Court of Appeals
of the
State of New York

In the Matter of

IRA J. RAAB, a Justice of the Supreme Court of Nassau County,

Petitioner,

- against -

STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

- and -

In the Matter of

WILLIAM J. WATSON, a Judge of the Lockport City Court, Niagara County,

Petitioner,

- against -

STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW ET AL.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are the Brennan Center for Justice at NYU School of Law and other national and statewide organizations working to promote and preserve judicial fairness and impartiality. *Amici* have an interest in this case because Petitioners are attacking canons of judicial conduct (the "Canons") that safeguard the independence of the courts and protect each litigant's right to an impartial tribunal. Weakening of the Canons also undermines the already eroding public confidence in the integrity of state courts. The specific interests of each *amicus* in the questions presented in these cases are set forth in greater detail in the appendix.

SUMMARY OF ARGUMENT

1. The Canons should not be judged under the so-called "strict scrutiny" test. Judge Watson and Justice Raab contend the Canons burden their fundamental rights. Even assuming this is so, the Canons also safeguard equally fundamental rights of the persons who appear before the courts. The Canons serve at least three interests of constitutional magnitude: the right of litigants to impartial courts; the preservation of liberty through the separation of powers; and public confidence in the courts' fairness, which is necessary both to the rights of individual litigants and to the functioning of the judiciary itself. This Court and the United States Supreme Court have held that states may regulate the conduct of public officials, including judges, in order to guarantee both the fact and the appearance of evenhanded application of the law, and that such regulations need not satisfy strict scrutiny.

2. The federal and state Constitutions permit New York to prohibit sitting judges from engaging in partisan politics, other than their own re-election campaigns. The belief that justice requires the insulation of judges from considerations of party and politics is enshrined in Article III of the United States Constitution and Article VI of the New York

Constitution. It has been a part of every major system of judicial ethics in this country. The Canons recognize that before election to the bench, most judges will have led active public lives. Prior political activity is no bar, and judicial aspirants are permitted to engage in further political activity inherent in their own candidacies for elected judgeships. What the Canons merely constrain political activity by judges while in office, which is necessary to safeguard judicial independence.

3. The Canons are also constitutional insofar as they regulate the conduct of campaigns for judicial office. Litigants do not have a right to win, but they do have a right to be heard by impartial courts. The United States Supreme Court has held that candidates must be permitted to "announce" their views. That does not mean that candidates may indicate that they will refuse to consider opposing arguments and evidence, much less that they can never be persuaded by the views of certain litigants or classes of litigants. The Canons preclude Pyrrhic campaigns in which the victor is left in charge of a court that does not include the minimal elements of what it means to *be* a court.

4. Finally, New York's decision to hold partisan judicial elections does not forfeit the state's right—or its obligation—to provide fair courts. Judicial impartiality is not a mere policy choice; the Fourteenth Amendment requires it. Direct election of judges has coexisted with independent state judiciaries for nearly two centuries. Even in the federal system of lifetime appointment, many excellent judges have had to leave behind their previously vigorous partisan lives when they accepted judicial office. They show by example that involvement in politics does not leave an indelible "taint" incompatible with the judicial role. Rather, in both elective and appointive systems, the public rightly expects individuals to disentangle themselves from politics once they become judges. Having

adopted a partly elective system, New York can reasonably conclude that allowing party nominations gives voters useful information in making their choices.

ARGUMENT

I.

The Canons Challenged By Petitioners Should Not Be Subjected To "Strict Scrutiny."

Both Judge Watson and Justice Raab contend that the Commission's decisions punish them for the content of their speech and must therefore satisfy the so-called "strict scrutiny" test of constitutionality. This Court's precedents refute Petitioners' contention.

Before turning to what this Court has said, however, it is important to examine what the United States Supreme Court has *not* said. In the leading case relied on by both Petitioners, the high court did not analyze whether the "Announce Clause" of Minnesota's canons must satisfy strict scrutiny; rather, the parties assumed that strict scrutiny applied. *See Republican Party of Minn. v. White*, 536 U.S. 765, ___, 122 S. Ct. 2528, 2534 (2002). The Supreme Court expressly disavowed any holding that the same constitutional rules must apply to judicial elections as to elections for political office. *Id.* at ___, 122 S. Ct. at 2539. Finally, *White* said nothing at all about regulation of sitting judges (other than those running for re-election), so whatever that case implies for New York's Canons in the election context, it does not state the standard of review for the Canons as applied to those judges who are not currently candidates.

