UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON, Plaintiff-Appellant v. **COLLEEN CONCANNON**, in her official Capacity as member of the Arizona Commission on Judicial Conduct, et al., Defendants-Appellees	No. 11-17634 On appeal from the United States District Court for the District of Arizona, No. 3:08-CV-08064-FJM

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE ARIZONA JUDGES' ASSOCIATION, JUSTICE AT STAKE, THE CAMPAIGN LEGAL CENTER, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

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[1] This *amicus curiae* brief is filed with the consent of all parties to this proceeding. No party's counsel authored any portion of this brief. No party or party's counsel contributed money intended to fund this brief's preparation or submission. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund this brief's preparation or submission. This brief does not purport to represent the position of NYU School of Law.

Amicus curiae Lambda Legal is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and people living with HIV. In 2005, Lambda Legal established a Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities and to encourage people across the nation to take action to support judicial independence and judicial diversity. The communities Lambda Legal represents depend upon a fair and impartial judiciary to enforce their constitutional and other rights.

Each *amicus* has an interest in this case because of its exceptional importance in protecting the reality and appearance of judicial impartiality and independence.

SUMMARY OF ARGUMENT

As the Supreme Court recently underscored in *Williams-Yulee v. Florida Bar*, states have a compelling interest in maintaining judicial integrity. To do so, states must establish measures to ensure that courts are fair, impartial, and independent of partisan political forces, both in reality and appearance. Arizona has chosen to select some of its judges through a system of nonpartisan elections that was intended to preserve judicial independence from the political branches and partisan politics. In order to further its recognized compelling interest in judicial integrity, Arizona has adopted a Code of Conduct – comprised of a limited number

of over-arching rules that are implemented by enforceable rules and enhanced by explanatory or aspirational comments – limiting the political activities of both sitting judges and judicial candidates. These rules, which ensure that the judiciary remains independent from political forces, are best understood as part of a broader set of policy choices and regulations through which Arizona and other states have, since the founding of the republic, crafted public policy to promote judicial integrity.

Moreover, these rules must also be understood within the context of efforts to protect judicial integrity in all circumstances, regardless of the method of judicial selection: They are binding on judges at all times, as well as on judicial candidates, and have been adopted even in jurisdictions that do not use judicial elections, including the federal government.

Ultimately, these rules cannot be considered in isolation, or even solely in relation to judicial elections; instead, they can only be fully understood in the context of a larger set of policies designed to ensure that the judiciary is fair and impartial, independent, and respected. Striking down these rules would call into question the constitutionality of all limits on the political activity of judges (including the well-established federal rules) and increase the risk of the politicization of the American judiciary.

ARGUMENT

I. ARIZONA HAS A COMPELLING INTEREST IN PROTECTING JUDICIAL INTEGRITY

As the United States Supreme Court has made clear, states have a "compelling interest in judicial integrity." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). Judicial integrity is "a state interest of the highest order" because "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) ("*White I*") (Kennedy, J., concurring). And judicial integrity remains a compelling interest regardless of whether judges are elected or appointed. *See Williams-Yulee*, 135 S. Ct. at 1673 ("A State's decision to elect judges does not compel it to compromise public confidence in their integrity."). As most states have done, Arizona has taken a step to protect the integrity of its judiciary by adopting restrictions on political activities by judges, based on the American Bar Association's Model Code of Judicial Conduct.

Judicial integrity requires that courts be fair and impartial as well as independent, in both reality and appearance. To be fair and impartial, courts must apply the law to the facts without bias or favor towards any party. *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). Judicial

independence, which preserves the separation of powers and enables meaningful judicial review of legislation, is likewise central to judicial integrity.

Our governmental system is built on the separation of powers: The judiciary must be independent from the partisan forces that control the executive and legislative branches not only to ensure confidence in the integrity of the judiciary, but also because judicial review sometimes requires judges to strike down laws embodying political policy preferences. As Madison explained in The Federalist No. 47, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961). But separating the judiciary from the other branches of government "means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place." John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 969 (2002). Thus, it is essential that the judiciary be truly independent.

