No. 06-3290

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KANSAS JUDICIAL WATCH, *et al.*,
Plaintiffs-Appellees,

v.

MIKE L. STOUT, in his official capacity as a Member of the Kansas Commission on Judicial Qualifications, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the District of Kansas, The Hon. Julie A. Robinson

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BRIEF OF *AMICI CURIAE* CONCERNED CORPORATIONS IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 29(c), *Amici Curiae* make the following disclosures:

1. ConocoPhillips has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

2. Emerson has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

3. General Electric Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

4. General Mills, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

5. General Motors Corporation has no parent corporation, and the following publicly held companies beneficially own more than 10% of General Motors Corporation's stock: State Street Bank & Trust Company and Brandes Investment Partners, L.P.

6. Halliburton Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

7. JPMorgan Chase & Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

8. Motorola, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

9. PepsiCo has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

10. Phelps Dodge Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

11. Texas Instruments Incorporated has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

12. Time Warner Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

13. Wyeth has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Donald B. Ayer

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INTEREST AND IDENTITY OF THE *AMICI CURIAE*[1]

This Brief is filed on behalf of the following 13 corporations: ConocoPhillips; Emerson; General Electric Company; General Mills, Inc.; General Motors Corporation; Halliburton Company; JPMorgan Chase & Co.; Motorola, Inc.; PepsiCo; Phelps Dodge Corporation; Texas Instruments Incorporated; Time Warner Inc.; and Wyeth (collectively "Concerned Corporations" or "*Amici*").

Amici Curiae Concerned Corporations are leading American corporations engaged in a broad range of industries, including manufacturing, retailing, and service, throughout the United States. Because of the size and breadth of their businesses, *Amici* are frequently parties in the nation's state courts, confronting all manner of controversies ranging from routine contract, tort, or personnel issues to cases involving serious long-term consequences for their companies. *Amici* have therefore been intensely interested in the operation of the state courts for many years. *Amici* are thus well-positioned to comment on trends affecting state courts, including those targeted by the Kansas Code of Judicial Conduct's provision at issue in this case dealing with direct solicitation of money and publicly stated support by judicial candidates.

[1] All parties have consented to the filing of this *Amici Curiae* brief.

INTRODUCTION

Amici do not quarrel with the choice by the majority of states to select their judges by means of a popular election process, as such decisions manifest a core democratic value that is at the heart of our system of government. *Amici* are aware, however, that many of these states are concerned that unregulated, partisan judicial elections have undesirable consequences that can be minimized, if not entirely eliminated, by modest governmental measures. *Amici* support these efforts. A choice to democratically elect judges need not entail the acceptance of all of the negative effects that may flow from partisan elections.

In particular, *Amici* are acutely aware of a number of troubling developments contributing to a decline in the perceived fairness of state courts and believe that the Kansas provisions enjoined by the United States District Court for the District of Kansas in this case are modest and well-conceived efforts to address those problems. Nearly everywhere, the costs of running a competitive race for state judicial office are increasing,[2] along with the contentiousness of such elections—especially in light of the increasing focus on highly emotional "wedge

[2] For example, in 2004, the average amount raised by the winning candidate in the forty-three races for state supreme court seats in which candidates raised any money increased 45%—to over $650,000—from the 2002 judicial elections. Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004*, at vii, *available at* http://www.justiceatstake.org/ files/NewPoliticsReport2004.pdf (last visited Dec. 15, 2006).

issues" that often have little relation to the judicial office. And as the need for funds has increased, the personal involvement of the candidates in raising money has also become more important.

In *Amici*'s experience, both the degree of polarization around particular issues and the levels of campaign funding tend to be higher in judicial elections where political parties play a significant role.[3] In such contests, candidates are compelled to align themselves with a political party in order to obtain the voter and financial support that will allow them to be competitive. The partisan methods of attracting voters on ideological grounds and of spending large sums on advertising in turn expand and intensify the "wedge-issue" electioneering.

Not surprisingly, the candidates' dependence on campaign funds raises questions about the independence and impartiality of successful candidates once they are on the bench. Numerous empirical studies confirm that the general public and the bar share *Amici*'s concern. That concern rests on the risk that some judges who must raise large quantities of money in order to secure election will be beholden to their supporters.