Strict scrutiny does not and cannot adequately weigh the competing constitutional interests at stake in the regulation of both sitting judges and judicial candidates. The First Amendment interests claimed by Petitioners are counterbalanced by the equally—if not more—fundamental rights of the litigants who appear before them. It is thus inappropriate to require the Canons to be the least intrusive possible regulation of Petitioners'

conduct, to the detriment of the rights of those over whom Petitioners have actively sought to sit in judgment. Both this Court and the United States Supreme Court have recognized that strict scrutiny does not apply to regulations that seek to ensure evenhanded application of the law by judges and other officials, even when the regulations burden the officials' speech and associational rights to some extent. *E.g.*, *Golden v. Clark*, 76 N.Y.2d 618, 628-30 (1990) (applying rational basis standard to provision barring holders of high city office from specified party activity); *accord United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564-65 (1973) (upholding on political activities of federal employees by deferring to "balance" struck by Congress between employees' interest in speech and government's interest in impartial execution of the law).

The vital interests that the Canons protect are so well-established as to be beyond dispute. Most obviously, the Canons protect the right of all persons who come before New York's courts to be heard by an independent and impartial tribunal. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). That states have a compelling interest in maintaining fair courts has never been seriously doubted. "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring). Chief Justice Rehnquist has described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government today." William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 273-74 (1996). Judges "must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or 'the home crowd' wants." Ruth

Bader Ginsburg, *Remarks on Judicial Independence*, 20 Hawaii L. Rev. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 Pepperdine L. Rev. 227, 229-30 (1980)).

We do not require litigants to put all their faith in judges' striving to do what is legally right; the Constitution guarantees them a judicial system that, to the extent possible, does not tempt judges to do otherwise. *See Withrow v. Larkin,* 421 U.S. 35, 47 (1975) (discussing circumstances in which "the *probability* of actual bias on the part of the judge . . . is too high to be constitutionally tolerable") (emphasis added); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.") (quotation marks omitted). Fairness requires not only that judges remain impartial as between the particular persons appearing before them, but also that they not become so entangled in partisan politics that their independence can be questioned. "It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion).

The Due Process Clause is not the only interest of constitutional magnitude served by the Canons. As is shown most plainly in Justice Raab's case, the Canons limit judges' freedom of action in order to safeguard the separation of powers that is the essence of our constitutional order. *See Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."). The *White* Court noted that the

parties had not explained what they meant by "independent," as distinct from "impartial," courts. 536 U.S. at ___ n.6, 122 S. Ct. at 2535 n.6; *see also Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, __, 2003 WL 366467, at *13-*14 (N.D.N.Y. Feb. 20, 2003). Judicial independence means something more than impartiality as to particular parties, or even as to particular legal issues. It means, at least, that the judiciary is neither dominated nor controlled by the political branches, and that it is disentangled from the forces that influence those branches' policy choices. If judges answer to political parties and electoral majorities to the same degree as legislators, the courts risk becoming mere shadow legislatures. They would lose the distinct character necessary for the non-legislative work of judging and for discharging their constitutional duty of judicial review.[1]

The principle of judicial independence as a crucial component of the separation of powers is enshrined in Article III of the federal Constitution and Article VI of the New York Constitution. For example, the state Constitution forbids judges of the Court of Appeals, the Supreme Court (including the Appellate Division), and other courts of superior jurisdiction from holding office in a political party or being members of the governing or executive agencies of political parties. N.Y. Const. art. VI § 20(b)(3). This and other sections of Article VI "seek to minimize the involvement of the judiciary in the

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

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

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

political process and the possible influences such exposure might bring with it. (N.Y. Temp. Comm. on Constitutional Convention, Pamphlet 12 [1967].)." *Hurowitz v. Bd. of Elections*, 53 N.Y.2d 531, 534 (1981); *see also West Virginia ex rel. Carenbauer v. Hechler*, 542 S.E.2d 405, 419 (W. Va. 2000) ("Critical to understanding the imperative that the judiciary be separated from politics, other than as may be required for the purpose of elections, is an appreciation of the dangers presented by commingling politics with the judiciary."). The idea of insulating judges from partisan politics did not originate with the Canons. It is how our organic law defines the judiciary.