A judiciary that is independent is:

> (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches, such as the political party apparatus by which legislators and elected executive officials organize themselves and

> their supporters; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics* 8 (2004), *available at* https://www.brennancenter.org/publication/after-white-defending-and-amending-canons-judicial-ethics/; *see also Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) ("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 for the views of his constituents.").

Judicial integrity also requires the appearance of fairness, impartiality, and independence. The judiciary has a unique role in our tripartite system of government. "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.'" *Williams-Yulee*, 135 S. Ct. at 1666 (citing The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961)). Instead, its authority "depends in large measure on the public's willingness to respect and follow its decisions." *Id.* Indeed, the public's belief that a court's judgments are fair and impartial is at the core of due process. *See, e.g.*, *In re Gault*, 387 U.S. 1, 26 (1967) ("[T]he *appearance* as well as the actuality of fairness, impartiality and orderliness [are] the *essentials of due process.*" (emphasis added)); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he *appearance* of evenhanded

justice . . . is *at the core of due process*." (emphasis added)). For this reason, it is essential that "justice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954). Adjudication by an "impartial judge is essential to due process" because "it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *White I*, 536 U.S. at 776.

Achieving a judiciary that is fair, impartial, and independent in reality and appearance requires limits on how a judge can behave, particularly in the realm of politics. "Judicial independence and neutrality require judges to limit or abstain from involvement in a variety of activities commonly enjoyed by others in the community, including politics." *In re Matter of William A. Vincent, Jr.*, 172 P.2d 605, 610 (N.M. 2007) (quoting *In re Inquiry Concerning McCormick*, 639 N.W.2d 12, 15 (Iowa 2002)). And "[w]hen judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior." *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010); *see also In re Dunleavy*, 838 A.2d 338, 354 (Me. 2003) ("Because a judgeship is in the nature of a public trust, it is unreasonable to permit a judge to subjugate that trust to her or his personal desire to actively participate in the political process.").

II. THE POLITICAL ACTIVITIES RULES ADVANCE ARIZONA'S COMPELLING INTEREST IN JUDICIAL INTEGRITY AND ARE CONSTITUTIONAL

A. Limiting Political Activity by Judges and Judicial Candidates Is Appropriate in Light of Their Unique Role

As Chief Justice Roberts explained in *Williams-Yulee*, "[j]udges are not politicians, even when they come to the bench by way of the ballot." 135 S. Ct. at 1662. It is because of this unique role that states must be permitted to regulate judges' and judicial candidates' political activities, so as to preserve both the appearance and the reality of a judiciary insulated from the political branches. Indeed, while the Supreme Court held in *White* that allowing judges to participate in public conversations about contested issues does not threaten the integrity of the courts, *see White I*, 536 U.S. at 778 ("Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." (quotation and citation omitted)), engaging in political activities as a judge or judicial candidate poses a clear and direct threat to judicial independence and impartiality. As the Seventh Circuit explained, "[w]hile *White I* teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is." *Siefert*, 608 F.3d at 986. Likewise, just as the Supreme Court in *Williams-Yulee* found that the personal solicitation canon may constitutionally be applied to judicial candidates, so too should the political

activities rules apply to judicial candidates as well as judges. The same compelling interests are at stake when judicial candidates engage in political activity as when sitting judges do – both scenarios raise concerns that a judge or a candidate seeking to become a judge are enmeshed in politics, drawing into question their judicial credibility and independence from the political branches.

Such engagement in political activity risks reducing public confidence in judicial independence and impartiality, as well as having an impact on judicial decision-making. First, when judges and judicial candidates wade into the political realm by making endorsements in elections, they raise reasonable questions about their independence and impartiality. *See Siefert*, 608 F.3d at 986 ("A local judge who tips the outcome of a close election in a politician's favor would necessarily be a powerful political actor, and thus call into question the impartiality of the court."). Thus, the political activities rules address "a broader concern that freely traded public endorsements have the potential to put judges at the fulcrum of local party politics, blessing and disposing of candidates' political futures." *Id*. Arizona "has a justified interest in having its judges act and appear judicial rather than as political authorities." *Id*. at 987.

