

No. 10-238

IN THE
Supreme Court of the United States

JOHN MCCOMISH *et al.*,
Petitioners,

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY
AS ARIZONA SECRETARY OF STATE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE,
13 FORMER CHIEF JUSTICES AND JUSTICES,
AND ONE FORMER TRIAL JUDGE
IN SUPPORT OF RESPONDENTS**

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**BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE,
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STATEMENT OF INTEREST¹

This brief is filed by Justice at Stake, 13 former chief justices and justices of state supreme courts, and one former state court trial judge.

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Justice at Stake is a nonpartisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake and its partners educate the public and work for reforms to keep special interest pressure out of the courtroom.²

Amici curiae include former or retired judges from 10 states:

Arkansas:	Justice David Newbern
Georgia:	Chief Justice Norman Fletcher
Indiana:	Justice Theodore R. Boehm
Louisiana:	Justice Harry T. Lemmon
Michigan:	Chief Justice Conrad L. Mallett, Jr. Justice Charles Levin
Montana:	Justice John Sheehy
North Carolina:	Chief Justice James Exum, Jr. Justice Willis P. Whichard
Pennsylvania:	Chief Justice Emeritus John P. Flaherty
Washington:	Chief Justice Richard Guy Chief Justice Robert Utter Judge Robert H. Alsdorf
Wisconsin:	Justice Janine P. Geske

² The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

Amici curiae are all committed to preserving judicial independence and integrity.

The majority of state judges are subject to some election process, and *amici curiae* believe that public financing of judicial elections is one of the best ways to eliminate corruption and the perception of corruption from judicial campaigns. Public financing thereby protects the government's compelling interest in maintaining an independent and well-respected judiciary. Because this Court's decision could directly affect the ability of states to implement fully functioning public financing systems in judicial elections, *amici curiae* write to underline the risks posed to the judiciary if the portion of Arizona's Citizens Clean Elections Act at issue in this case is overturned.

Justice at Stake and its partners believe that democracy depends on fair and impartial courts that can protect individual rights, guarantee equal justice, and make decisions based solely on the facts and the law—without fear of intimidation or demands for special treatment. Justice at Stake partners and allies have come together to help Americans keep special interests and political pressure out of the courtroom.

SUMMARY OF ARGUMENT

In response to the rising tide of money flooding into judicial elections, Justice at Stake and its allies write to emphasize that invalidating the triggered matching funds provision of Arizona's Citizens Clean Elections Act may lead to the collapse of public financing systems for judicial elections that have been implemented in other states.

A deluge of special interest money is eroding public trust in America's courts. Judges in the majority of the states are elected, and the cost of these elections has reached unprecedented levels. The public is increasingly skeptical of justice rendered by a system where the litigants are often the primary donors to the judges' campaigns. The public believes that campaign contributions directly impact the way judges decide cases, and the data indicate that this perception may be accurate. As a result, many litigants feel that they must contribute to judges' campaigns, lest their opponents obtain an advantage. The flood of money in judicial elections has dangerously politicized judicial races and has threatened the integrity of the judiciary.

Public financing eliminates the need for judges to "dial for dollars" from major contributors, many of whom appear before them in court. It is therefore one of the most powerful reforms in shielding courts from special-interest influence. In states where it has been used, there is no evidence that public financing has chilled anyone's free speech rights. There is evidence, however, that candidates and voters alike find that public financing of judicial elections provides an indispensable mechanism for combating the erosion of trust in America's courts.

ARGUMENT

Public concern over the effects of skyrocketing judicial election spending has risen along with the costs of those elections. As a result, in recent terms this Court has seen numerous cases dealing with state and federal laws that seek to mitigate the harmful effects of campaign contributions in elections generally, *see, e.g., Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010); *Davis v. Federal*

Election Comm'n, 128 S. Ct. 2759 (2008), and with corruption concerns arising from substantial contributions to judicial campaigns in particular. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). These cases have helped highlight concerns uniquely associated with the rising tide of money in judicial elections.³

Public financing systems seek to minimize corruption and the appearance of corruption by eliminating or reducing the amount of money elected judges must raise from potential litigants. Minimizing corruption and the appearance of corruption remains, more than ever, an important government interest. *See Citizens United*, 130 S. Ct. at 901 (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). Striking down the triggered matching funds provision of Arizona's Citizens Clean Elections Act will threaten the viability not only of Arizona's public financing framework, but also the public financing systems for judicial elections in other states whose laws are similar to Arizona's.⁴

³ *See, e.g.*, Brief of Justice at Stake *et al.* as *Amici Curiae* Supporting Appellee, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), No. 08-205, 2009 WL 2365225 (July 31, 2009); Brief for the Conference of Chief Justices as *Amici Curiae* Supporting Neither Party, at 4, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), No. 08-22, 2009 WL 45973 (Jan. 5, 2009); Brief of Justice at Stake *et al.* as *Amici Curiae* Supporting Petitioners, *Caperton*, 129 S. Ct. 2252, No. 08-22, 2009 WL 45976 (Jan. 5, 2009); Brief *Amici Curiae* Of 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners, *Avery v. State Farm Mut. Ins. Co.*, No. 05-842, 2006 WL 295175 (Feb. 3, 2006) (*cert. denied*, 547 U.S. 1003 (2006)).

⁴ Four states have implemented systems of public financing for judicial elections. *See infra* Part II.A.

I. COSTS OF JUDICIAL ELECTIONS ARE SKYROCKETING NATIONALLY, AND WITH INCREASED COSTS COME INCREASED POTENTIAL FOR CORRUPTION AND THE APPEARANCE OF CORRUPTION.