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[3] This is true both in judicial elections that are officially denominated as partisan and in non-partisan races in which political parties nonetheless are actively involved.

Finally, it has also been *Amici*'s shared experience that the prospect of increasingly costly, divisive, and partisan judicial elections discourages many of the most qualified candidates from seeking office and, likewise, discourages well-qualified judges from seeking re-election.

In these circumstances, *Amici* often find themselves between a rock and a hard place. As members of the communities in which they operate, and as regular participants in the judicial process, nearly all of the *Amici* are often approached with requests to contribute to judicial candidates in many of the 39 states employing electoral systems for the selection of judges. While *Amici* are keen to support a qualified judiciary, any decision to contribute to even the most promising candidate has the potential to create an appearance of seeking favor in any future litigation. That potential is only compounded where the judge himself makes the request. On the other hand, refusing to give may create a real or perceived disadvantage that neither the *Amici* nor their shareholders can lightly disregard.

The problem is by no means confined to *Amici*'s home jurisdictions or to circumstances in which they are affirmatively asked to contribute. *Amici* often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they are not located and have not contributed to or been

solicited by judicial candidates. The phenomenon of being "home-towned" is a familiar one. As one leading plaintiff's counsel has described:

> [W]hat I call the "magic jurisdiction," ... [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money....[4]

Fortunately, such "magic jurisdictions" in America are limited in number. But the disturbing trend toward highly partisan and divisive elections of judges serves only to increase the prospect for such mischief and creates a parallel phenomenon that is only somewhat less malignant: namely, that the prospect of being perceived as beholden to supporters discourages many of the best candidates from service.

ARGUMENT

The personal solicitation provision (sometimes referred to as the "Committee Clause") of the Kansas Code of Judicial Conduct enjoined by the District Court is a modest and effective measure. Canon 5C(2) states:

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[4] Richard Scruggs, *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *in Industry Commentary* (Prudential Securities, Inc., New York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs).

> A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support nor shall a candidate serve as his or her own campaign treasurer. A candidate subject to public election may, however, establish committees of responsible persons to solicit and accept reasonable campaign contributions, to manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year.

KAN. S. CT. R. 601A, Canon 5C(2) (2006).

While perhaps it is impossible to remove all concern that an electoral system funded by contributions will leave candidates beholden to their contributors and supporters, Kansas' relatively modest bar on direct solicitation by candidates addresses this problem by insulating the candidate himself from the fundraising and public support gathering activity. From the perspective of *Amici*, this measure plays an important role in preventing, or at least greatly curbing, the threat of a race to bottom, wherein judicial candidates, in order to have any chance of getting elected, must be willing to "drag the sack" and personally line up attorneys and potential litigants to offer publicly stated support for their candidacies.

Because these concerns implicate real, immediate constitutional interests separate and apart from any effort to suppress any message or point of view, the District Court erred in applying a strict scrutiny analysis and in concluding that

Kansas' solicitation clause in Canon 5C(2) cannot be enforced on the basis of Plaintiffs' facial challenge.

I. KANSAS' REGULATION OF SOLICITATIONS BY JUDICIAL CANDIDATES PROVIDES SUBSTANTIAL RELIEF FROM A SERIOUS PROBLEM

A. Personal Solicitation By Judicial Candidates Creates A Number Of Serious Problems

Based on their own experience, *Amici* submit that direct and personal solicitations of campaign contributions and publicly stated support by a judge or judicial candidate are likely to be coercive, contribute to a widespread—and reasonable—perception of bias in the administration of justice, and deter many well-qualified attorneys and judges from seeking or remaining in judicial positions.

1. Personal Requests For Money And Support By Judgeship Candidates Are Coercive When Directed To Repeat Litigants

Direct appeals by the candidate himself frame the request for money and support in the most personal terms, and a refusal to contribute or publicly line up in favor of the candidate is thus likely to be construed as a rebuff. Thus, a personal request for financial assistance and publicly stated support by a judicial candidate naturally gives rise to a concern that the decision whether and how much to contribute to or publicly support the would-be judge may impact how one will be treated as a litigant.