In addition to the appearance of impropriety that may arise when judges act as political powerbrokers, judicial entanglement in party politics may result in party loyalty, rather than fitness for the bench, being the chief qualification sought

in prospective judicial candidates. And once on the bench, favors owed to political actors may overshadow the impartial application of the law in particular cases or at a minimum appear to do so. *See id.* at 984 ("[E]ndorsements may be exchanged between political actors on a quid pro quo basis."). This threat is similar to that identified by the Supreme Court in *Caperton*, where the concern was a judge's "debt of gratitude" to a campaign supporter. *Caperton*, 556 U.S. at 882 ("Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to [his supporter] for his extraordinary efforts to get him elected."). In addition to the retrospective gratitude felt toward partisan supporters, judges enmeshed in the political fray who face reelection would face pressure to rule in ways that attract future political party support and stave off primary challengers who may be backed by party leaders.[2]

[2] "[U]nder some retention methods, judges' voting is associated with the political preferences of those who will decide whether the judges keep their jobs. For example, the results indicate that when judges face Republican retention agents in partisan reelections, they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals." Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 629 (2009). "Furthermore, when the preferences of those who will reappoint a judge change, so too do the judge's rulings. The results show that when a Republican governor replaces a Democratic governor, judges are more likely to vote in favor of the business in a business-versus person case, in favor of the employer in a labor dispute, and in favor of defendants in general in tort cases." *Id.*

These scenarios are particularly problematic in those highly scrutinized cases where a judge must decide a political issue – such as a ruling on legislation closely associated with a political party, or a ruling vindicating an individual's civil rights in a case closely associated with a party's position. In these cases, it is critical that judges act, and be seen as acting, as neutral arbiters rather than political actors. Even if a judge faithfully and impartially applies the law in such politically-charged cases, close association with political players will provide ammunition for partisans on the other side to call the judge's motivation into question and may damage public confidence in the legitimacy of the court's determination.

These concerns are not merely theoretical; history also shows that the rules were adopted and promulgated in direct response to instances of judges issuing "partisan political rather than impartial judicial decisions." *Moon v. Halverston*, 288 N.W. 579, 581 (Minn. 1939) (Loring, J., concurring). Indeed, these rules remain an important enforcement mechanism against present impermissible judicial conduct. In recent years, judges have faced discipline for improperly acting as informal campaign advisors, *see In re DeFoor*, 494 So. 2d 1121 (Fla. 1986), taking part in phone banking for political parties, *see In re Raab*, 793 N.E.2d 1287 (N.Y. 2003), putting up lawn signs for candidates, *see McCormick*, 639 N.W.2d

12, and spreading negative information regarding the opponent of the judge's spouse in a judicial election, *see In re Codispoti*, 438 S.E.2d 549 (W. Va. 1993).

B. The Rules Protect Judicial Integrity in Both Elective and Non-Elective Contexts

Importantly, although political activities rules of the type at issue in this case are perhaps most often discussed and analyzed in the context of judicial elections, the important protections from improper political influence that they provide also apply to all sitting judges, regardless of how they are selected. *Cf. White I*, 536 U.S. at 808 (Ginsburg, J., dissenting) ("The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." (quoting *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992))). This general applicability – to both judicial candidates and sitting judges, whether elected or appointed – distinguishes these rules from the "announce clause" at issue in *White I*. In *White I*, the majority held that the announce clause was not well-tailored "because it [wa]s woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms" – a concern not at issue in this case. 536 U.S. at 783.

Indeed, the importance of these rules in insulating the judiciary from partisan political forces is underscored by the fact that many states have adopted some variation of the ABA Model Code, and every state provides some limits on the political activities of judges.[3] The importance of rules ensuring judicial independence from partisan politics even outside of the electoral context is perhaps most apparent in the federal judiciary's Code of Conduct for United States Judges. Federal judges are, of course, appointed for life, and not subject to elections. Nonetheless, the Judicial Conference has seen fit to include for decades a political activities rule derived directly from the 1972 version of the ABA *Model Code*.[4] *See* Report of the Proceedings of the Judicial Conference of the United States (Sept. 1973) at 52 (reporting that the Joint Committee on Standards of Judicial Conduct authorized by the Judicial Conference chose to adopt, in large part, the ABA *Model Code*'s political activities rule). That rule, which is now Canon 5 of the Code of Conduct for United States Judges, prohibits judges from, among other things, making speeches on behalf of political organizations or candidates, publicly

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[3] *See* Am. Bar Ass'n, *Comparison of ABA Model Judicial Code and State Variations, Rule 4.1* (Feb. 3, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/4_1.authcheckdam.pdf (comparing state rules modeled on the ABA Model Code). Other states, while not adopting the model code, nevertheless place limits on judicial political activity. *Cf.* Ala. Canons of Judicial Ethics, Canon 7 ("A judge or judicial candidate shall refrain from political activity inappropriate to judicial office.").