A. Judicial Elections Occupy a Unique Position in the American Political Landscape.

Although rejected by the Framers for Article III Courts, judicial elections at the state level are not a recent innovation.⁵ Thirty-nine states currently use some form of judicial election for their appellate or trial courts,⁶ and the majority of the country's approximately 10,000 state judges are selected or retained through some variety of election.⁷ Judicial

⁵ When the Federal Constitution was adopted in 1789, all state constitutions provided for the appointment of judicial officers. Starting with Georgia in 1812, states began adopting varying systems for electing judges. By the time the Fourteenth Amendment was ratified, 24 of 34 states elected some or all judges. See Larry C. Berkson, American Judicature Society, *Judicial Selection in the United States: A Special Report*, at 2–3 (1980) (updated by Rachel Caufield in 2004), available at <http://www.ajs.org/selection/docs/Berkson.pdf>; E. Haynes, *Selection and Tenure of Judges* 99–135 (1944).

⁶ See generally American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm; see also American Bar Ass'n Standing Comm. on Judicial Independence, *Public Financing of Judicial Campaigns* 5 (2002); Berkson, *supra* note 5, at 1; Deborah Goldberg, Brennan Center for Justice at NYU School of Law, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4–5 (2002), available at <http://www.brennancenter.org/page/-/d/ji3.pdf>.

⁷ Roy Schotland, *Republican Party of Minn. v. White: Should Judges Be More Like Politicians?*, 41 JUDGES' J. 7, 9 (2002).

selection processes vary among the states. Looking just at each state's highest court, nine states select high-court judges through traditional partisan elections, in which candidates may associate themselves with a political party.⁸ Thirteen states use nonpartisan elections, in which judicial candidates cannot associate themselves with a political party.⁹ Sixteen states appoint high-court judges and then use retention elections after a specified term, allowing voters to choose whether to retain each judge; if judges are not retained, the state appointment commission typically nominates replacements.¹⁰

Judicial elections were originally intended, even as conceived in the early nineteenth century, to be different from elections for representative offices. Judicial elections sought to secure a judiciary that was “free from the corrosive effects of politics and able to restrain legislative power.”¹¹ Judges, unlike legislators, are not advocates who represent constituents, and they are not free to make campaign promises about how they will rule.¹² Rather than being partisan actors, judges are “independent constitutional officers” who “must make decisions based

⁸ American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection: Courts of Last Resort*, available at http://www.judicialselection.us/uploads/documents/Summary_Initial_Selction_1196092501390.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 *HISTORIAN* 337, 338–39 (1983).

¹² Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 *LOY. L.A. L. REV.* 1489, 1490–91 (2001).

only on the Constitution and law, applied to the facts of each case.”¹³ While voters expect legislators to be partisan advocates interested in specific outcomes, they expect judges to be fair and impartial arbiters of the law. In the words of one Tennessee state representative, judges should be “decision makers” rather than “policy makers,” and judges must therefore be able to participate in elections free of partisan rancor.¹⁴ Indeed, judges are asked to apply the law impartially even when the result may not be popular with voters.¹⁵

B. Spending in Judicial Elections Has Skyrocketed in the Last Decade.

Despite these ideals, spending in judicial elections has skyrocketed in recent years, creating the appearance that many judges are beholden to the interests of those who helped them reach the bench. The increased costs of campaigning compel judges to solicit and accept donations from current and potential litigants, augmenting concerns over corruption and the appearance of corruption. Nationally, state supreme court candidates raised and spent over \$206.9 million in judicial elections from 2000 to 2009.¹⁶ That is

¹³ Robert K. Rouse, Jr., *My Word: Judicial Election Ideas Flawed*, ORLANDO SENTINEL, Sep. 9, 2010, http://articles.orlando-sentinel.com/2010-09-09/news/os-ed-judicial-elections-myword-0909120100908_1_judicial-elections-circuit-judge-endorsements-of-judicial-candidates.

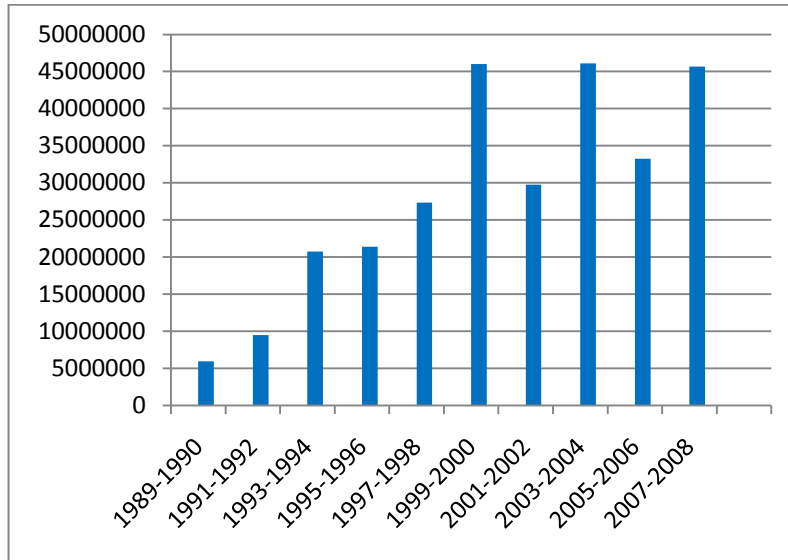
¹⁴ Matt Wilson, *Public funding studied for judge elections*, CHATTANOOGA TIMES, Jan. 25, 2007.

¹⁵ Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1472 (2001).