To be sure, many—hopefully most—judges would never be influenced by the fact or absence of a contribution, assuming they learned of it. However, the possibility of such improper influence, based on one's response to a request for help, is an imponderable that generally cannot be evaluated with certainty. That uncertainty, coupled with the personal character of the appeal, puts repeat litigants especially in a very difficult position in determining how to respond.

2. Personal Solicitation By Candidates Is A Likely Source Of Potential Judicial Bias And Compounds Public Perceptions Of Such Bias

The practice of judicial candidates openly requesting and receiving large amounts of money contributes to a public perception, supported by empirical evidence, that judges may favor lawyers and litigants who contributed to their campaigns.

For example, a poll regarding Texas judicial elections, which include no bar on personal solicitation, revealed that fully 83 percent of Texans and 79 percent of practicing lawyers surveyed believed that campaign contributions significantly influence an elected judge's decisions. *Republican Party v. White*, 416 F.3d 738, 774 (8th Cir. 2005) (Gibson, J., dissenting) (citing Alexander Wohl, *Justice for Rent*, THE AMERICAN PROSPECT (May 22, 2000)), *cert. denied*, 126 S. Ct. 1165 (2006). This perception is not always unreasonable, even if it cannot be determined whether it is accurate. As Judge Gibson has noted, one poll conducted

by the National Center for State Courts showed that 48% of Texas state appellate and trial judges surveyed believed that campaign contributions had a fairly significant or very significant degree of influence over judicial decision-making. *White*, 416 F.3d at 774 (Gibson, J., dissenting). Another poll showed that, on a national basis, 26% of state judges believe that campaign contributions affect judicial decision-making.[5] And the Texas Supreme Court, for instance, was 750 percent more likely to grant petitions for discretionary review filed in 1994-98 by contributors of at least $100,000 than by non-contributors. Contributors of $250,000 or more were 1,000 percent more likely to be heard than non-contributors.[6]

3. Personal Solicitation By Candidates Creates Concerns Even Where A Party Is Not Solicited

For *Amici* and others, the effects of such potential bias are perhaps most acute in jurisdictions in which they are engaged in litigation, though they have

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[5] *See* National Surveys Of American Voters and State Judges conducted by the polling firm Greenberg Quinlan Rosner Research*, available at* http://www.justiceatstake.org/files/PollingsummaryFINAL.pdf (Feb. 14, 2002) and http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf (sites last visited Dec. 15, 2006).

[6] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm (last visited Dec. 15, 2006); *see also* Aman Mcleod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 505-09 (2005) (compiling and discussing studies demonstrating the effect of campaign contributions on judicial decision-making).

little or no continuous presence there. In these locales, *Amici* sometimes find themselves exposed to the added risk of being seen as an out-of-state deep pocket.

In one recent case, for instance, a settlement letter sent by a Texas attorney to an out-of-state defendant pointedly observed that the appeals court with potential jurisdiction over the case "is comprised of six justices, all of whom are good Democrats," and asserted that one justice "was recently elected with our firm's heavy support, and is a man who believes in the sanctity of jury verdicts."[7]

A former elected Justice of the West Virginia Supreme Court, Richard Neely, pointed out this problem by describing the view taken by some elected state court judges toward out-of-state defendants:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[8]

The systemic damage associated with such "home-towning" is made worse when judicial candidates may personally solicit campaign contributions and publicly stated support. *Amici* will be at a real or apparent disadvantage against local adversaries who personally answered a judge's personal request for funds and

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[7] As reported in the San Antonio Express-News. *See* John McCormack, *Lawyer Waging 'Jihad' On Ford*, SAN ANTONIO EXPRESS NEWS, Oct. 17, 2005, at 1B.

[8] Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From The Politics Of State Courts*, at 4 (The Free Press: New York 1988).

publicly stated support. *Amici* are thus forced to make judgments about whether to settle or try a case in such jurisdictions, often resulting in fewer cases being tried and higher settlements.