Finally, beyond the fact of judicial impartiality and independence, litigants and the state have a constitutional interest in the judiciary's being seen to be impartial and independent. For the individual litigant, "the appearance of even-handed justice . . . is at the core of due process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). For the effective functioning of the judiciary itself, the appearance of impartiality and the public's confidence in courts' fairness is almost as important as the reality of fairness. *See Mistretta v. United States,* 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). When individuals seek judicial office, they accept the duty to maintain both the reality and the perception of impartiality and independence. *See Cox v. Louisiana,* 379 U.S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public.").

Resolving challenges to the Canons is not a matter of weighing the state's mere policy preferences against the Petitioners' constitutional rights. The interests served by the Canons are themselves of constitutional magnitude, and the standard of review applied to

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

II.

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

The "least restrictive means" approach is especially unsuited to addressing the Canons' restrictions on the political activities of sitting judges, as in Justice Raab's case, for two reasons. First, the judges' own First Amendment interests are not implicated to the same degree as in the election context of *White*; and second, the case law makes clear that strict scrutiny does not apply when the government requires officials charged with the impartial application of the laws to refrain from personal involvement in partisan politics.

In *White*, it was assumed that strict scrutiny applied not only because the Announce Clause regulated speech on the basis of its content, but also because it "burdens a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office." *White*, 536 U.S. at ___, 122 S. Ct. at 2534 (quotation marks omitted). *See also id.* at ___, 122 S. Ct. at 2538 ("We have never allowed

the government to prohibit candidates from communicating relevant information to voters during an election."). The partisan activity of sitting judges, who may be years away from reelection, does not serve the important function of informing voters. Justice Raab's case in particular has little to do with the issues underlying *White*. "[T]he [*White*] decision was less about the free speech rights of judges and candidates than the information needed by voters when they choose judges." Cynthia Gray, *The States' Response to* Republican Party of Minnesota v. White, 86 Judicature 163, 163 (Nov.-Dec. 2002).

Courts routinely apply less than strict scrutiny to measures that restrict the partisan activities of public officials, including judges. For example, this Court applied rational basis review under the New York Constitution to a city charter provision barring policy-making city officials from carrying out certain functions in political parties. *Golden*, 76 N.Y.2d at 628-30. The Court found that the provision did not burden the fundamental rights of the restrained officials, the parties, or the voters. *See also Fletcher v. Marino*, 882 F.2d 605, 612-14 (2d Cir. 1989). Courts outside New York have reached similar conclusions. *See, e.g.*, *Clements*, 457 U.S. at 968, 970; *In re Buckson*, 610 A.2d 203, 223-24 (Del. 1992).

Whatever level of scrutiny is applied, the state's interest in curtailing partisan activity by sitting judges is of paramount importance. Party discipline is "repugnant to the . . . functioning of an independent judiciary." *Rosenthal v. Harwood*, 35 N.Y.2d 469, 475 (1974). Even before a judicial aspirant ascends to the bench, "[p]olitical organization leaders ought not exact a promise of party loyalty from candidates for judicial office as a condition of support, and such candidates should not make these promises in exchange for support." *Donovan v. Bd. of Elections*, 29 N.Y.2d 725, 726 (1971). "A more precise choice of words

would have replaced 'ought not' with the more accurate 'may not.'" *Rosenthal*, 35 N.Y.2d at 473. Loyalty to party is partiality to persons, an assault on the most elemental quality of a judge. *See White*, 536 U.S. at ___, 122 S. Ct. at 2535.

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

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

ABA Formal Op. 113 (1934). The principle that judges, when they are not running for office themselves, should dissociate themselves from political parties and the campaigns of other candidates has been applied time and again over the succeeding decades by high courts and ethical authorities throughout the country.[2] Politicians may become judges, as President Taft