¹⁶ James Sample *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2000-2009* 1 (2010), available at

more than double the \$83.3 million raised for the same purpose from 1990 to 1999.¹⁷

Figure 1: Increasing Fundraising in State Supreme Court Elections¹⁸



State-specific judicial election spending records also have been smashed during the past decade. All but two of the 22 states with contestable supreme court elections had their costliest-ever contests in the

http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 5. The figures in this chart are based on Justice at Stake's analysis of contribution data maintained by the National Institute on Money in State Politics. See Nat'l Inst. on Money in State Politics, *Industry Influence Search Tool*, <http://www.followthemoney.org/database/IndustryTotals.phtml>. Data collection for the 2009-2010 judicial campaign cycle has not yet been completed.

2000-2009 decade.¹⁹ For example, in 2004, \$9.3 million was spent in the Illinois Supreme Court election, exceeding the spending in 18 United States Senate contests that year.²⁰ It was the most expensive contested judicial election in American history.²¹ On election night, even the victor, Justice Lloyd Karmeier, called the spending “obscene for a judicial race” and asked, “What does it gain people? How can people have faith in the system?”²²

More recently, several other states followed the trend set in Illinois. In 2009, a total of \$8.7 million was spent on judicial elections in Pennsylvania, Wisconsin, and Louisiana. More importantly, candidates in each race accused their opponents of being ethically tainted.²³ For example, in the 2008 Wisconsin Supreme Court race, Michael Gableman’s campaign ran television advertisements suggesting incumbent Justice Louis Butler had helped free a child rapist on a technicality when he worked as a

¹⁹ Sample, *supra* note 16, at 1.

²⁰ Deborah Goldberg *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2004*, vi (2004), available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2004.

²¹ Jesse Rutledge, ed., Justice at Stake, *The New Politics Of Judicial Elections in the Great Lakes States, 2000–2008* 1 (2008), available at <http://www.followthemoney.org/press/Reports/NPJEGreatLakes2000-2008.FINAL.pdf>.

²² Tort Reformers Score Victories in Midwest Judicial Races, INSURANCE J., Nov. 22, 2004, <http://www.insurancejournal.com/magazines/midwest/2004/11/22/features/49934.htm>.

²³ Sample, *supra* note 16, at 2.

public defender.²⁴ In reality, Butler lost an appeal on behalf of the client, and unrelated to Butler's representation, the client was later released on parole.²⁵ It was then that Butler's former client assaulted an eleven-year-old girl.²⁶ Justice Butler was ultimately unseated.²⁷ And the ad run by Gableman's campaign shows that increases in spending on judicial campaigns have been accompanied by a decrease in civility. The corrosive effect of politics has seeped into judicial races.

Independent expenditures by special interest groups frequently have exceeded spending by judicial candidates themselves. For example, in the 2008 Wisconsin Supreme Court election, third-party interest groups outspent candidates four-to-one.²⁸ Furthermore, 95% of television advertising was paid for by outside interest groups.²⁹ Special interest groups were responsible for almost nine out of every ten dollars spent during the campaign.³⁰ One corporate

²⁴ Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, MILWAUKEE J. SENTINEL, Mar. 26, 2008, <http://www.jsonline.com/blogs/news/31985659.html>.

²⁵ Sample, *supra* note 16, at 32.

²⁶ *Id.*

²⁷ Patrick Marley & Stacy Forster, *Gableman Victorious*, MILWAUKEE J. SENTINEL, Apr. 2, 2008, <http://www.jsonline.com/news/wisconsin/29406414.html>.

²⁸ See Stacy Forster, *Spending in Supreme Court Race Just Under \$6 Million*, MILWAUKEE J. SENTINEL, Jul. 22, 2008, <http://www.jsonline.com/blogs/news/31992584.html>.

²⁹ Press Release, Brennan Center for Justice *et al.*, *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), available at http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf.

group mimicked the message of Michael Gableman's campaign, attacking incumbent Justice Louis Butler in television advertisements by referring to him as "Loophole Louie" and accusing him of preferring criminals over the police.³¹

Recently, skyrocketing judicial election spending spilled into retention elections. In 2010, high-court retention elections in Illinois, Iowa, Colorado, and Alaska resulted in approximately \$4.6 million in total costs—more than twice the \$2.2 million raised nationally for all retention elections in the entire 2000-2009 decade.³² Much of this spending came from special interest groups seeking to unseat judges who disagree with their views. Like elections to fill judicial vacancies, retention elections have become costly and politicized.

Of these recent high-court retention elections, Iowa's 2010 supreme court election received the most national attention. There, out-of-state organizations poured money into a successful campaign to remove three supreme court justices who had joined a unanimous decision that legalized same-sex

³⁰ Press Release, Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), available at http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin.

³¹ Forster, *supra* note 24.

³² Press Release, Justice at Stake, *2010 Judicial Elections Increase Pressure on Courts* (Nov. 3, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_group_say?show=news&newsID=9129.

marriage.³³ Groups involved in the campaign included National Organization for Marriage, the American Family Association, the Family Research Council, the Campaign for Working Families and Citizens United.³⁴ Fueled by almost \$1,000,000 from these groups, television ads attacked the justices as being “liberal” and “activist” and accused them of “becom[ing] political [and] ignoring the will of voters.”³⁵ Not wanting to politicize the judiciary in Iowa, the justices did not raise campaign money and made few public appearances during the election. After the election, they released a statement that decried what they called “an unprecedented attack by out-of-state special interest groups” and noted that “[t]he preservation of our state’s fair and impartial courts will require more than the integrity and fortitude of individual judges, it will require the steadfast support of the people.”³⁶

That is exactly why some states have turned to public financing. Public financing may not eliminate independent expenditures by special interest groups, but it does reduce the opportunity for actual corrup-

³³ A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

³⁴ Justice at Stake, *supra* note 32.

