No. 13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari

To The Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* PROFESSOR JED SHUGERMAN IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Professor Jed Shugerman is an expert on the history of judicial elections in America,[2] and has written the only in-depth book on that topic, *The People's Courts: Pursuing Judicial Independence in America* (2012). Professor Shugerman's scholarship refutes the notion that States adopted judicial elections in an effort to turn judges into conventional politicians. Rather, history reveals that States adopted judicial elections in order to promote judicial independence and the rule of law, and to protect judges from special interests and the corruption endemic to the States' appointment systems. This pursuit of judicial independence from corrupting influences also drove each successive reform of their judicial-election systems.

Professor Shugerman files this brief to provide historical context relevant to the Court's consideration of the direct solicitation ban, which has been adopted by thirty of the thirty-nine States that elect their judges.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the amicus curiae and their counsel made any such monetary contribution.

[2] *See, e.g.*, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061 (2010); *The Twist of Long Terms: Judicial Elections, Role Fidelity and American Tort Law*, 98 Geo. L.J. 1349 (2010); *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DePaul L. Rev. 529 (2010).

SUMMARY OF ARGUMENT

Bans on direct solicitation of money by judicial candidates are part of a long history in which the States have adopted and reformed judicial elections for the express purpose of protecting courts against the reality and appearance of improper influence.

This historical reality is contrary to a perception that the adoption of judicial elections was an open abandonment of judicial independence and impartiality, in favor of treating judges like conventional politicians. Related to this misperception, there is an oft-expressed view that the only solution to the problems that elections pose is to abolish them. As Justice O'Connor put it in her concurrence in *Republican Party of Minnesota v. White*, "[i]f 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." 536 U.S. 765, 792 (2002).

Plainly, the "States are free to choose [judicial elections] rather than, say, appointment and confirmation." *Id.* at 795 (Kennedy, J. concurring). And having done so, States may adapt their election rules to pursue judicial integrity, "despite the difficulties imposed by the election system." *Id.* at 796.

Thirty-nine States have adopted elections as the means for choosing judges, and the historical context of their adoptions bolsters the case for following the precedents of deference to State choices in judicial selection.

Parts I and II set out that history, culminating with the adoption, beginning in 1972, by thirty of the States with judicial elections, of the prohibition on

direct solicitation of money by judicial candidates at issue in this case. The widespread adoption of this rule, in the face of the increasing importance that money has come to play in modern elections, reflects the States' pursuit of the "hard task" of "codify[ing] the essence of judicial integrity." *Id.* at 793 (Kennedy, J. concurring).

Part III concludes by discussing real-world instances of direct solicitation abuse, and suggesting that the very widespread adoption of the direct solicitation ban is a targeted rejection of conduct that invites actual corruption and the public appearance of improper influence.

ARGUMENT

I. THIRTY-NINE STATES HAVE TURNED TO JUDICIAL ELECTIONS IN ORDER TO PROTECT JUDICIAL INDEPENDENCE AND AVOID THE APPEARANCE AND REALITY OF IMPROPER INFLUENCE AND BIAS.

Historically, the States have exercised broad sovereign powers to protect the public integrity of their judiciaries against the probability and appearance of bias. Indeed, the history and evolution of state judicial systems exemplifies the States' critical "'role as laboratories for experimentation to devise various solutions where the best solution is far from clear.'" *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (Kennedy, J., plurality op.) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

A. States Created Judicial Elections To Promote Judicial Independence From The Other Branches And From Special Interests.

Judicial independence has long been a central principle in the structure of state governments. Indeed, even during the colonial era, an independent judiciary was seen as an inalienable feature of republican government. *See, e.g.*, The Declaration of Independence para. 11 (U.S. 1776) ("[King George] has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and payment of their Salaries."). Once the colonies won their independence, the States sought to structure their judiciaries in a way that prevented this kind of judicial dependency and adopted varying models to achieve that end: four adopted a model of executive appointment and legislative consent, four others chose legislative election, three combined legislative election and tenure "at pleasure," and two provided judges with seven-year terms instead of life tenure. Evan Haynes, *The Selection and Tenure of Judges* 101–33 (1944).