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[2] *E.g.*, *In re McCormick*, 639 N.W.2d 12 (Iowa 2002) (publicly supporting another's candidacy for political office); *Carenbauer*, 542 S.E.2d 405 (running for different seat on same court); *In re Hill*, 8 S.W.3d 578 (Mo. 2000) (writing letter to newspaper criticizing mayor and praising police chief); *In re Glickstein*, 620 So.2d 1000 (Fla. 1993) (per curiam) (endorsing another judge for retention); *Buckson*, 610 A.2d 203 (seeking party's nomination for political office); *In re Katic*, 549 N.E.2d 1039 (Ind. 1990) (per curiam) (participating in selection of party's nominee for nonjudicial office); *Miss. Judicial Performance Comm'n v. Peyton*, 555 So.2d 1036 (Miss. 1990) (serving on party's executive committee and participating as delegate to party's national convention); *In re Kaiser*, 759 P.2d 392, 395 (Wash. 1988) (identifying family as "lifelong Democrats" in state with nonpartisan judicial elections); *In re Wright*, 329 S.E.2d 668 (N.C. 1985) (making political contributions); *In re Davis*, 291 S.E.2d 547 (Ga. 1982) (per curiam) (participating in effort to recall mayor); *In re Bennett*, 267 N.W.2d 914, 920 (Mich. 1978) (participating in another's campaign for legislative office); *Alex v. County of Los Angeles*, 111 Cal. Rptr. 285 (Cal. Ct. App. 1974) (running for political office); *In re Pagliughi*, 189 A.2d 218 (N.J. 1963) (acting as party's ward leader, joining political club, and signing and notarizing petitions for party executive committee candidates); *Mahoning County Bar Ass'n v. Franko*, 151 N.E.2d 17 (Ohio 1958) (cont'd)

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

Recognizing that judges should be drawn from people who have led active public lives, the Canons require citizens to refrain from partisan activity only when they serve on the bench. In this respect, the Canons are narrowly tailored to disentangle the function of judging from politics; thus, even if strict scrutiny applied, the Canons would survive. Rules against partisan activity are "directed primarily at the suspicion that may arise when a judge performs judicial service and at the same time engages in political activity. It does not prohibit one who has engaged in such activity in the past from accepting judicial office." ABA Formal Op. 193 (1939). This is in keeping with the essential ethical principles of the legal profession. Lawyers are expected to act zealously for each client they represent in their careers, even as they move from role to role with each engagement, but they cannot simultaneously play incompatible roles by representing clients with conflicting interests. The sin is not having once been involved in politics, but in failing to abandon that role when ascending to the bench. *See In re Maney*, 70 N.Y.2d 27, 30 (1987) (per curiam)

(cont'd)
(running for political office); *State v. McCarthy*, 38 N.W.2d 679 (Wis. 1949) (per curiam) (running for political office); ABA Formal Op. 113 (1934) (stating judge may not appear at public gathering whose purpose is to advance another's candidacy for nonjudicial office).

("[P]etitioner never really terminated his intense political involvement after his election to judicial office . . . .").

The Canons are also narrowly tailored in permitting only the exceptions to the general rule that are required to account for our state's system of electing some judges. This Court has repeatedly noted that a judge may engage only in political activity that is "necessary" and "essential" to his or her candidacy. *Maney*, 70 N.Y.2d at 30; *Rosenthal*, 35 N.Y.2d at 473-74. The exceptions "permit this limited type of activity (1) only in connection with the partisan nomination as a result of which he is to become a candidate, and (2) only during the election campaign in which he is partisan candidate." ABA Formal Op. 312 (1964). *See also* ABA Informal Op. 85-1513 (1985) (stating lawyers applying for appointive judgeships are barred from partisan political activity and making exceptions for elected judges "in recognition of the political realities involved in public elections"). Unlike the underinclusive Announce Clause struck down in *White*, the ban on partisan political activity is tailored to reach only the behavior that creates the problem and to permit what is necessary. *See White*, 536 U.S. at __, 122 S. Ct. at 2537-38. As this Court put it: "[Judges] are, in short, to be as nonpartisan as the selection of Judges by election permits." *Rosenthal*, 35 N.Y.2d at 473.

III.

The Canons' Limitations On Campaign Conduct Are Constitutional.

On one point, all parties and *amici* in *White* agreed: states may prohibit judicial candidates from promising specific results. *See White*, 536 U.S. at ___, 122 S. Ct. at 2554-55 (Ginsburg, J., dissenting) (quoting briefs). What is less certain after *White* is how far along the continuum between the permissible ban on "pledges or promises" and the

impermissible ban on "announcements" a state can go. *See id.* at ___, ___ 122 S. Ct. at 2533, 2539 (declining to opine on Commit Clause and declining to hold that states can regulate judicial campaigns only to the extent they can regulate political-office campaigns); Roy A. Schotland, Republican Party of Minnesota v. White: *Should Judges Be More Like Politicians?*, 41 Judges' J. 7, 7 (Summer 2002) (*White*'s discussion of fate of the Commit Clause is "not a model of clarity") (quotation marks omitted). The Canons must be able to regulate something beyond explicit promises to deliver specific outcomes in particular cases, for otherwise it would be far too easy to circumvent the constitutionally sound Pledge or Promise Clause. *See White*, 536 U.S. at ___, 122 S. Ct. at 2558 (Ginsburg, J., dissenting).