4. Allowing Personal Solicitation In Judicial Elections Deters Many Qualified Candidates From Seeking Judicial Office

Some of the *Amici* and their employees have participated, through bar associations, community organizations, and word of mouth, in efforts to encourage well-qualified attorneys to seek judicial office. Those efforts have revealed another serious downside of the increasingly expensive and contentious character of judicial elections: outstanding attorneys who might otherwise be interested in public service as a state court judge despite lagging salaries are often discouraged from seeking office in a system that effectively requires them to act in a way that undermines the appearance of judicial independence. *See, e.g.*, Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 114 (2003) ("Not only is the amount needed to run a campaign often staggering, but many might find the notion of soliciting potential litigants and their attorneys for contributions to be ethically distasteful.").

The incentive to seek judicial office often rests on an altruistic desire to serve and to advance the public good through evenhanded application of the law. These idealistic aspirations are too often quelled, and candidacies are discouraged,

by the necessity for candidates to engage in conduct such as the personal solicitation of funds and publicly stated support from attorneys and potential litigants before the bench that the candidate seeks.

B. Kansas' Solicitation Clause Promotes The Integrity, Impartiality, And Quality Of A State Judiciary

Although no reform can remove all concern that judicial elections will leave candidates beholden to their contributors and deter some qualified candidates, Kansas' solicitation clause addresses these concerns by reasonably regulating the method of judicial fundraising and garnering of public support. Specifically, the clause leaves candidates fully free to raise funds and line up publicly stated support through committees in a manner that largely eliminates the direct, public appearance that the candidate will later be influenced by would-be contributors' and/or supporters' decisions. By preventing direct solicitation by candidates, this rule also avoids the most egregiously coercive aspects of judicial campaign solicitation and curbs real and perceived threats to judicial independence and integrity that, left unchecked, would reduce the efficacy of the judicial branch.

Faced with a request from a campaign committee rather than the would-be judge, a potential donor and supporter has somewhat less reason to wonder whether declining to give will create a risk of unfavorable future treatment at the hands of the judge, because the judicial candidate is not directly engaged in the solicitation that would unavoidably inform the candidate whether the request was

granted or rejected. This sensible limitation on the most problematic form of fundraising, while not a complete solution to the problem, also plays an important role in reassuring the general public that judges themselves are a step removed from the "nitty-gritty" of the fundraising process and, consequently, encourages qualified candidates to seek office. Further, the solicitation clause reduces concerns that *Amici* and other out-of-town litigants will be "home-towned" in jurisdictions in which they do not participate in judicial fundraising, because judges in these jurisdictions are less likely to be indebted to local interests that they did not themselves personally solicit and may not be aware contributed to their campaigns.

II. THE FIRST AMENDMENT SHOULD NOT BE READ TO BAR REASONABLE REGULATION OF JUDICIAL CONTESTS

A. The District Court Erred In Assuming Strict Scrutiny To Apply Generally To All Regulation Affecting The Manner Of Judicial Electioneering And Fundraising

The District Court applied strict scrutiny, the most onerous standard known to First Amendment jurisprudence, to every challenged aspect of the Kansas Code. Because strict scrutiny "almost always[] results in invalidation," *Vieth v. Jubelires*, 541 U.S. 267, 293 (2004), it is reserved for content- or viewpoint-based restrictions that lack justification in countervailing constitutional concerns, *see, e.g., Bartnicki v. Vopper,* 532 U.S. 514, 536 (2001) (Breyer, J., concurring) ("'strict scrutiny'—with its strong presumption against constitutionality—is normally out of place

where ... important competing constitutional interests are implicated"). In contrast, the Court has repeatedly indicated, in a number of contexts, that the presence of such countervailing concerns defeats the application of strict scrutiny, even for content-based regulations.