³⁵ Linda Casey, National Institute on Money in State Politics, *Independent Expenditure Campaigns in Iowa Topple Three High Court Justices*, <http://www.followthemoney.org/press/ReportView.phtml?r=440&PHPSESSID=537afaf30e26c5e5fbacd362439dd2e9>; Press Release, Brennan Center for Justice, *New Web Site Details Spending, TV Ads for 2010* (Sep. 23, 2010), available at http://www.brennancenter.org/content/resource/new_web_site_details_spending_tv_ads_for_2010.

³⁶ Sulzberger, *supra* note 33.

tion and the appearance of corruption that emerges when donors give money to judges in front of whom they may appear as litigants.

C. The Skyrocketing Costs of Judicial Elections Erode Judicial Integrity and Independence.

This Court has recognized that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” *Mistretta v. United States*, 488 U.S. 361, 407 (1989). That reputation, as well as due process of law, relies upon the absence of actual and perceived bias or corruption. As this Court also observed, “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.” *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968). The relevance of that observation was reaffirmed in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264-65 (2009), in which this Court concluded that “there is a serious risk of actual bias...when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case. . . .”

Dramatic increases in spending in judicial elections invite suspicions of bias and corruption. As the tide of money has risen in judicial elections, so too have perceptions that contributions to judicial campaigns affect judicial decision-making.

1. The Public Believes That Money Spent on Campaigns Influences Judges' Decisions in Particular Cases.

Data repeatedly show that the public firmly believes that judicial outcomes are in fact influenced by campaign contributions:

- A 2010 Harris poll found that 71% of those surveyed thought campaign contributions had at least some influence on judges' decisions.³⁷
- A February 2009 USA TODAY/Gallup poll found that 89% of those surveyed believed that the influence of campaign contributions on judges' rulings is a problem and 52% considered it a "major" problem.³⁸
- A survey conducted in 2007 for the Annenberg Public Policy Center showed that 69% of the public believe that raising money for elections affects a judge's rulings to a moderate or great extent, and over 90% of those surveyed thought judges should be removed from cases involving an individual or group that contributed to the judge's campaign.³⁹

³⁷ *The Harris Poll National Quorum Justice at Stake Campaign, June 9–13, 2010* at 6, 12, available at http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf.

³⁸ Joan Biskupic, *Supreme Court Case With The Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

³⁹ Annenberg Public Policy Center, *Public Understanding of and Support for the Courts 3* (2007), available at <http://www.law.georgetown.edu/Judiciary/documents/finalversion/JUDICIALFINDINGSoct1707.pdf>.

These concerns have been voiced consistently throughout the last decade. For example, in 2004, 70% of those surveyed believed that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, and in 2001, 76% of those surveyed believed campaign contributions influence judges' decisions.⁴⁰

The results of these national surveys have been confirmed by the results of surveys within specific states:

- A 2011 poll showed that 79% of North Carolina registered voters thought it was a very serious problem when a judge receives campaign contributions from parties who have cases pending on which the judge might ultimately rule. Moreover, 83% of voters thought it was at least somewhat likely that campaign contributions influence the judges' rulings.⁴¹
- A 2010 poll found that 78% of West Virginians thought campaign contributions to state supreme court candidates have at least some influence on the court's decisions, and 68% thought that state supreme court candidates receiving campaign contributions from

⁴⁰ Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), available at <http://faircourts.org/files/ZogbyPollFactSheet.pdf>; Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire 4* (2001), available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

⁴¹ 20/20 Insight LLC, North Carolina Registered Voter Survey, Feb. 8–10 2011, available at http://www.justiceatstake.org/media/cms/JAS_NC_Poll_8E8BA04EDD15A.pdf.

private citizens, businesses, and interest groups whose cases they may hear is a serious or very serious problem.⁴²

- A 2008 survey in Wisconsin found that 78% of voters thought campaign contributions have at least some influence on judges' decisions.⁴³
- A 2008 statewide survey in Minnesota found that 59% felt that campaign contributions to judges have some influence on judges' decisions, and 78% were concerned about judicial candidates having to raise money, run television advertising, and potentially seek political party and special interest group support.⁴⁴

These results should not be surprising. Perceptions of a biased judiciary lead to public distrust, which in turn undermines the effective administration of justice. Justice Ming W. Chin of the California Supreme Court explained, "When judges have to rely on campaign donors to get or keep their jobs, there is

⁴² Anzalone Liszt Research, Inc., *Justice at Stake West Virginia 2010 Poll 2*, available at http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf.

⁴³ American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* (January 2008), at 4, available at http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Toplines_4BAC7C24F248C.pdf.

⁴⁴ Decision Resources, Ltd., *Justice at Stake Study Minnesota Statewide Final 5* (January 2008), available at http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf.

an inevitable public perception of judicial bias or favoritism.”⁴⁵

The perception that positive outcomes are being bought by litigants diminishes the integrity of all judicial decisions. Even James Bopp, Jr., a frequent critic of campaign finance reform, has noted that “[b]ecause courts have neither the power to levy taxes nor to command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice rather than mere political actors.”⁴⁶ See also *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002). The erosion of public confidence in the judiciary is more than an academic issue; it reflects a fundamental concern with the ongoing viability of the judicial system as we know it. Public financing systems for judicial elections seek to restore that confidence and safeguard the impartiality of the judiciary.

2. There Is a Substantial Risk That Money Spent on Campaigns Actually Affects Judicial Decisions.

The effects of judicial campaign contributions extend beyond public perception. Judges in fact remain very aware of the political pressures upon them. Former California Supreme Court Justice Otto Kaus famously observed that setting aside the political consequences of high-profile judicial decisions as an elected judge is “like ignoring a crocodile in your bathtub.” *White*, 536 U.S. at 789 (O’Connor, J.,

⁴⁵ Justice Ming W. Chin, *Judicial Independence Under Attack Again?*, 61 HASTINGS L. J. 1345, 1348 (July 2010).