White discussed three kinds of impartiality, and the solution to this puzzle may lie in the third: the concept of open-mindedness. *See id* at ___, 122 S. Ct. at 2536-37. A candidate may have "views" on disputed issues and may disclose them, but once elected a judge must be able to listen to the arguments of all litigants and give each due consideration.[3] If the essence of due process is an opportunity to be heard, someone has to be listening. The touchstone of permissible regulation should be whether the candidate's words, in context, would lead a reasonable litigant to believe the candidate will likely not give fair consideration to the litigant's non-frivolous factual or legal contentions.

[3] Justice Kennedy of the U.S. Supreme Court recently reiterated the connection between judicial independence and a judicial aspirant's preserving the flexibility to be persuaded by litigants' arguments. "Calling it a danger to judicial independence for senators to insist on nominees with specific views, Kennedy made an eloquent case for a judge's highest authority still coming from 'the ability to change his mind.'" Dahlia Lithwick, *Confirmation Consternation*, http://slate.msn.com/id/2081463 (last visited April 15, 2003) (reporting on Justice Kennedy's speech at University of Virginia Law School).

In that light, a general statement of views such as describing oneself as "a law and order candidate" is permissible. *See In re Shanley*, 98 N.Y.2d 310, 313 (2002) (per curiam). On the other hand,

> [a]s a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous 'tough on crime' statement . . . the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause.

Indiana Comm'n on Judicial Qualifications, *Preliminary Advisory Op. No. 1-02*, *republished in* 46 Res Gestae 16, 17 (Jan.-Feb. 2003) ("*Indiana Advisory Opinion*"). When a candidate says he or she believe judges should never grant bail to accused criminals, that is not an announcement of the candidate's views as to what is legally correct; it is an indication that the candidate will not listen to the arguments of particular parties. *Compare White*, 536 U.S. at ___, 122 S. Ct. at 2535 (faulting Announce Clause because "it does not restrict speech for or against particular *parties,* but rather speech for or against particular *issues*.") *with Kaiser*, 759 P.2d at 396 (holding judge's campaign statements "single out a special class of defendants and suggest that [their] cases will be held to a higher standard when tried before Judge Kaiser").

This approach creates a judicially manageable standard that can be applied in specific cases. In its post-*White* analysis, the Indiana Commission on Judicial Qualifications explained:

> Expressions of a philosophy concerning the appropriate sanction for certain crimes, such as a statement that '[a]ll drunk drivers should spend some time in jail,' may fall somewhere between a pledge of future conduct and a permissible statement about how properly to address a societal problem. This statement is not necessarily inconsistent with a pledge to address each case on its merits, but certainly invites criticism on the basis that future defendants accused of that crime likely will have little faith that the judge will entertain a legitimate plea for leniency and, therefore, may seek and deserve the judge's disqualification.

Indiana Advisory Opinion, 46 Res Gestae at 17. Candidate Watson's comment about "using" bail to make Lockport "unattractive" goes further than saying what "should" happen, as in the Indiana hypothetical. Defendants appearing before Judge Watson can make arguments as to the level of bail required to ensure their appearance at trial and avert danger to the community, but they know those arguments will fall on deaf ears: Judge Watson has committed himself to applying standards different from those mandated by the law.

IV.

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

A theme of Justice Raab's brief is that New York forfeited its power to regulate judges' conduct when it instituted the practice of electing some judges in partisan elections.[4] As we shall show, there are a number of problems with this contention, but the most basic is that the due process rights of individual litigants are not New York's to forfeit. Indeed, the state is required by the Fourteenth Amendment to *guarantee* litigants an impartial court. As previously discussed, the Canons make the minimum necessary exceptions to permit candidates to contest judicial elections meaningfully. That is far different from opening the floodgates to every sort of improper conduct, let alone permitting judges to flout

[4] This theme is presumably borrowed from Justice O'Connor's concurrence in *White*. *See White*, 536 U.S. at ___, 122 S. Ct. at 2544 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."). The majority, however, disavowed any implication that by having judicial elections, a state must accept the full panoply of constitutional doctrine applying to legislative and executive elections, *see id.* at ___, 122 S. Ct. at 2539, and of course none of the Justices addressed the regulation of *sitting* judges like Justice Raab outside the election context. *See also* Schotland, 41 Judges' J. at 7 ("The majority's opinion reveals that one or more justices are unwilling or at least unready to strike more (or much more) regulation of judicial campaigns.").

the constitutional rights of those who appear before them. *See Maney*, 70 N.Y.2d at 30 (noting ethical rules apply "[n]otwithstanding that some political activity is necessary in a jurisdiction such as ours, which selects most of its Judges by public election").