Strict scrutiny is normally not applied when it would interfere with well-established traditions involving no invidious distinctions. For instance, in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld the Hatch Act's restrictions on the rights of federal employees to run for office on a partisan ticket, solicit votes for partisan candidates, or engage in political campaigning. In doing so, it noted that its decision—reached without applying strict scrutiny—merely "confirm[ed] the judgment of history, a judgment made by this country over this last century that it is in the best interest of the country ... that federal service should depend upon meritorious performance rather than political service." *Id.* at 557. Similarly, in *Burson v. Freeman*, 504 U.S. 191 (1992), the Supreme Court upheld a Tennessee law prohibiting political speech within 100 feet of a polling place on election day in view of the state's significant, constitutional interest in protecting voters. Justice Scalia noted in his separate opinion concurring in the judgment in that case that, "[b]ecause restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, ... 'exacting

scrutiny' ... is inappropriate." *Id.* at 214 (Scalia, J., concurring in the judgment). Of course, a judiciary "owing fidelity to no person or party is a 'longstanding Anglo-American tradition,'" *White v. Republican Party*, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting) (citing *United States v. Will,* 449 U.S. 200, 217 (1980)), and thus the protection of the independence of the judiciary is a tradition entitled to some measure of deference.

The Supreme Court has also refused to apply strict scrutiny to fundraising and other associated speech restrictions in federal elections. In *McConnell v. FEC,* 540 U.S. 93, 137 (2003), the Court reviewed and largely upheld (under intermediate, "closely drawn" scrutiny) the election-related regulations of the Bipartisan Campaign Reform Act ("BCRA")—regulations that are far more elaborate and restrictive than Kansas' Committee Clause. For instance, the Court upheld a solicitation clause that prevents a candidate from "soliciting" any funds "unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(e). The BCRA also requires forced speech based on content—namely, that "electioneering communications" "authorized" by a candidate or his political committee "clearly identify the candidate or committee, or if not so authorized, identify the payor and announce the lack of authorization." *McConnell,* 540 U.S. at 230. While a rule precluding an author from remaining anonymous is normally subject to exacting scrutiny,

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 351 (1995), *McConnell* held that such editorial discretion may be fettered to protect the important state interests in avoiding actual or apparent corruption, 540 U.S. at 136-37. *A fortiori*, then, the Committee Clause, which has a much smaller impact on candidates' actual speech rights, should be subject to intermediate scrutiny.

Furthermore, *McConnell*'s logic in applying only intermediate scrutiny to electoral regulations applies with full force to the Committee Clause. On one hand, the Court noted that campaign contribution restrictions and similar regulations require less exacting scrutiny because they bear "'more heavily on the associational right than on freedom to speak,'" primarily affecting the ability of "'like-minded persons to pool their resources'" or affiliate themselves with candidates. 540 U.S. at 135 (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), and *Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377, 388 (2000)). At the same time, electoral regulations implicate important countervailing Constitutional interests, most notably the prevention of "'actual corruption,'" "'the eroding of public confidence ... through the appearance of corruption,'" and the "'integrity of our electoral process.'" *Id.* at 136 (quoting *FEC v. Nat'l Right To Work Comm.*, 459 U.S. 197, 208 (1982)). This combination of minimally burdened speech rights and the importance of protecting the integrity of electoral processes—not to mention

the due process concerns that are specially implicated in the context of judicial elections—strongly counsels for an intermediate form of scrutiny.

Indeed, the case for lesser scrutiny of restrictions on judicial election practices is stronger than where legislative elections are concerned. While legislators are expected to be accountable and responsive to their constituents in the enactment of legislative policies, judges preside over and decide cases by applying law impartially and without favor or attention to any particular interests. Further, whereas legislatures are collective bodies that act by the rule of (ordinary or sometimes super-) majorities, judges sit alone or at most in small panels, and thus their word on a particular issue is either determinative or highly influential of the outcome. As a result of these two factors, any reality or perception that a single judge is subject to the influence, financial or otherwise, of a litigant undermines his or her proper performance—and public trust in that performance—far more seriously than does the presence of a few corrupted legislators in a body that is predominantly viewed as honest.

Finally, the Supreme Court has long recognized that the states must be free to regulate the time, place, or manner of speech activities generally, provided the restrictions "are justified without reference to the content of the regulated speech" and are drawn so as to leave alternate channels of communication open. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks

omitted). Indeed, the Court has specifically recognized the states' authority to regulate the time, place, and manner of holding elections as against free association objections. *Clingman v. Beaver,* 544 U.S. 581, 586 (2005) (holding such regulations to be subject to strict scrutiny only where they impose "severe burdens"); *Nixon*, 528 U.S. at 386-89 (refusing to apply strict scrutiny to regulation of campaign contributions). Here, Kansas' effort to regulate direct solicitation of contributions leaves candidates fully free to request money or public support—and allows supporters to provide such money and public support—so long as they do so in such a way as to minimize influence on subsequent judicial decision-making. As such, the regulation is unrelated to the suppression of any message or point of view.