[4] The 1972 ABA *Model Code*, in turn, was based upon, and was largely a reworking of, the original 1924 *Canons of Judicial Ethics*.

endorsing or opposing political candidates, soliciting funds for or contributing to political organizations or candidates, and otherwise engaging in political activity – the exact range of conduct prohibited by the Arizona provisions challenged here. *See* Code of Conduct for United States Judges, Canon 5.

The adoption of these rules by the federal judiciary, as well as by those states that have eschewed judicial elections, highlights that the interests sought to be furthered by political activities rules reflect the broad purpose of protecting the independence of judges from the pressures of partisan politics. *See In re Raab*, 793 N.E.2d at 1291 n.4 (recognizing that, in promulgating Canon 5, "[t]he federal government . . . perceive[d] the importance of shielding the federal judicial system from political influence and corruption and the appearance of political influence and corruption").[5]

III. ARIZONA'S CODE OF JUDICIAL CONDUCT IS AN ESSENTIAL COMPONENT OF ITS NONPARTISAN JUDICIAL ELECTION SYSTEM DESIGNED TO PRESERVE JUDICIAL INTEGRITY

States should not be required to suspend these generally applicable judicial rules simply because they have chosen to have an elected judiciary. States have long pursued the goal of judicial integrity through reforms to the processes of selecting, retaining, and regulating their judges – including the adoption of judicial

[5] In addition to these rules specific to the judiciary, the federal government and the states place limits on the political activities of government employees. Those rules have been upheld against constitutional challenge. *See, e.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973).

elections – and the political activities rules are an important component of this broader regime. For the same reason, states should not be required to excuse judicial candidates from the standards by which the judicial branch is regulated, which would result in an uneven playing field in judicial elections, as sitting judge candidates and non-judge candidates would be held to different standards.

Judicial codes of conduct, which have been adopted by nearly every state, as well as the federal judiciary, are a continuation of the states' longstanding efforts to "create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *See White I*, 536 U.S. at 808 (Ginsburg, J., dissenting) (internal quotation marks omitted). At the state level, judicial elections, and later, nonpartisan elections, emerged as an attempt to assert judicial independence from the other branches of government – the same values underlying the adoption of the political activities rules. After recognizing that judicial elections alone could not ensure judicial independence, many states enacted additional measures to bolster such independence, including rules regulating political activities. None of the reform measures alone is sufficient to remove politics from the judiciary; instead they work collectively to bolster judicial independence by helping insulate the judiciary from political forces and partisanship.

A. States Turned to Judicial Elections in Order to Promote Judicial Independence

An independent judiciary has been a fundamental principle of government since the founding of the United States. *See* 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."); *N.C. Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008) ("The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that 'the complete independence of the courts of justice is peculiarly essential' to our form of government.").

Early state constitutions provided for various models of judicial selection that were designed to prevent judges from being beholden to any single executive or other political entity – systems that included executive appointment and legislative consent, legislative election, and long periods of tenure. *See* Brief of Amicus Curiae Professor Jed Shugerman in Support of Respondent at 4, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (No. 13-1499), 2014 WL 7366053. These systems, however, ultimately failed to protect against the political branches' interference with the judiciary: "[B]y 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." *Id*.

