No. 07-1454

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

W. RUSSEL ("RUSTY") DUKE, *et al.*,

Plaintiffs-Appellants,

v.

LARRY LEAKE, *et al.*,

Defendants-Appellees,

and

COMMON CAUSE NORTH CAROLINA, *et al.*,

Intervenors-Defendants-Appellees.

Appeal From The United States District Court
For The Eastern District Of North Carolina
No. 5:06-cv-00324-BR

BRIEF *AMICI CURIAE* OF TEN ORGANIZATIONS CONCERNED ABOUT THE INFLUENCE OF MONEY ON JUDICIAL INTEGRITY, IMPARTIALITY, AND INDEPENDENCE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are all non-profit organizations; no *amicus* has a parent corporation; no *amicus* issues stock and, consequently, there are no publicly held corporations that own 10% or more of the stock of any *amici* organization.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Legislation and Legislative History:

Miscellaneous Sources:

James Sample, Brennan Center for Justice at NYU School of Law *et al.*, *The New Politics of Judicial Elections 2006* (Justice At Stake ed., 2007), *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicial Elections2006.pdf 4, 6, 7, 8, 9, 26

Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out On Judicial Elections (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf 16

Peter Callaghan, *Why Donations in Judicial Races Demand Limits*, Tacoma News Trib., Jan. 20, 2006, *available at* http://www.thenewstribune.com/ news/columnists/callaghan/story/5459887p-4927316c.html 15

Petition For A Writ of Certiorari, *Avery v. State Farm Mutual Automobile Insurance Co.*, No. 05-842 (U.S. Dec. 27, 2005), 2005 WL 3662285.....13

Ryan Keith, *Spending for Supreme Court Seat Renews Cry For Finance Reform*, Assoc. Press, Nov. 3, 2004 7

Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm 14, 20

STATEMENT OF INTEREST

This *amici curiae* brief in support of Appellees is filed on behalf of ten nonprofit, nonpartisan organizations:[1]

- American Judges Association;
- Campaign Legal Center;
- Center for Civic Policy;
- Demos: A Network for Ideas and Action;
- Illinois Campaign for Political Reform;
- League of Women Voters of the United States;
- League of Women Voters of North Carolina;
- Progressive Maryland;
- Public Citizen, Inc.; and
- Reform Institute.

These *amici curiae* have for many years studied campaign fundraising and spending practices in judicial, legislative, and executive branch elections in states across the nation. Descriptions of each of the organizations are included in an appendix to this brief. All of the *amici* share a concern about the threat that skyrocketing judicial election fundraising poses to the integrity, impartiality, and independence of the judiciary and thus to the ability of elective state courts to guarantee due process of law to the litigants who come before them. *Amici* recognize the potential of judicial election public financing systems, like the North Carolina system at issue in this litigation, to reduce the threat of actual and

[1] Pursuant to local rules 27(a) and 29(a), counsel for Appellants, Appellees and Intervenors-Appellees have been contacted and all parties, through counsel, have consented to the participation of these organizations as *amici curiae* and the filing of this brief.

apparent corruption of the judicial system posed by large private political contributions to judicial candidates. Consequently, *amici* support Appellees in the present case and respectfully urge affirmance of the decision below.

SUMMARY OF ARGUMENT

National data show recent dramatic increases in fundraising by candidates for state judicial office. The huge and increasing influx of money into judicial campaigns nationwide presents a serious threat of actual and apparent corruption of the judicial system. With large campaign expenditures becoming a virtual prerequisite for election to judicial office from coast to coast, candidates are raising contributions from the most readily available source—lawyers and their clients with cases before the courts. As a result, confidence in fair and impartial courts is suffering.

States urgently need mechanisms through which they can further their compelling interest in combating actual and perceived corruption in the judicial system related to large private campaign contributions. North Carolina's judicial public funding program is just such a system. The public financing fund allows candidates for North Carolina appellate judicial seats to dramatically reduce their reliance on private campaign contributions by providing participating candidates with sufficient public funds to mount competitive campaigns. North Carolina's

judicial public financing system deters corruption and the appearance thereof, and is a model for judicial elections throughout the nation.

Though North Carolina was the first state to enact a system of full public financing for judicial campaigns,[2] public financing systems for elective legislative and executive offices have existed for more than three decades and have been upheld against constitutional challenge by the Supreme Court and numerous circuit courts. *See Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996). Courts have consistently recognized that public financing programs, contribution limits, and disclosure requirements—the provisions of North Carolina law at issue in this case—serve important government interests in deterring actual and apparent corruption and creating a well-informed electorate, while simultaneously advancing the First Amendment interest in vigorous, open campaign debate. The district court correctly dismissed Plaintiffs'-Appellants' claims and *amici* respectfully urge this Court to affirm the decision below.

[2] In April 2007, New Mexico became the second state to enact a judicial election public financing system, by amending its existing system of public financing for candidates for the state Public Regulation Commission. *See* N.M. STAT. § 1-19A-1 *et seq.* (West 2007).