⁴⁶ James Bopp, Jr. and Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DEN. U. L. REV. 195, 198 (2008).

concurring) (citing Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 UNIV. COLO. L. REV. 733, 739 (1994)). With increased pressure to raise enormous campaign war chests and renewed efforts to unseat judges over particular rulings, the jaws of that crocodile loom larger than ever.

Reports show that some campaign contributions result in positive procedural and substantive outcomes for donors, raising significant judicial integrity issues. An empirical study of state supreme court judges' voting patterns conducted by Joanna Shepherd of Emory Law School determined that "there is a strong relationship between campaign contributions and judges' voting."⁴⁷ For example, data showed that contributions from pro-business groups increased the probability that judges would vote for the business litigant in a business-versus-individual or a products liability case.⁴⁸ The study was consistent with other academic studies that "have shown that the behavior of elected judges changes as reelection approaches. The judges deviate from earlier voting patterns, impose longer criminal sentences, and side with the majority in death penalty cases."⁴⁹

An analysis of the voting patterns of the Louisiana Supreme Court confirmed these findings.⁵⁰ The

⁴⁷ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 669 (2009).

⁴⁸ *Id.* at 669.

⁴⁹ *Id.* at 648.

⁵⁰ Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10

report evaluated the voting patterns of the seven justices over 14 years and included 177 cases in which at least one of the parties had been a campaign contributor to one of the justices.⁵¹ The report found that “judicial voting patterns sharply favored the contributors’ interests.”⁵² The data showed that three of the justices voted in favor of their contributors on average 65%–70% of the time.⁵³ Moreover, the data showed that the odds that one particular justice would vote for the defendant’s position increased by nine percent with each donation of \$1000 to his campaign.⁵⁴

Other studies have shown similar results at various stages of litigation. One report demonstrated the likelihood that the Texas Supreme Court would grant certiorari to a given petition rose in conjunction with the amount the petitioner donated to the justices’ campaigns.⁵⁵ A *New York Times* report reviewed 12 years of Ohio Supreme Court merits decisions and found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved. More importantly, those justices

GLOBAL JURIST 1 (2010), available at <http://www.bepress.com/gj/vol10/iss3/art4/>.

⁵¹ *Id.* at 7.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 8.

⁵⁵ Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), available at <http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf>.

then voted in favor of their contributors 70% of the time.⁵⁶

Anonymous surveys of judges mirror the public's fear of financial influences on judicial outcomes and evince a recognition of the effect of money on judicial decision-making. For example, a 2001 survey of state judges revealed that almost half agreed that campaign donations influence courtroom decisions by some judges, and most elected high court justices reported experiencing pressure to raise campaign money during their election years.⁵⁷

Occasionally, judges have forthrightly confirmed as much. One retired West Virginia Supreme Court justice admitted:

As long as I am allowed to redistribute wealth from out-of-state companies to 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.⁵⁸

This pressure was put particularly plainly by Ohio Justice Paul E. Pfeifer: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. They mean to be

⁵⁶ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, <http://www.nytimes.com/2006/10/01/us/01judges.html>.

⁵⁷ Bert Brandenburg, *Big Money And Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 210 (Summer 2010).

⁵⁸ Joshua C. Hall and Russell S. Sobel, *Is the 'Missouri Plan' Good for Missouri? The Economics of Judicial Selection*, 15 POLICY STUDY 7, n.44 (May 21, 2008) (quoting Justice Richard Neely).

buying a vote. . . . Whether they succeed or not, it's hard to say."⁵⁹ The studies cited above indicate that they do, in fact, succeed.

The political realities of judicial elections risk shifting judges' focus from the merits of cases to the practicalities of job security. In the words of two North Carolina judges, contributors are cognizant of these realities and send judges an explicit message: "Play ball, or risk losing your job."⁶⁰ Public financing systems for judicial elections realign the focus on the administration of justice and seek to distance judges from the effects on campaign contributions.

3. Litigants Feel Pressure to Spend Money on Judicial Campaigns.

The pressures created by contributions to judicial campaigns extend to potential litigants as well. Parties feel they must contribute to judicial campaigns, lest their failure to contribute affect the outcome of cases.

Businesses in particular have felt obligated to contribute to judges' election war chests:

- A 2007 Zogby International poll of 200 business leaders found that 79% thought campaign contributions had at least some influence on judges' decisions.⁶¹

⁵⁹ Liptak & Roberts, *supra* note 56, at A1 (quoting Justice Paul E. Pfeifer).

⁶⁰ Ames Alexander, *Donations pose risks, judge says Campaign contribution can create perception of judicial influence*, CHARLOTTE OBSERVER (NC), May 18, 2005, available at 2005 WLNR 15731813.

⁶¹ Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions*

- In an *amicus* brief filed in this Court in 2006, 39 national corporations explained that they “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.”⁶²

Regardless of whether contributions actually have such an effect, the perception that they can affect an outcome directly influences individual behaviors and experiences with the judicial system. Attorneys and interested parties are mindful of the practical effects of this perception:

- A Texas lawyer worried: “With our partisan elections today, given a hard but close case, which even a biased judge couldn’t be criticized for holding either way, the judge is going to decide for the party who gave him the \$10,000 donation for his campaign chest.”⁶³
- Wallace Jefferson, Chief Justice of the Texas Supreme Court, warned in 2009: “In a close race, the judge who solicits the most money

to *Judges* 4 (May, 2007), available at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf.

⁶² Brief of Amicus *Curiae* Concerned Corporations in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006), No. 05-566, 2006 WL 42102 (Jan. 4, 2006).