Despite these initial efforts to guard against dependence upon and influence from a central power, by the early nineteenth century state judiciaries were beholden to the legislature, the executive, and, by extension, the parties that controlled each. Governors with the power of appointment typically nominated persons supporting their agendas, and then threatened those judges with removal if they behaved independently. *See, e.g.*, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York* 613 (1846). Similarly, state legislatures controlled

not only the salaries, fees, and removal of state judges, *see* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 161 (1969), but also the substance and finality of their judgments, *see* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, in* The Constitution 93, 97 (James Morton Smith ed., 1971).

As one example, "[t]he New Hampshire legislature regularly vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes." *Id.* And in the 1820s, Missouri and Kentucky each removed their entire supreme courts prior to the expiration of their terms as a way of imposing shorter, unanticipated term limits upon what had become a disfavored bench. W.J. Hamilton, *The Relief Movement in Missouri, 1820-1822*, 22 Mo. Hist. Rev. 51, 89–90 (1927).

Against this backdrop, a severe economic depression in the 1840s precipitated a desire to free the judiciary of its dependence on the political branches. The 1840s depression led to the recognition that state legislatures had been overspending on canals, roads, and railroads—and often with political insiders and special interests corrupting the spending process. *See* Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1076–80 (2010). This overspending drove nine

States into default, and led to the closing of half of America's banks. Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839-1865*, at 75-76 (2001). Fiscally conservative reformers campaigned for constitutional conventions to impose new spending limits on legislatures. *See* Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* Toward a Usable Past 388, 401 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

Legislative excess, however, was not the only target of public ire. Reformers partly blamed judges for having been captured by legislators and governors, so that they did not check the other branches sufficiently. *See, e.g.*, *Debates and Proceedings in the New-York State Convention for the Revision of the Constitution* 651 (S. Croswell & R. Sutton reporters, Albany, Albany Argus 1846) (remarks of delegate Amos Wright) ("Who selects most of your judges now? The politicians of a party caucus."). As a result, the reformers sought to create a new state judiciary that would be more independent from governors and legislatures—and more independent from the forces of corruption. *See, e.g.*, *The Constitutional Debates of 1847*, at 466 (Arthur Charles Cole ed., 1919) (remarks of delegate Archibald Williams).

To achieve such judicial independence, States began selecting judges through popular elections. Although a few States, including Georgia and Mississippi, experimented early on with judicial elections, it was not until New York debated the merits of, and ultimately adopted, judicial elections at its 1846 state constitutional convention that a

national trend began. *The People's Courts*, *supra* at 57-86 (collecting authorities from each state); *see also* Shugerman, *Economic Crisis*, *supra* at 1096 (detailing the frequency of state constitutional conventions during the nineteenth century, through which the States addressed a broad array of problems, often "learn[ing] from one another's mistakes" in one decade and "borrow[ing] heavily from one another's constitutional innovations" in another).

Notably, the States adopted judicial elections for the express purpose of liberating judges from partisan interests and "increas[ing] fidelity" to the people. *See Report of New York Constitutional Convention*, *supra* at 645 (remarks of delegate Ira Harris); *see also The People's Courts*, *supra* at 104-116 (collecting state data). As one commentator put it, "make [judges] elective by the people, and then indeed will we have an independent judiciary." Veto, *Letter to the Editor*, *reprinted in* Samuel Medary, The New Constitution at 206, July 28, 1849.

For States in the early to mid-nineteenth century, therefore, "popular election was not viewed as inconsistent with the ideal of a powerful independent judiciary." Phillip L. Dubois, Special Issue, *Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections*, 40 S.W. L.J. 31, 35 (1987). To the contrary, judicial elections were seen as essential to an independent judiciary as well as the state constitutions' promises "to protect the rights of the people." 2 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1809 (H. Fowler ed., Indianapolis, A.H. Brown 1850) (remarks of Judge Borden). Ultimately, by 1860,

eighteen of the thirty-one States in the Union elected all of their judges, and five additional States elected some of their judges. *The People's Courts*, *supra* at 105 (compiling state data).

