practice of electing some judges in partisan elections. *See* 244 F. Supp. 2d at 88, 89 (citing *White*, 536 U.S. at 789-92 (O’Connor, J., concurring)).⁸ As we shall

⁸ As the District Court noted, Justice O’Connor’s concurrence suggested that Minnesota sacrificed its interest in impartial courts by holding judicial elections. *See White*, 536 U.S. at 792 (O’Connor, J., concurring) (“If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”). The majority, however, disavowed any implication that by having judicial elections, a state must accept the full panoply of constitutional doctrine applying to legislative and executive elections, *see id.* at 783, and of course none of the Justices (cont’d)

show, there are a number of problems with this contention, but the most basic is that the due process rights of individual litigants are not New York's to forfeit. Indeed, the state is required by the Fourteenth Amendment to *guarantee* litigants an impartial court. As previously discussed, the Canons make exceptions to permit candidates to contest judicial elections meaningfully. That is far different from opening the floodgates to every sort of improper conduct, let alone permitting judges to flout the constitutional rights of those who appear before them. *See Maney*, 510 N.E.2d at 313 (noting ethical rules apply “[n]otwithstanding that some political activity is necessary in a jurisdiction such as ours, which selects most of its Judges by public election”).

Justice Spargo may believe that the state has an all-or-nothing choice between holding elections and having fair courts, but citizens know better. They value both direct democratic control over judicial selection and courts that are independent. An extensive national survey of public attitudes toward state courts is instructive. Respondents were asked which of the following statements came closer to their own view: (1) Courts are unique

(cont'd)

addressed the regulation of *sitting* judges outside the election context. *See also Clements*, 457 U.S. at 968 n.5 (plurality opinion) (“The State’s particular interest in maintaining the integrity of the judicial system could support [a ban on judges’ running for political office before their judicial term ended], even if such a restriction could not survive constitutional scrutiny with regard to any other officeholder.”).

institutions of government that should be free of political and public pressure; or (2) Courts are just like other institutions of government and should not be free of political and public pressure. 78% chose the first statement. Yet 76% said judges in their state should be elected.⁹ Justice at Stake Frequency Questionnaire, at 7 (2002), <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (last visited Jun. 10, 2003) (“JAS Survey”).

The public’s values may be in tension, but they are not self-contradictory. “[T]he word ‘representative’ connotes one who is not only *elected* by the people, but who also, at a minimum, *acts on behalf* of the people.

⁹ Most other states also balance the democratic value they perceive in electing judges with the constitutional necessity for judicial independence and impartiality.

The constitutions of the thirty-nine states in which judges face elections of some type have an array of such provisions, unique to the judiciary, to accommodate the choice of popular selection with the constitutional value of judicial independence. In all thirty-nine states (except Nebraska), judges’ terms are longer than any other elective official’s. In thirty-seven of these states, only judges are subject to both impeachment and special disciplinary process. In thirty-three states, judges are the only elective state officials subject to requirements of training and/or experience (except that in ten of those states, the attorney general is subject to similar requirements). In twenty-three states, only judges are subject to mandatory age retirement. In twenty-one states, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in eighteen states, only judges cannot run for a nonjudicial office without first resigning.

Schotland, 41 Judges’ J. at 10.

Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People.”

Chisom v. Roemer, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting).

Citizens understand that judges, once they have been elected, must be able to perform their duties without favor toward any political organization and without prejudging any litigant’s case. The Canons not only require judges to meet these standards but make it easier for them to do so. The ban on partisan activity means that even if a judge has had to curry favor with political parties in order to be nominated, he or she can (and must) refuse to do party service once on the bench. Without that rule, party leaders would be free to press judges to use the prestige and power of their offices to benefit the party and its candidates for political office, with the implied or actual threat of withholding renomination or support for appointment to a higher court. The Supreme Court has noted the importance of protecting public employees from such pressures. *See Letter Carriers*, 413 U.S. at 566.

That kind of pressure would not only threaten judicial independence and impartiality, but would also create an unacceptable risk of abuse of the judicial office. Whatever service an aspiring judge may have done for the party before being nominated pales next to what he or she could do with the power and prestige of office. Lawyers, for example, would be particularly

susceptible to fundraising calls from judges on behalf of parties and candidates for political office. The very reputation for independence and probity that judges enjoy would become a weapon to be deployed by party leaders to shore up other candidacies through endorsements, press statements, and public appearances. By prohibiting such behavior, the Canons insulate judges from pressures to misuse their positions—pressures that might otherwise be difficult or impossible to resist.