To be sure, some regulation of judicial elections may be properly subjected to strict scrutiny. One such example is the prohibition considered in *White v. Republican Party*, 536 U.S. 765 (2002), which completely prohibited candidates for the judiciary from expressing their views on issues of concern to voters. But not every state regulation is so easily dismissed. The notion that a member of the judiciary might be "in the pocket" of a supporter is much weightier than the vaguely stated interest in *White* that judges not compromise "open-mindedness" to arguments presented in their court. Given the gravity of the concerns animating the Committee Clause and the presence of significant constitutional concerns on

both sides of the analysis, the District Court's decision to apply strict scrutiny to Kansas' effort to control the way in which its judges solicit money and public support was manifestly improper.

B. Even Assuming That The Kansas Solicitation Limitations Must Satisfy Strict Scrutiny, They Are Narrowly Tailored To Advance Compelling State Interests

Even assuming that Kansas' effort to regulate personal judicial solicitation is properly viewed through the lens of First Amendment strict scrutiny—a proposition that *Amici* submit is unsound—the District Court nonetheless erred in holding that the regulation failed that test.

1. The State Has A Compelling Interest In Combating The Reality And Appearance Of Improper Influence Of Judges

It is clear that a state's interest in preserving the actual and perceived integrity of its judiciary "lies at the very heart of a state's ability to provide an effective government for its people." *White*, 416 F.3d at 766 (Gibson, J., dissenting). Indeed, the Supreme Court has repeatedly recognized this interest as both legitimate and compelling. *E.g.*, *Nixon*, 528 U.S. at 390; *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985) (referring to "preventing corruption or the appearance of corruption" as a "legitimate and compelling government interest[]"). And, of course, states are obligated to protect against the appearance of, as well as actual, judicial bias. *Cox v. Louisiana*, 379 U.S. 559, 565

(1965). This interest in avoiding actual and perceived bias and corruption of the judiciary is clearly implicated by the solicitation clause at issue here.

First, the state undoubtedly has a compelling interest in addressing the risk or appearance of improper influence based on direct solicitation of contributions by a judge from individual litigants or their attorneys—whether the solicited parties elect to give or not. *Nixon*, 528 U.S. at 390. This perception of improper influence typically runs to local interests. As a result, states like Kansas have a further compelling interest, arising under the Constitution's due process and interstate privileges and immunities clauses, in providing a fair forum to non-resident defendants. U.S. CONST. ART. IV, § 2, cl. 1.

Supreme Court precedent clearly supports the notion that states should be free to act against bias "in intermediate forms that are more subtle than bribery and explicit agreements." *White*, 416 F.3d at 769 (Gibson, J., dissenting). For example, the Court's decision in *Nixon* plainly recognized "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." 528 U.S. at 389.

As noted above, the Supreme Court has likewise upheld the Hatch Act's restrictions on the rights of federal employees to engage in a variety of partisan political activities, even though the Act does not require any actual corruption or influence to trigger its proscriptions. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at

564-65. Clearly, the postal workers affected by the Hatch Act wielded far less partisan power and posed a lesser threat to "the great end of Government—the impartial execution of the laws"—than state court judges. *Id.* at 565; *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (stressing the heightened due process interest in an impartial tribunal as "preserv[ing] both the appearance and reality of fairness"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 392 (1979) (finding interest in a fair trial sufficient to outweigh assumed First Amendment right of press to attend pre-trial hearing).