It is important to note, however, that mid-nineteenth century campaigns generally did not rely on campaign donations. Judicial candidates ran on a partisan slate, and parties campaigned to get out the vote for their candidates. *See* Jed Shugerman, *The Twist of Long Terms*, 98 Geo. L. J. 1349, 1379–90 (2010). Parties raised the bulk of the money, rather than the candidates themselves, and moreover, parties raised a large amount of their money from their office-holders as part of the spoils system of kicking back public salaries to the local party. *Id.* Thus, the state reformers that adopted judicial elections were not embracing a system of direct judicial fundraising. *Id.*

B. States Have Enacted Wide-Ranging Reforms To Ensure The Public Legitimacy Of Their Judiciaries And Avoid The Probability Of Bias.

Although the turn to judicial elections largely succeeded in removing legislative and gubernatorial influence from the process of judicial selection, this change produced new threats of undue influence, or the appearance of such, over the state judiciaries. In response to these emerging sources of influence, States enacted a series of modest reforms aimed at ensuring the public legitimacy of their judiciaries and avoiding the appearance of partiality.

The initial concern facing States that adopted judicial elections was the significant role that political parties played in the elections and the

corruption that ensued. As contemporaneous documentation and historical accounts show, judicial elections during this period were often close and hotly contested, which increased coalition politics and known corruption. In California, for instance, elections were swung by party machines more than the candidates themselves. 1 E.B. Willis & P.K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (1880). And in Pennsylvania, a brand of urban machine politics reigned, leading to the tyranny of local political bosses of the majority party. Mahlon H. Hellerich, *The Origin of the Pennsylvania Constitutional Convention of 1873*, 34 Penn. Hist. 158 (1967). That corruption increased over time is evidenced by the fact that more New York judges were awaiting trial for official corruption in 1872 alone than from 1777 to 1846. Renee Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 Geo. Mason L. Rev. 109, 157 (2007).

In the 1860s and 1870s, several States began extending judges' terms as a means to insulate judges from party machines and corruption and thus avoid the appearance of impropriety and risk of undue influence on their judiciaries. *The People's Courts*, *supra* at 144-54 (compiling state data). As explained by James Bryce, "short terms . . . oblige [the judge] to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence." James Bryce, 1 *The American Commonwealth* 455 (1906).

In the decades that followed, States continued to view party politics as a threat to the integrity of their judiciaries. Because party connections still determined the nominations process, elected judges were perceived as being beholden to partisan interests, and their independence and integrity were questioned once on the bench. *See, e.g.*, Robert Cushman, *Non-Partisan Nominations and Elections*, 106 Annals Am. Acad. Pol. & Soc. Sci. 83 (1923); Barry Friedman, *The Will of the People* 183 (2009) (citing a study by the National Economic League led by William Howard Taft). Even the Governor of Nebraska alleged that courts were "composed of lawyers who owe their position, not so much to legal attainment and profound learning, as they do to political service rendered." Gilbert E. Roe, *Our Judicial Oligarchy* 14 (1912) (quoting Gov. Aldrich).

Moreover, judicial elections remained hotly contested. For example, an 1889 Pennsylvania election for lower court seats was tainted by bribes, bitter personal fights, and a guerilla newspaper war waged in a way that lessened respect for the judiciary. *The Westmoreland Judgeship*, Pittsburgh Com. Gazette, Oct. 24, 1889; *The Thirty-Fifth Judicial District*, Pittsburgh Com. Gazette, Oct. 30, 1889. Likewise, in an 1894 New York election, partisan thugs and "gangs of rowdies" beat each other in a "free for all scuffle" at the ballot box. John Fabian Witt, *The Accidental Republic* 157, 281 n.22 (2004) (quoting *First Round for Warner*, N.Y. Herald, June 12, 1894).