Nor is there any contradiction in the idea that a previously active partisan can assume a nonpartisan role and perform the judicial function. The nine Justices who decided *Brown v. Board of Education*, 347 U.S. 483 (1954), comprised a former Governor of California, three former United States Senators, a former member of the Kentucky Assembly, a former Secretary of War, a former Chairman of the Securities and Exchange Commission, and two former United States Attorneys General. *See* SUPREME COURT HISTORICAL SOC’Y, TIMELINE OF THE JUSTICES, http://www.supremecourthistory.org/02_history/subs_timeline/02_a.html (last visited Jun. 10, 2003). Their predecessor Justice Cardozo had previously been elected three times to state courts, including the New York Court of Appeals. He understood what his former Court later expressed: “There can be no doubt that after election a Judge has no partisan responsibility to any political party. On the contrary his

responsibility is to discharge the duties of his judicial office in total indifference to any prior political affiliation.” *Rosenthal*, 323 N.E.2d at 182.¹⁰ The rights of a citizen before seeking judicial office and the duties of a judge after a successful campaign are quite different things, and there is no reason a state must permit its judicial officers to obliterate those differences. *See* ABA Formal Op. 312 (1964) (“He should not become an active promoter of the interests of one political party as against another. This applies to appointed judges and elected judges whether or not the nomination and election is partisan or nonpartisan and extends during the entire tenure as judge.”); *Signorelli*, 637 F.2d at 861-63 (upholding New York’s rule requiring judge to resign before running for Congress). We do not *want* our judges to be ignorant of public affairs and the functioning of the political branches; but we do want them to be *judges*. It denies history to insist that these two democratic impulses cannot both be satisfied.

¹⁰ The Supreme Court of Ohio, where judges are nominated in partisan primaries but appear on the general election ballot without party labels, expressed a similar view: “The purpose of such restrictions is to keep judges ever mindful that, even though they may have been nominated in a partisan primary and may have been connected to some extent with partisan politics during their campaign for election (though elected on a nonpartisan ballot), once elected to the judiciary they have assumed an office of public trust which must remain outside and distinct from the ‘mainstream’ of partisan politics in order to maintain the independence, impartiality and freedom from bias, prejudice and pressure, which the people have a right to expect from their judges.” *Franko*, 151 N.E.2d at 25.

An irony of using *White* to attack New York's partisan elections is that partisan elections serve precisely the constitutional function that was determinative in *White*: giving voters information about candidates. Across the country, there are noticeably fewer votes in judicial elections than in every other race on the same ballot.¹¹ The most common reason voters give for declining to select a judicial nominee is that they do not know enough about the candidates. JAS Survey, at 2. Almost half say they have "no information at all" or "just a little information" about judicial candidates. *Id.* at 4. One vital, and for many voters dispositive, piece of information about any candidate, judicial or otherwise, is the candidate's party affiliation. See Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148, 151-55 (Stephen B. Burbank & Barry Friedman eds., 2002) (contending that party labels enhance judicial independence by providing signals about

¹¹ For example, in the 2002 general election in Michigan, approximately 4.4 million votes were cast in a race for two seats on the state's court of last resort, as compared to 5.3 million votes in a race for two seats on the Wayne State University Board of Governors. See 2002 Official Michigan General Election Results, <http://miboecfr.nicusa.com/election/results/02GEN/> (last visited Jun. 10, 2003). We are advised that a forthcoming academic study of judicial elections in 13 states from 1998 to 2000 has found that in all but one instance, state Supreme Court races drew fewer votes than every other statewide race.

candidates' general philosophies to counter the influence of interest groups that seek to punish judges for particular decisions).

This does not mean that a judge is expected to maintain party loyalty while on the bench; as previously noted, citizens may want both to elect their judges and for the judges to behave independently once they have been elected. But in evaluating a candidate's background, particularly a candidate who is not an incumbent judge, a voter can use a shorthand label that indicates broadly whether the person's prior life reflects the values and experiences that the voter considers important. Perhaps the voter trusts the leadership of a particular party to make judgments about which candidates would be the best judges, or perhaps the voter believes that prior political affiliation reflects the kinds of "views" that a candidate can "announce" directly after *White*. Either way, the state's decision to use a partisan ballot neither undercuts its interest in maintaining an independent and impartial judiciary nor excuses it from its obligation to provide such a judiciary to litigants.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court reverse the judgment of the United States District Court for the Northern District of New York.