Petitioners may believe that the state has an all-or-nothing choice between holding elections and having fair courts, but citizens know better. They value both direct democratic control over judicial selection and courts that are independent. An extensive national survey of public attitudes toward state courts is instructive. Respondents were asked which of the following statements came closer to their own view: (1) Courts are unique institutions of government that should be free of political and public pressure; or (2) Courts are just like other institutions of government and should not be free of political and public pressure. 78% chose the first statement. Yet 76% said judges in their state should be elected.[5] Justice at Stake Frequency Questionnaire, at 7 (2002),

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

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

Schotland, 41 Judges' J. at 10.

http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf (last visited Apr. 16, 2003) ("JAS Survey").

The public's values may be in tension, but they are not self-contradictory. "The word 'representative' connotes one who is not only *elected* by the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . The judge represents the Law—which often requires him to rule against the People." *Chisom v. Roemer*, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting). Citizens understand that judges, once they have been elected, must be able to perform their duties without favor toward any political organization and without prejudging any litigant's case. The Canons not only require judges to meet these standards but make it easier for them to do so. The ban on partisan activity means that even if a judge has had to curry favor with political parties in order to be nominated, he or she can (and must) refuse to do party service once on the bench. Without that rule, party leaders would be free to press judges to use the prestige and power of their offices to benefit the party and its candidates for political office, with the implied or actual threat of withholding renomination or support for appointment to a higher court. Restrictions on campaign speech similarly insulate candidates from demands to commit themselves to particular courses of action (and thereby, ironically, to disqualify themselves from hearing the kinds of cases on which they have committed).

There is no contradiction in the idea that a previously active partisan can perform the judicial function. The nine Justices who decided *Brown v. Board of Education*, 347 U.S. 483 (1954), comprised a former Governor of California, three former United States Senators, a former member of the Kentucky Assembly, a former Secretary of War, a former Chairman of the Securities and Exchange Commission, and two former United States

Attorneys General. *See* SUPREME COURT HISTORICAL SOC'Y, TIMELINE OF THE JUSTICES, http://www.supremecourthistory.org/02_history/subs_timeline/02_a.html (last visited Apr. 16, 2003). Their predecessor Justice Cardozo had previously been elected to the New York County Supreme Court and twice to this Court (which was at the time an elected body). He understood what his former Court later expressed: "There can be no doubt that after election a Judge has no partisan responsibility to any political party. On the contrary his responsibility is to discharge the duties of his judicial office in total indifference to any prior political affiliation." *Rosenthal*, 35 N.Y.2d at 475.[6] The rights of a citizen before seeking judicial office and the duties of a judge after a successful campaign are quite different things, and there is no reason a state must permit its judicial officers to obliterate those differences. *See* ABA Formal Op. 312 (1964) ("He should not become an active promoter of the interests of one political party as against another. This applies to appointed judges and elected judges whether or not the nomination and election is partisan or nonpartisan and extends during the entire tenure as judge."); *Signorelli v. Evans*, 637 F.2d 853, 861-63 (2d Cir. 1980) (upholding New York's rule requiring judge to resign before running for Congress). We do not *want* our judges to be ignorant of public affairs and the functioning of the political branches; but we do want them to be *judges*. It denies history to insist that these democratic impulses cannot both be satisfied.

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

An irony of Justice Raab's use of *White* to attack New York's partisan elections is that partisan elections serve precisely the constitutional function that was determinative in *White*: giving voters information about candidates. Across the country, there are noticeably fewer votes in judicial elections than in every other race on the same ballot.[7] The most common reason voters give for declining to select a judicial nominee is that they do not know enough about the candidates. JAS Survey, at 2. Almost half say they have "no information at all" or "just a little information" about judicial candidates. *Id.* at 4. One vital, and for many voters dispositive, piece of information about any candidate, judicial or otherwise, is the candidate's party affiliation. *See* Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 148, 151-55 (Stephen B. Burbank & Barry Friedman eds., 2002) (contending that party labels enhance judicial independence by providing signals about candidates' general philosophies to counter the influence of interest groups that seek to punish judges for particular decisions).