States began adopting judicial elections in the mid-nineteenth century in an effort to insulate judges from other political actors.[6] *See* Wendy R. Weiser, *Regulating Judges' Political Activity After* White, 68 Alb. L. Rev. 651, 676 (2005). Although judicial elections placed selection of judges in the public's hands, similar to that of the political branches, the "move for judicial elections was by no means an effort to make the judiciary like the other branches, but instead, an effort to elevate the judiciary and make it more independent of other branches so that it could better render justice." Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 Ind. L. Rev. 659, 660 (2002); *accord* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Studies 431, 447 (2004) (the move to elections was "intended,

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[6] Between 1847 and 1910, 20 of the 29 then-existing states switched to judicial elections, and all 17 states that joined the Union in that time adopted judicial elections. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Studies 431, 436 (2004). Arizona, which gained statehood two years later in 1912, adopted judicial election for all judges upon admission to the Union. *See* Nat'l Ctr. for State Courts, *History of Reform Efforts: Arizona*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=AZ (last visited June 12, 2015). In 1974, Arizona switched to merit selection for all judges except superior court judges in smaller counties. *Id*.

first and foremost, to provide judges with an independent base of power that would enable them to stand up to legislative pressure"); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 205 (reformers "intended the elective system to insulate the judiciary . . . from the branches that it was supposed to restrain"). "[W]hat was desired by the reformers" in the move to judicial elections "was an independent court, not a court subject to the popular will." Hanssen, *supra*, at 447; *cf. Williams-Yulee*, 135 S. Ct. at 1667 ("States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227–28 (7th Cir. 1993) (Posner, J.) ("We do not understand the plaintiffs to be arguing that because Illinois has decided to make judicial office mainly elective rather than . . . wholly appointive, it has in effect redefined judges as legislators or executive-branch officials. . . . Judges remain different from legislators and executive officials, even when all are elected.").

B. Arizona and Other States Adopted Nonpartisan Judicial Elections and Political Activity Rules to Further Protect Judicial Integrity

Judicial elections, however, did not succeed in ensuring judicial independence, as elections brought with them a significant role for the political parties and the potential for corruption. *See* Weiser, *supra*, at 676 ("Instead of making judges completely independent from politicians, judicial elections in many

states had caused judges to become responsive to the same political forces that dominated legislatures." (internal quotation marks omitted)); Renee L. Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 Geo. Mason L. Rev. 109, 118 (2007) ("Far from removing judges from politics . . . , judicial elections and short terms put some New York City judges under the influence of corrupt party bosses."). Partisanship was a particular problem for judicial independence: Political parties in many states were effectively able to select judicial candidates because of their strangleholds over electoral systems. *See* Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 Rutgers L. Rev. 1027, 1032–33 (2001). And judges were frequently subject to accusations of party treason because of decisions thought to be "contrary to the interests of" the party that endorsed them. *See Moon*, 288 N.W. at 581–82 (Loring, J., concurring).

In response to these ills, the Progressive Movement at the turn of the century – a movement that largely sought to eliminate the influence of political machines from the political system – successfully prodded states to adopt further reforms to insulate judicial elections from politics and partisanship, including fixed terms for

judges, staggered terms, and, most significantly, nonpartisan judicial elections.[7] *See* Hanssen, *supra*, at 446–47; Lerner, *supra*, at 141–43 (discussing New York's reforms, including extension of judicial terms, and noting that "[t]he words 'permanence' and 'independence' occur repeatedly in the [Convention] debates on this topic"). In short, rather than return to a patronage system that had proven inadequate to protect judicial independence, the focus in many states –including Arizona – in the last century has been to preserve an electoral selection system that promotes judicial integrity and to adopt constraints on partisan conduct that threatens judicial independence.

Nonpartisan elections were a particularly important development: Like the advent of judicial elections themselves, the move to nonpartisan judicial elections was "motivated by the desire to ensure the judiciary's independence" – in this case, "not only from the legislatures, but also from the political forces they represented." Weiser, *supra*, at 676. As one justice on the Minnesota Supreme Court explained, nonpartisan judicial elections were designed to "lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions." *Moon*, 288 N.W. at 581 (Loring, J., concurring).

[7] Between 1910 and 1958, 17 of 46 existing states switched to nonpartisan judicial elections, and one of the two new states to join the Union – Arizona – adopted nonpartisan judicial elections. Hanssen, *supra*, at 436–37.

However, even the move to nonpartisan judicial elections failed to insulate judges from the perils and pressures of partisan politics. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 869 (8th Cir. 2001) (noting that, in the 1930s, "merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement"), *rev'd sub nom White I*, 536 U.S. 765; Hanssen, *supra*, at 451 ("Nonpartisan elections for public officials also disappointed, as party machines proved nearly as adept as before at capturing the candidates.").