⁶³ David Barnhizer, “*On The Make*”: *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATHOLIC UNIV. L. REV. 361, 379–80 (2001).

from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical."⁶⁴

- An Ohio AFL-CIO official admitted: "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."⁶⁵

Attorneys thus find themselves facing ironic ethical and strategic questions: Does the requirement of zealous advocacy on behalf of their clients demand that attorneys contribute to judges? Is it malpractice *not* to attempt to influence a case's outcome in jurisdictions where such behavior is the norm?

The influx of money into judicial elections thus perpetuates a cycle that weakens the integrity of the judicial system. Attorneys must worry whether they have contributed enough to the judge's campaign for their clients to receive a fair hearing. The perception that campaign contributions encourage positive judicial outcomes creates incentives to contribute, and those contributions further augment the pressure to add to the rising tide of money. Public financing for judicial elections seeks to break that cycle.

⁶⁴ Wallace B. Jefferson, "Why not elect judges on merit, not whim?" DALLAS MORNING NEWS, Mar. 12, 2009, http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html.

⁶⁵ Sample, *supra* note 16, at 9 (citing J. Christopher Heagarty, "The Changing Face of Judicial Elections," N.C. ST. BAR J. 19, 20 (2002)).

II. PUBLIC FINANCING IS AN IMPORTANT MEANS OF COMBATING CORRUPTION AND THE APPEARANCE OF CORRUPTION IN JUDICIAL ELECTIONS, AND THIS COURT'S DECISION WILL AFFECT THE ABILITY OF STATES TO PROVIDE PUBLIC FINANCING TO PROTECT JUDICIAL INDEPENDENCE.

A. Public Financing of Judicial Elections Fosters Judicial Independence and Strengthens Public Perceptions of Judicial Integrity.

State laws providing public financing directly address the problems of actual and perceived corruption in judicial elections. As detailed above, the influx of money into traditionally financed judicial elections has created the perception that justice may be for sale. Publicly funded candidates, however, are not seen as beholden to specific contributors, and judges elected under public financing have few opportunities to pass judgment on a litigant who helped their election effort. Likewise, judges elected with public financing need not fear that parties they rule against will contribute to their opponents in upcoming elections. Public financing preserves judicial independence while promoting discussion about candidates' qualifications rather than their politics.

Public financing lessens the pressures on judicial candidates to raise money and lessens opportunities for ethical conflicts by refocusing judicial campaigns on the qualifications of the candidates, rather than the money lining the pockets of potential donors.⁶⁶ Judicial candidates, for example, “report that full

⁶⁶ See *Brandenburg*, *supra* note 57, at 215.

public funding ‘allowed them to concentrate on connecting with voters rather than on soliciting campaign contributions.’”⁶⁷ North Carolina Court of Appeals Judge Wanda Bryant explained that she “chose to run under the new public financing system because the system is such that [she] could focus on talking with voters about [her] legal experience and qualifications instead of spending countless hours dialing for dollars.”⁶⁸ In this way, public financing promotes a dialogue between judicial candidates and voters while minimizing partisan rancor.

Currently, public financing systems in four states expressly seek to mitigate perceptions of a biased judiciary and to realign the focus of elections on candidate qualifications. North Carolina,⁶⁹ Wisconsin,⁷⁰ and New Mexico⁷¹ provide public financing for judicial elections.⁷² West Virginia will begin to offer

⁶⁷ Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L. J. 95 (2003).

⁶⁸ Wanda Bryant, *Publicly Finance Judicial Elections*, SEATTLE POST-INTELLIGENCER, Mar. 20, 2007, available at 2007 WLNR 5330089.

⁶⁹ North Carolina Public Campaign Fund, N.C. Stat. § 163-278.61 *et seq.* (West 2011).

⁷⁰ Wis. Stat. Ann. § 11.001 *et seq.* (West 2010); Impartial Justice Act, S. 40, 2009–2010 Leg. (Wis. 2009).

⁷¹ New Mexico Voter Action Act, N.M. Stat. Ann. § 1-19A-1 *et seq.* (West 2011). *See also* American Judicature Society, *Judicial Campaigns and Elections*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

⁷² *See generally* *Public Financing of Judicial Campaigns*, *supra* note 6, at 30; Brennan Center for Justice, *State Judicial Elections*, http://www.brennancenter.org/content/section/category/state_judicial_elections; Committee for Economic

public financing for candidates in the 2012 election.⁷³ Each of these states has turned to public financing specifically to address the issues discussed above. For example, West Virginia’s system is designed to “protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.”⁷⁴ Likewise, North Carolina’s law recognizes that “impartiality is uniquely important to the integrity and credibility of the courts.”⁷⁵

Public support for public financing of judicial elections is strong. A survey of West Virginia residents showed that nearly 75% of citizens favored adopting a system of public financing for statewide judicial elections.⁷⁶ Likewise, 65% of Wisconsin voters surveyed in 2008, prior to that state’s adoption of updated public financing laws, said they favored public financing for state supreme court candidates.⁷⁷

Development, *Justice for Hire: Improving Judicial Selection* 1–4 (2002), available at http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf.

⁷³ West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. VA. Code § 3-12-1 *et seq.* (West 2011); H.B. 4130, 79th Leg., 2d Sess. (W. Va. 2010).

⁷⁴ W. Va. Code § 3-12-2(9).

⁷⁵ N.C. Stat. § 163-278.61.

⁷⁶ Andrew Clevenger, *Judicial Reform Survey: Public mixed on financing Committee probing judiciary holds first meeting, at Marshal*, CHARLOTTE GAZETTE & DAILY MAIL (WV), Aug. 29, 2009, available at 2009 WLNR 17006336.