This does not mean that a judge is expected to maintain party loyalty while on the bench; as previously noted, citizens may want both to elect their judges and for the judges to behave independently once they have been elected. But in evaluating a candidate's background, particularly a candidate who is not an incumbent judge, a voter can use a shorthand label that indicates broadly whether the person's prior life reflects the values and

[7] For example, in the 2002 general election in Michigan, approximately 4.4 million votes were cast in a race for two seats on the state's court of last resort, as compared to 5.3 million votes in a race for two seats on the Wayne State University Board of Governors. *See* 2002 Official Michigan General Election Results, http://miboecfr.nicusa.com/election/results/02GEN/ (last visited Apr. 16, 2003). We are advised that a forthcoming academic study of judicial elections in 13 states from 1998 to 2000 has found that in all but one instance, state Supreme Court races drew fewer votes than every other statewide race.

experiences that the voter considers important. Perhaps the voter trusts the leadership of a particular party to make judgments about which candidates would be the best judges, or perhaps the voter believes that prior political affiliation reflects the kinds of "views" that a candidate can "announce" directly after *White*. Either way, the state's decision to use a partisan ballot neither undercuts its interest in maintaining an independent and impartial judiciary nor excuses it from its obligation to provide such a judiciary to litigants.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court to confirm the Commission's authority to enforce the Canons.

Dated: New York, New York
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APPENDIX: THE *AMICI* AND THEIR INTEREST IN THESE CASES

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

Campaigns for People promotes non-partisan campaign finance and ethics reform in Texas. The organization supports state judicial reforms in Texas that enhance judicial independence, including judicial codes of conduct and public financing of judicial campaigns. As one of the first courts of last resort in a sister State to consider the implications of the *White* case for ethical provisions other than the "announce clause," this Court's decisions may be influential in the development of the law nationwide. Accordingly, Campaigns for People takes an interest in these cases because of their potential effect on the ability of Texas to maintain both the reality and appearance of impartiality in its courts.

Democracy South is a regional network devoted to building state multi-racial, multi-issue, multi-ethnic coalitions to address issues of social, environmental, and economic justice. In the South, historically the last and only effective remedy available to racial, ethnic, and political minorities suffering injustice has often resided in an impartial judiciary that is functionally independent of the excesses of popular sentiments. Our heritage

has shown that an independent and impartial judicial system is an absolutely imperative bulwark for the defense of our democracy and the protection of our liberties. Ten states in our network select judges in elections that are showing deeply disturbing signs of growing politicization evidenced by and linked to soaring campaign costs. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Circuit Court struck down sections of Georgia's Judicial Ethics Canons that prohibited judicial candidates from making partisan and/or ideological appeals on hotly contested issues of the day. Bans on the personal solicitation of endorsements and campaign contributions by judicial candidates were also overturned. Without the restraints of judicial canons, special interests within the boundaries of the 11th Circuit can now demand that judicial candidates announce their preferences on hot button issues like affirmative action, voting rights, labor law, abortion, tort reform, or the death penalty. Judicial candidates will find these demands difficult to resist, since major campaign donations will ride on public knowledge of their political and/or ideological convictions. In the 11th Circuit no constraints remain to keep judicial campaigns from degenerating into the kind of free-for-alls typical of contests for representative office. Unchecked, such a trend will eventually erode the separation of our courts and legislatures and ultimately undermine public confidence in the fairness and impartiality of our courts. We join this brief to arrest this assault on an independent and impartial judiciary.

The Fund for Modern Courts is a non-partisan, non-profit, statewide court reform organization dedicated to improving the judicial system in New York State. Founded in 1955, and led by concerned citizens, prominent lawyers, and business leaders, Modern Courts is the only organization focused exclusively on improving the state's courts. Through advocacy and education, as well as its successful in-court programming such as the Citizens

Court Monitoring Program and the Citizen's Jury Project, Modern Courts has been instrumental in promoting effectiveness, efficiency and fairness in the administration of justice in New York State. Central to its mission is support for a nonpolitical court system which engenders public confidence in the fair and impartial administration of justice. The canons of judicial conduct of New York State further this end. Modern Courts, therefore, has a deep and abiding interest in strengthening an independent judiciary and the issues before this Court on this appeal.