2. The District Court Misapplied First Amendment Strict Scrutiny Analysis By Requiring Perfect, Rather Than Simply Narrow, Tailoring

The District Court enjoined the solicitation clause, reasoning that Kansas had not narrowly tailored its efforts to fully eradicate the problems that it was purporting to address. But Kansas' effort to balance competing constitutional obligations is worthy of considerably more judicial deference and respect than the District Court afforded. *Compare Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1237 (D. Kan. 2006) [App. 361] ("The solicitation clause in Kansas creates a barrier to personal solicitation by requiring it be conducted by a committee. But the committee provision only bolsters the argument that the solicitation clause is an underinclusive regulation to serve the state interest of impartiality. The Canon does not prohibit all solicitations, only those made in person."), *with Nixon*, 528

U.S. at 400 (Ginsburg, J., concurring) ("[W]here constitutionally protected interests lie on both side of the legal equation ... there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'").

The District Court's approach would require such a delicate traipse between under- and overinclusiveness that states could not conceivably craft any constitutionally adequate safeguard against the problem of actual or perceived judicial bias. The fact that the Kansas Code, as the District Court noted, "does not prohibit all solicitations, only those made in person," *Kansas*, 440 F. Supp. 2d at 1237 [App. 361], reflects that Kansas crafted its regulations to address only the most serious threats to the interest in judicial integrity and to minimize the constraints on First Amendment interests. That is hardly a basis to conclude that the regulation is fatally under-inclusive.

Rather, this supposed under-inclusiveness confirms only that Kansas has narrowly tailored Canon 5C(2) to account for the competing constitutional interests at stake. As the dissent in *White* summarized, "[e]ven in questions subject to strict scrutiny, there simply has to be some room for judgment about how wide to cast the net, and it should be apparent that it is more offensive to the First Amendment for a measure to be too broad than to be too narrow." 416 F.3d at 783 (Gibson, J., dissenting).

The District Court's conclusion that "[t]he fact that judicial campaigning requires candidates to garner publicly stated support and campaign contributions does not, in itself, suggest that they will be partial to their endorsers or contributors once elected," *Kansas*, 440 F. Supp. 2d at 1237 [App. 361], also ignored the harmful effects of the types of personal solicitation that it found to be constitutionally protected. Any personal appeal for funds or support by a judicial candidate—especially when addressed to repeat litigants—is inherently highly coercive, as discussed above, far more than an approach by a member of a committee of the candidate's delegates. Thus, the institutionalized perpetuation of the practice of personal solicitation by those who are or would be sitting judges does a great deal of damage to the appearance of judicial integrity and impartiality. It is no answer that "the recusal canon is narrowly tailored to cure any impartiality that may result from a candidate personally soliciting support or contributions," or that, "[i]f such solicitation prevents a successful candidate from being impartial in any specific case or controversy, that candidate has an obligation to recuse himself or herself." *Kansas*, 440 F. Supp. 2d at 1237 [App. 361]. The possibility that a judge may recuse himself or herself does nothing to reassure general public confidence in judicial integrity and impartiality. If anything, a judge's recusal due to a personal solicitation for contributions or support from a party or litigant exacerbates public concern regarding the effects of the practice of personal

solicitation and raises concerns that other judges should be, but are not, recusing themselves for the same reasons. By enacting both its recusal and solicitation clauses, Kansas has attempted to avoid creating a system in which judges are systematically required to recuse themselves based on solicitation activities that, being permitted, they have no choice but to engage in. Indeed, judges who cannot personally solicit have no systematic need to know the identity of their contributors or those who declined to give and, due to the recusal clause, have a real incentive to avoid learning this information. As the Commentary to Kan. S. Ct. R. 601A, Canon 5C(2) explains, "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E." KAN. S. CT. R. 601A, Canon 5C(2), Commentary (2006).

Ultimately, states choosing among competing constitutional interests are compelled to draw lines somewhere. Where—as in the case of Kansas' effort to regulate direct solicitation of funds and publicly stated support from prospective litigants and their counsel—the line is drawn to minimize the impact on the First Amendment and to address a harm that is especially acute, there is no basis for condemning the regulation because it does not eliminate all of "the inherent effects of elections on the public's confidence in judicial impartiality." *Kansas*, 440 F. Supp. 2d at 1237 [App. 362].

CONCLUSION

For the foregoing reasons, *Amici Curiae* Concerned Corporations respectfully urge the Court to reverse the District Court's order enjoining and prohibiting enforcement of Canon 5C(2) against any candidate for judicial office.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,468 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® Office Word 2003 in 14-point font Times New Roman.

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