⁷⁷ American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* 3 (January 2008), available at http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Top_lines_4BAC7C24F248C.pdf.

Even 73% of national business leaders support public financing of state judicial elections.⁷⁸

The voting public thus recognizes that public financing of judicial elections safeguards the independence of the judiciary by curbing opportunities for corruption and the appearance of corruption. And given that the perception of corruption can be just as corrosive to the courts as actual corruption, such systems effectively bolster the integrity of the judiciary.

B. Public Financing Systems That Address the Practical Concerns of Judicial Candidates Benefit the Judicial System.

Public financing systems minimize the possibility that campaign contributions will lead to undue pressures upon the judiciary and the appearance of judicial corruption. But such systems can only achieve that goal if candidates elect to participate in public financing. Matching or supplemental fund provisions, such as the provision in Arizona's public financing program, are a vital element of public financing systems.

Without matching fund provisions, public financing systems are not viable alternatives to traditional systems of private funding. As the ABA Standing Committee on Judicial Independence concluded, judicial candidates, like other candidates, only will participate in public financing "if they receive public

⁷⁸ Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* 3 (May, 2007), available at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf.

funds in amounts sufficient to enable them to reach voters effectively.”⁷⁹ The ABA Committee thus concluded that “making supplemental public funds available to candidates for the purpose of enabling them to respond to speech sponsored by independent campaign expenditures is the most workable means to encourage robust debate in judicial campaigns and preserve public financing as a viable option for judicial candidates.”⁸⁰ In other words, candidates will participate in public funding systems if they have some assurance that their participation will not automatically ensure that they will be vastly outspent by their opponents.

At the same time, matching funds provisions help ensure the sustainability of the public financing system. It is not feasible for states to advance millions of dollars to all potential candidates early in an election cycle, if ever. Such a requirement, which is the primary alternative to a triggered matching funds provision, would make it impossible for states to fund public financing systems. Matching funds provisions ensure reasonable and appropriate distribution of funding, with the flexibility to provide additional funds as campaign competitiveness increases. Accordingly, each of the four states that provide public financing for judicial elections provide limited

⁷⁹ American Bar Ass’n, Standing Comm. on Judicial Independence, *Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns* 44 (2002).

⁸⁰ *Id.* at 49.

matching funds when nonparticipating candidates' expenditures reach a specified threshold.⁸¹

Systems that do not provide matching funds, or which provide inadequate funds to sustain a campaign, cannot succeed in addressing corruption because such systems are not viable for candidates. In Wisconsin, for example, where judicial elections historically have been partially publicly financed, the limited public funds became insufficient to finance the entire campaign and candidates were forced to rely heavily on supplemental private contributions.⁸² As candidates drifted away from public financing between 2000 and 2009, expenditures in Wisconsin Supreme Court elections totaled nearly \$6.7 million, and including third-party television spending, the total over the same period was \$11.5 million.⁸³ Spending reached \$8.5 million in the 2007–2008 election cycle alone.⁸⁴ In response to this dramatic increase in spending, Wisconsin recently passed a new “Impartial Justice” bill, creating a more robust system of public financing for judicial elections.⁸⁵ The new law, which is in effect for the 2011 election, provides for increased initial funding for appellate court candidates, matching funds when nonparticipating candidates outspend participants, and additional funds when third-parties make independent

⁸¹ N.C. Stat. § 163-278.67; N.M. Stat. § 1-19A-14; Wisc. Impartial Justice Act, S. 40, § 11.512(2); W. Va. Code § 3-12-11(3).

⁸² Goldberg, *supra* note 6, at 4.

⁸³ Sample, *supra* note 16, at 12.

⁸⁴ *Id.* at 2.

⁸⁵ Impartial Justice Act, S. 40, 2009–2010 Leg. (Wis. 2009); see also Brandenburg, *supra* note 57, at 216.

disbursements under certain conditions.⁸⁶ Three of four candidates for a contested seat on the Wisconsin Supreme Court already have sought and qualified for public funding.⁸⁷

North Carolina has the oldest full public financing systems for judicial elections: it was enacted in 2002 and took effect in 2004.⁸⁸ Participation in the system is high. Since it began, 77% of all candidates have enrolled in the program, with 64% qualifying to receive public funds.⁸⁹ In 2008, 11 of the 12 candidates participated in the program.⁹⁰ In the 2010 campaign, eight judicial candidates collected \$1.7 million in total funding, and 73% of this was from public funds.⁹¹ The exact opposite was true in 2002, the last election before public financing was available: in that election cycle, 73% of funding came from

⁸⁶ Impartial Justice Act, S. 40, § 11.512(2), § 11.513(2).

⁸⁷ Patrick Marley, *Three Supreme Court Candidates Will Get Public Funding*, MILWAUKEE J. SENTINEL, Jan. 13, 2011, available at <http://www.jsonline.com/news/statepolitics/113461409.html>.

⁸⁸ N.C. Ctr. for Voter Educ., Fact Sheet: The Public Campaign Fund, http://www.ncjudges.org/media/fact_sheet_pcf.html.

⁸⁹ Press Release, Democracy North Carolina, *Special-Interest Funding Declines In State Court Elections As 77 percent Of The Top Judges Qualify For Public Funds* 1 (December 21, 2010), available at <http://www.democracy-nc.org/downloads/JudicialPublicFinPRDec2010.pdf>. Candidates qualify by demonstrating support of their candidacy by obtaining qualifying contributions from at least 350 registered voters; contributions may be between \$10 and \$500. N.C. Stat. § 163-278.62, § 163-278.64. See also N.C. Ctr. for Voter Educ., *supra* note 88.