Dated: New York, New York
June 17, 2003

BRENNAN CENTER FOR JUSTICE
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APPENDIX: THE *AMICI* AND THEIR INTEREST IN THESE CASES

The Brennan Center for Justice at NYU School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through its Fair Courts Project, the Center works to protect the judiciary from politicizing forces, including the undue influence of money on judicial elections and efforts to relax canons on judicial conduct that help to safeguard crucial differences between judges and officers of the political branches. The Center takes an interest in this case because of its important implications for the ability of all states, and particularly those like New York that have judicial elections, to maintain both the reality and appearance of impartiality in their courts.

Campaigns for People promotes non-partisan campaign finance and ethics reform in Texas. The organization supports state judicial reforms in Texas that enhance judicial independence, including judicial codes of conduct and public financing of judicial campaigns. As one of the few courts to consider the implications of the *White* case for ethical provisions other than the “announce clause,” this Court may influence the development of the law nationwide. Accordingly, Campaigns for People takes an interest in this case

because of its potential effect on the ability of Texas to maintain both the reality and appearance of impartiality in its courts.

Democracy South is a regional network devoted to building state multi-racial, multi-issue, multi-ethnic coalitions to address issues of social, environmental, and economic justice. In the South, historically the last and only effective remedy available to racial, ethnic, and political minorities suffering injustice has often resided in an impartial judiciary that is functionally independent of the excesses of popular sentiments. Our heritage has shown that an independent and impartial judicial system is an absolutely imperative bulwark for the defense of our democracy and the protection of our liberties. Ten states in our network select judges in elections that are showing deeply disturbing signs of growing politicization evidenced by and linked to soaring campaign costs. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Circuit Court struck down sections of Georgia's Judicial Ethics Canons that prohibited judicial candidates from making partisan and/or ideological appeals on hotly contested issues of the day. Bans on the personal solicitation of endorsements and campaign contributions by judicial candidates were also overturned. Without the restraints of judicial canons, special interests within the boundaries of the 11th Circuit can now demand that judicial candidates announce their preferences on hot button issues like affirmative action, voting

rights, labor law, abortion, tort reform, or the death penalty. Judicial candidates will find these demands difficult to resist, since major campaign donations will ride on public knowledge of their political and/or ideological convictions. In the 11th Circuit no constraints remain to keep judicial campaigns from degenerating into the kind of free-for-alls typical of contests for representative office. Unchecked, such a trend will eventually erode the separation of our courts and legislatures and ultimately undermine public confidence in the fairness and impartiality of our courts. We join this brief to arrest this assault on an independent and impartial judiciary.

The Fund for Modern Courts is a non-partisan, non-profit, statewide court reform organization dedicated to improving the judicial system in New York State. Founded in 1955, and led by concerned citizens, prominent lawyers, and business leaders, Modern Courts is the only organization focused exclusively on improving the state's courts. Through advocacy and education, as well as its successful in-court programming such as the Citizens Court Monitoring Program and the Citizen's Jury Project, Modern Courts has been instrumental in promoting effectiveness, efficiency and fairness in the administration of justice in New York State. Central to its mission is support for a nonpolitical court system which engenders public confidence in the fair and impartial administration of justice. The canons of judicial conduct of New

York State further this end. Modern Courts, therefore, has a deep and abiding interest in strengthening an independent judiciary and the issues before this Court on this appeal.

The North Carolina Center for Voter Education is a non-partisan, not-for-profit organization dedicated to improving the quality and responsiveness of our election system. By examining the current system of states' campaign and election laws, and by promoting research and public discussion about the electoral process, the Center hopes to raise public awareness, make the campaign process more inclusive, and increase citizen participation in our elections. The Center takes an interest in this case because of its important implications for how states that elect their judiciaries, such as North Carolina, attempt to reduce the worrisome influence of money and politics over judicial selection.

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,506 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 for Windows in 14-point Times New Roman.

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Dated: June 17, 2003

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 17th day of June, 2003, I caused two true and accurate copies of the Brief (the "Brief") of the Brennan Center for Justice at NYU School of Law *et al.* as *Amici Curiae* in Support of Defendants-Appellants-Cross-Appellees and Supporting Reversal to be deposited in the United States Mail, postage prepaid, and addressed to each of the following:

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In addition, I dispatched the original and 25 copies of the Brief to a third party commercial carrier for delivery to the Clerk by the next business day.

Laura M. Moulton