In the 1910s, States began adopting non-partisan judicial elections to address these revitalized concerns of partisanship, special interests, and

corruption. In 1911, Ohio passed the Non-Partisan Judiciary Act and then raised the issue again a year later at its high-profile 1912 convention, where it implemented direct party primaries to precede the nonpartisan election. Ohio Rev. Code Ann. 3505.04; *Proceedings and Debates of Ohio Constitutional Convention of 1912*, at 1051–52 (J.V. Smith reporter, 1851). By the end of the decade, eight other States followed Ohio's lead, with ten more adopting nonpartisan elections soon thereafter. *The People's Courts*, *supra* at 160 (collecting state data).

Once implemented, certain States concluded that nonpartisan elections were not as effective in protecting judicial independence as was desired. Instead, because judicial candidates could not rely on party organization to raise money, make connections, and get out the vote, candidates turned to special interest groups, including organized crime, for funding. 9 *Transactions of Commonwealth Club of California*, 311–12 (1914), *in* Lamar T. Beman, *Election versus Appointment of Judges*, 65 (1926). Moreover, observers recognized that as judicial candidates could no longer rely on party identification to get elected, these candidates had to raise even more money directly, and campaign even more aggressively. These problems set the stage for a sweeping new round of reforms in favor of judicial independence from financial corruption. *The People's Courts*, *supra* at 170-76 (collecting data).

In light of these challenges, in the 1920s and 1930s, the American Bar Association and the American Judicature Society proposed the adoption of what is now known as the merit selection system. Under this model, a nominating commission, which

includes representatives of the state bar, selects a short slate of candidates, and the governor chooses one person from that slate. Once nominated, the judge sits an initial term and then runs in a yes-or-no retention election. *See, e.g.*, *id.* at 185.

In 1937, the Missouri Bar Association grew tired of the political corruption that its judiciary faced and created the Missouri Institute for the Administration of Justice. This organization outlined a five-part merit selection process that was eventually passed by voters in 1940. Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 Mo. L. Rev. 199 (2007). Building upon this success, and the success of California a few years prior, many state and local reformers in the 1950s championed "The Missouri Plan" as a critical reform to address the difficulties that arose under partisan and nonpartisan election models. Ultimately, nineteen States adopted the merit selection system wholesale and another nine chose to incorporate certain parts of it. *The People's Courts*, *supra* at 208 (collecting data).

The nineteenth and twentieth centuries thus saw major reforms by the vast majority of States. Following the adoption of judicial elections, the States devised and employed widely diverse approaches to improving their judiciaries, each stage driven by the goal of protecting judges from corruption. By 1990, thirty-nine of the fifty States directly elected their judges: seven retained partisan elections; thirteen used nonpartisan elections and two more used nonpartisan elections after a partisan nomination; sixteen adopted retention elections; and the final two relied on legislative elections. *Carey v.*

Wolnitzek, 614 F.3d 189, 211–13 (6th Cir. 2010) (compiling data on state elections in Appendix).

II. SINCE 1972, THIRTY OF THE THIRTY-NINE STATES THAT ELECT THEIR JUDGES HAVE BANNED DIRECT SOLICITATION OF MONEY BY JUDGES AND CANDIDATES.

In recent decades, there have been vast increases in the amount of money spent on judicial elections. Between 1990 and 2008, States saw a 700% increase in the amount of money raised per election cycle by state supreme court candidates. Lawrence Lessig, *Republic, Lost* 229 (2011). In 2002 alone, Florida's judicial elections at the trial level alone cost $16 million—nearly half the amount spent that year collectively in state-wide legislative races. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077, 1080 n.13 (2007).

These "growing sums of money" used to "influence the outcome of a judicial election" make it "hard to have faith that we are selecting judges who are fair and impartial." *See* Justice Sandra Day O'Connor, *How To Save Our Courts*, Parade, Feb. 24, 2008.

In view of the variations in the judicial electoral systems adopted by the States, it is notable that those States have responded with substantial consistency to these new challenges. In more than 75% of the States "with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds." Roy A. Schotland, *Six Fatal Flaws: A Comment On Bopp And Neeley*, 86 Denv. U. L. Rev. 233, 235 (2008) (emphasis in original). At the outset certain States implemented a precatory approach to direct solicitation bans, as was

initially suggested by the ABA in 1972. *See* American Bar Association, *Model Code of Judicial Conduct*, Canon 7(B)(2) (1972) (providing that a candidate "should not himself solicit or accept campaign funds"). As time passed, however, these States recognized the need for a clear prohibition on direct solicitations and adopted the mandatory language of the 1990 ABA Model Code of Judicial Conduct. *See* American Bar Association, *Code of Judicial Conduct*, Canon 5(C)(2) (1990).