The American Bar Association's development of the *Canons of Judicial Ethics*, first adopted in 1924 as an aspirational model for judicial conduct, was a significant step towards promoting the goal of judicial integrity promised by judicial elections. Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 Geo. J. Legal Ethics 441, 450 (2006). Two of those rules – Canons 28 and 30[8] – specifically addressed

[8] Canon 28 read:

> While entitled to entertain his personal views or political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement

the political activity of judges, and effectively prohibited them from engaging in political activity. *See* Berness, *supra*, at 1035. Those rules were subsequently

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> of candidates for public office and participation in party conventions.

Canon 30 read:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.
>
> While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.
>
> If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.
>
> He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Am. Bar. Ass'n, *Canons of Judicial Ethics* (1924), *available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf.*

adopted in forty-three states – both states that had adopted judicial elections,[9] and states that relied on other methods to choose judges.[10]

The *Canons of Judicial Ethics*, and the ABA's *Model Code of Judicial Conduct* that replaced it in 1972, were a continuation of the century-old effort to ensure judicial integrity and independence from partisan politics. As commentators have noted, the codification of "traditional limitations on the political activities of judges" was the ABA's and the states' attempt to "remain[] committed to elective judicial selection systems" and the independence from political branches promoted by elective systems, while at the same time "limit[ing] the political activity of judges" to ensure that the downsides of judicial elections – namely, vulnerability to partisan politics – did not undermine the goals of an impartial and independent judiciary. *See* Berness, *supra*, at 1035. That the rules were adopted in an overwhelming majority of states suggests that states viewed them as a "mediating influence against the political and social pressures inherent in an elected judiciary." Sparling, *supra*, at 450.

As this brief history shows, when nonpartisan judicial elections on their own proved, like partisan elections, to be insufficient to maximize judicial

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[9] For example, Arizona, a judicial election state, adopted the ABA's rules in 1956. *See* Keith Swisher, *The Short History of Arizona Legal Ethics*, 45 Ariz. St. L.J. 813, 818 & n.11 (2013).

[10] *See supra* Part II.B (discussing importance of rules in both judicial election and judicial appointment jurisdictions).

independence, the states determined that rules directly prohibiting judges from engaging in political activities were necessary to protect and promote judicial integrity. These rules, which helped states avoid the pitfalls and dangers that proved to otherwise accompany judicial electoral politics, must be considered in the context of this "integrated system of judicial campaign regulation" that Arizona, and so many other states, have developed over the course of more than 150 years. *See White I,* 536 U.S. at 812 (Ginsburg, J., dissenting). Just as the political activities rules promote judicial integrity in unelected systems, they are likewise a critical component of nonpartisan electoral systems, enhancing the independence sought by states that chose to adopt judicial elections. As such, the rules are properly tailored to preserving and promoting judicial integrity in the face of the omnipresent pressure of partisan politics.

****

Striking down Arizona's political activities rules would call into question the constitutionality of such rules in all jurisdictions – including the well-established federal rules that have, so far as we know, never been subject to constitutional challenge. At a minimum, a ruling invalidating Arizona's canons would prevent those states that have judicial elections from enforcing rules designed to generally protect judicial integrity and independence, effectively forcing those states to choose between having judicial elections and taking other steps to protect judicial

integrity. Either outcome would be contrary to well-established case law recognizing the rights of states to enact rules to promote judicial integrity, *see supra* Part I. And to single out states, like Arizona, that utilize judicial elections, would place onerous conditions upon the recognized ability of states to set forth the means for selecting their own judiciary, and undermine Arizona's policy choice to utilize elections as a mechanism for protecting judicial independence and the integrity of the courts. *See Williams-Yulee*, 135 S. Ct. at 1662 ("Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls.").

CONCLUSION

For the reasons set forth above, *amici* respectfully request that this Court affirm the District Court's judgment and uphold the constitutionality of Arizona's rules protecting nonpartisan judicial elections.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Cir. R. App. P. 40-1(a), I certify that this brief contains 5,947 words. This brief has been prepared using Microsoft Word in Times New Roman 14-point font size. This brief has been scanned and is virus free.

/s/ Richard Ziegler
Richard Ziegler

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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