⁹⁰ Damon Circosta, N.C. Center for Voter Education, *Public Financing Not So Radical Anymore*, Feb. 2, 2009, http://www.ncvotered.com/column/2009/2_2_09_pcf_not_radical.php.

⁹¹ Democracy North Carolina, *supra* note 89, at 1.

interested individual donors.⁹² That is to say, where before 73% of funding came from donors who could later have a case before the elected judges, now the result is reversed: 73% of funding comes from the agnostic public pool.⁹³ Participation in the system has not disadvantaged candidates; since 2003, 39 candidates qualified for public funds, and 19 won their elections.⁹⁴ In the words of Judge Bryant: “It makes all the difference. I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’ any day, anytime, anywhere.”⁹⁵

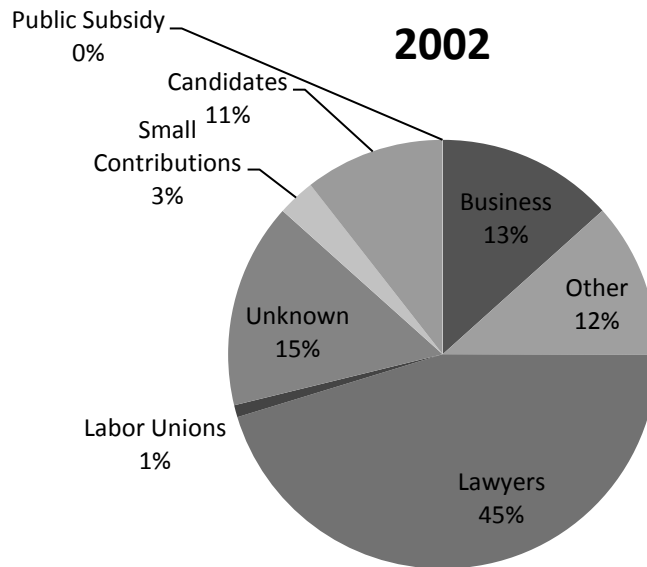
⁹² *Id.*

⁹³ For a comparison of the sources of campaign contributions in the 2002 and 2008 elections, *see* Figures 2 and 3.

⁹⁴ Democracy North Carolina, *supra* note 89, at 3.

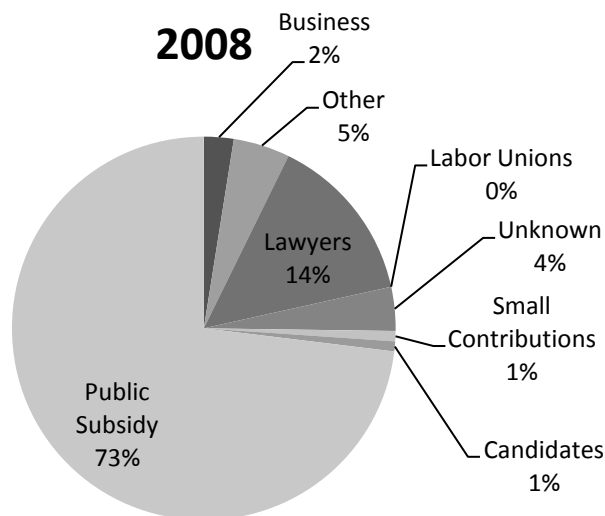
⁹⁵ Brandenburg, *supra* note 57, at 215.

Figure 2: Sources of North Carolina Judicial Campaign Contributions, 2002⁹⁶



⁹⁶ The figures in this chart are based on Justice at Stake's analysis of contribution data maintained by the National Institute on Money in State Politics. See National Institute on Money in State Politics, *Industry Influence Search Tool*, <http://www.followthemoney.org/database/IndustryTotals.phtml>.

Figure 3: Sources of North Carolina Judicial Campaign Contributions, 2008⁹⁷



North Carolina’s public financing system has succeeded in encouraging, rather than chilling, speech in judicial elections. Accordingly, the Fourth Circuit rejected a challenge to the constitutionality of North Carolina’s public financing system. *North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008), *cert. denied* 129 S. Ct. 490 (2008). The court held that the system’s triggered matching funds provision was not coercive and that candidates who do not participate in public financing “remain free to raise and spend as much money, and engage in as much political speech, as they desire.” *Id.* at 436, 441. Moreover, the court noted that the goals of the system reflected traditional and long-held

⁹⁷ *Id.*

values: “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.... [T]he provisions challenged today... are within the limits placed on the state by the First Amendment.” *Id.* at 441.

The continued success of public financing for judicial elections relies on the states’ ability to design systems that encourage participation through provisions that address campaign realities. If this Court were to invalidate the triggered matching funds provision of the Arizona Citizens Clean Elections Act, states such as North Carolina, Wisconsin, and West Virginia may not be able to sustain their systems, which promote and protect the impartiality and independence of the judiciary. Simply put, stripped of the option to create matching fund provisions, states will find it more difficult to create sustainable public financing systems for judicial elections.

CONCLUSION

The rising tide of money flowing into judicial elections shows no sign of abating. As that tide rises, so too does public skepticism regarding the impartiality of the judiciary. Justice O’Connor has observed that “[j]udicial independence does not just happen all by itself. It is tremendously hard to create, and easier than most people imagine to destroy.”⁹⁸ Invalidating the triggered matching funds provision of Arizona’s public financing system threatens the ability of states to preserve and protect this

⁹⁸ Sandra Day O’Connor, *A Fair, Impartial and Independent Judiciary*, Nat’l Voter, Feb. 2008, at 7, 8, available at <http://www.lwv.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=10515>.

crucial judicial independence. At a minimum, it will have a chilling effect on the efforts of other states to establish viable alternatives to the spending arms race in judicial elections.

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