By 2010, thirty States had adopted[3] a mandatory prohibition on the direct solicitation of campaign funds by judicial candidates. *See Carey*, 614 F.3d at 211–13 (compiling then-current data on state elections).

III. THE DECISION TO BAR DIRECT SOLICITATION OF MONEY BY JUDICIAL CANDIDATES ADVANCES THE VITAL INTEREST IN A FAIR, INDEPENDENT, AND IMPARTIAL JUDICIARY—AND ONE THAT APPEARS TO BE SUCH.

Viewed in historical context, in which most States decided to adopt judicial elections as a means of establishing judicial independence, and then to

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[3] At least three states—Kentucky, Georgia, and North Carolina—have repealed or substantially altered their bans in light of adverse judicial decisions. *See* ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, *Background Paper*, http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background.html (last visited December 20, 2014) (citing *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), and *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)); *see also Carey*, 614 F.3d at 189.

adopt various reforms aimed at curbing abuses and threats to the reality and perception of judicial integrity, the ban on personal solicitation of money is a rare instance in which the States have spoken almost with one voice. Indeed, this prohibition is an obvious step for States that have adopted electoral systems while remaining vigilant to defend against evolving threats of bias and corruption, and the appearance of such.

While "[t]o comprehend, then to codify, the essence of judicial integrity is a hard task," *White*, 536 U.S. at 793 (Kennedy, J., concurring), the decision to bar candidates from personally requesting money has not been a hard call. That is because the practice of personally asking for money tends inherently to create both the reality and the appearance of bias and undermines public confidence in judicial integrity. Justifiably, States have deemed that practice incongruous with their "vital" interest, recognized by all members of this Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009), in ensuring "public confidence in the fairness and integrity of the nation's elected judges." Allowing such bald, personal appeals for money is no way to "maintain a fair, independent, and impartial judiciary—and one that appears to be such." *Id.* at 890 (Roberts, C.J., dissenting).

As this Court has noted in a number of contexts, personal solicitation "exert[s] pressure" on recipients and "demands an immediate response, without providing an opportunity for comparison or reflection." *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (upholding state bans on lawyer solicitation); *see also United States v. Kokinda*, 497

U.S. 720, 734 (1990) (plurality op.) (upholding a federal ban on political solicitation). If this is true of solicitation by lawyers, or advocates outside of a post office, it cannot be any less true of those who possess, or seek to possess, the power of a state-court judgeship. Indeed, in those jurisdictions without direct solicitation rules, lawyers know they must comply with a judge's demand for money as a "protection against ill fortune" in the courtroom. *See* Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006. According to one attorney in such a jurisdiction, "Giving money to a judge's campaign means you're less likely to get screwed"—otherwise, "bad things" can happen. *Id.*

Moreover, direct solicitation creates a greater probability of bias than do other fundraising methods. A "realistic appraisal of psychological tendencies and human weakness," *Caperton*, 556 U.S. at 883 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), indicates that *personally* asking for money opens solicitors to greater opportunity for embarrassment or elation, depending on the success of their efforts. That being so, solicitors will undoubtedly have a greater personal stake in the success or failure of direct solicitation, and thus a concomitantly greater temptation "to disregard neutrality" based on the solicitee's response. *See id.* at 886.

Hence, direct solicitation poses a "regulable *quid pro quo* danger." *See McConnell v. FEC*, 540 U.S. 93, 316–17 (2003) (Kennedy, J. concurring in the judgment in part and dissenting in part). Perhaps as importantly, the appearance of possible bias is

enhanced materially by the fact that the personal nature of the request is perceived by others to give the candidate a more direct personal investment in the solicited party's decision to contribute or not.

The following reports of conduct by judges and judicial candidates suggest why the rule banning direct solicitation has been so universally adopted:

- Judges soliciting money from attorneys "in their chambers in the middle of presiding over their cases." *See, e.g.*, *The People's Courts*, *supra* at 4.
- Soliciting money from attorneys by requiring them "to walk the gauntlet past [the] bailiff and make an appropriate campaign contribution before they could present their arguments." *See, e.g.*, Gerald F. Richman, *The Case For Merit Selection And Retention Of Trial Judges*, 72 Fla. Bar J. 71, 71 (1998).
- Soliciting money from attorneys during an in-chambers conference regarding a pending case and telling one that "he was f***ed because he hadn't contributed while the others had." *See, e.g.*, *In re Sobel*, No. 0405-248 (Nev. Comm'n on Jud. Discipline Aug. 15, 2005).
- Soliciting money from attorneys in a bar by telling one that the "going rate for contributions from attorneys was $500 and that if he did not contribute, he would receive adverse rulings from the [judge] if he was elected." *See, e.g.*, *In re Tennant*, 516 S.E.2d 496, 498 (W. Va. 1999).
- Soliciting money over the phone from an attorney in a pending case, and—after receiving several hundred dollars from the attorney—denying a motion to recuse and granting summary

judgment in favor of the contributor's client. *See, e.g.*, *Aguilar v. Anderson*, 855 S.W.2d 799, 801 (Tex. App. 1993).

- Soliciting money at a "'testimonial' dinner" "from attorneys appearing before" the judge, and accepting $10,000 for "personal expenses" and $2,000 for the "re-election campaign." *See, e.g.*, Marie A. Failinger, *Can a Good Judge Be a Good Politician?*, 70 Mo. L. Rev. 433, 447 (2005).
- Soliciting money from citizens' groups while running for traffic-court judge, telling a motorcycle club: "There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. I got some stuff that I got to do, but if you all can give me twenty ($20) dollars you're going to need me in Traffic Court, am I right about that?" *See, e.g.*, *In re Singletary*, 967 A.2d 1094, 1096 (Pa. Commw. Ct. 2008).
- Soliciting and receiving $2,500 from an attorney, at a public fundraiser personally hosted by the judge, one day after ruling in favor of that attorney's clients. *See, e.g.*, Julie Fancher, *Dallas County's Judge Carlos Cortez Is Asked to Recuse Himself from Case Involving Campaign Donor*, The Dallas Morning News, Sept. 11, 2014, *available at* http://www.dallasnews.com/news/metro/20140911-judge-carlos-cortez-is-asked-to-recuse-himself-in-civil-case.ece.

These anecdotes underscore the extent to which direct solicitation by judges raises the same "specter of direct corruption," Failinger, *Can a Good Judge Be a Good Politician?*, *supra* at 490, that the States have

struggled to eliminate since adopting judicial elections in the mid-nineteenth century.

They also demonstrate that disqualification and recusal are not adequate substitutes for direct solicitation rules. Disqualification and recusal are litigation-specific rules that address issues of bias piecemeal once "a proceeding" is initiated. *See, e.g.*, Fla. Code of Jud. Conduct, Canon 3(E)(1). But they do not address the probability of bias arising outside of discrete cases, and they do not address the corrosive, systemic effects that direct solicitation has on the public's confidence in the judiciary in general.

In fact, disqualification and recusal *exacerbate* the very problems direct solicitation rules guard against. As the *Caperton* opinions acknowledge, public confidence in the judiciary may be eroded by *either* the appearance that judges are biased, *see* 556 U.S. at 881–82 (maj. op.), or through "*allegations* that judges are biased, however groundless those charges may be," *see id.* at 891 (Roberts, C.J., dissenting) (emphasis added). Thus, by curtailing such ad-hoc accusations of bias before they can arise, direct solicitation rules not only enhance the appearance of impartiality before litigation begins, but they also reduce the incidence of *disqualification and recusal*, which themselves can "bring our judicial system into undeserved disrepute" *after* litigation begins. *See id.* at 902 (Roberts, C.J., dissenting).

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

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