ARGUMENT

I. THE RECENT DRAMATIC INCREASE IN STATE JUDICIAL ELECTION FUNDRAISING PRESENTS A SERIOUS THREAT OF ACTUAL AND APPARENT CORRUPTION OF JUDICIAL SYSTEMS NATIONWIDE.

Judicial candidates from coast to coast are shattering judicial election fundraising records and receiving very large contributions to do so. This increasing role of private money in judicial election campaigns threatens the public's confidence in fair and impartial courts. The state has an important interest in restoring public confidence by deterring the actual and apparent corruption resulting from large private campaign contributions. North Carolina's judicial public financing system is a constitutional means of doing so.

A. Levels of campaign fundraising are rising rapidly in the thirty-eight states that conduct elections for their supreme courts.

North Carolina is one of thirty-eight states that elect their high court justices. Deborah Goldberg, Brennan Center for Justice at NYU School of Law *et al.*, *The New Politics of Judicial Elections 2004* vi (Justice At Stake ed., 2005), *available at* http://www.JusticeatStake.org/files/NewPoliticsReport2004.pdf [hereinafter *New Politics 2004*]. The trend toward high levels of judicial campaign fundraising in those states began in the late 1990s. The 1999-2000 election cycle marked a watershed year for judicial election fundraising and spending. During the 1999-2000 cycle, state supreme court candidates raised $45.6 million—61 percent more

than was raised in the 1997-98 election cycle, and more than double the amount raised in 1994. Deborah Goldberg, Brennan Center for Justice at NYU School of Law *et al.*, *The New Politics of Judicial Elections* 7 (Justice At Stake ed., 2002), *available at* http://www.justiceatstake.org/files/JASMoneyReport.pdf [hereinafter *New Politics 2000*].

Following the watershed 1999-2000 election cycle, judicial candidate fundraising continued to climb rapidly. During the four election cycles from 1999-2006, candidates for state high courts around the nation raised more than $157 million—nearly double the amount raised by candidates during the four preceding election cycles spanning 1990-98. James Sample, Brennan Center for Justice at NYU School of Law *et al.*, *The New Politics of Judicial Elections 2006* 15 (Justice At Stake ed., 2007), *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf [hereinafter *New Politics 2006*].

During the 2003-04 election cycle, nine[3] of the twenty-one states (40%) that held entirely privately financed contested supreme court elections (*i.e.*, not including North Carolina) broke aggregate candidate fundraising records. *New Politics 2004* at 13. This percentage grew in 2005-06, when five[4] of the ten states (50%) that held entirely privately financed contested supreme court elections set

[3] Arkansas, Georgia, Illinois, Montana, New Mexico, Nevada, Ohio, Washington, West Virginia.
[4] Alabama, Georgia, Kentucky, Oregon, Washington.

state records not only for total fundraising by all high court candidates, but also for candidate fundraising in a single court race. *New Politics 2006* at 15.

Alabama is a stark example of high judicial campaign fundraising. In 2000, the race for Alabama Supreme Court justice set a judicial fundraising record of over $4.8 million, *New Politics 2004* at 32 n.35, and judicial campaign fundraising in Alabama has continued to grow rapidly. Eleven judicial candidates raised a combined $7.5 million in Alabama's 2004 Supreme Court election. *Id.* at 15. Candidates for the Alabama Supreme Court in 2006 raised a combined $13.4 million, nearly doubling the $7.5 million raised in 2004. *New Politics 2006* at 15 & n.12. Since 1993, Alabama Supreme Court candidates have raised an aggregate of more than $54 million. *Id*.

Illinois is another example of skyrocketing judicial campaign fundraising. In the Illinois 2004 race for supreme court justice, Justice Lloyd Karmeier and Judge Gordon Maag combined to raise over $9.3 million in political contributions—which remains the national judicial election fundraising record for a single seat race. *New Politics 2004* at 14-15; *see also New Politics 2006* at 15 n.12. Trial lawyers and labor unions contributed $1.2 million to Judge Maag via the Justice for All PAC, while trial lawyers also wrote six-figure checks to the Democratic Party of Illinois, which in-turn contributed approximately $2.8 million to Judge Maag. *New Politics 2004* at 19. The U.S. Chamber of Commerce routed

$2.3 million to Justice Karmeier through the Illinois Republican Party and several PACs. *Id.* Justice Karmeier himself remarked with regard to the campaign fundraising: "Basically that's obscene for a judicial race. . . . What does it gain people? How can people have faith in the system?" Ryan Keith, *Spending for Supreme Court Seat Renews Cry For Finance Reform*, Assoc. Press, Nov. 3, 2004.

Special interest groups have also played in increasingly influential role in judicial elections through independent expenditures, which are estimated to have exceeded $7 million during the 2006 judicial elections. *New Politics 2006* at 21 Fig. 13. Organizations established by the U.S. Chamber of Commerce, for example, spent an estimated $2 million to influence judicial elections in Ohio and Michigan in 2006. An organization named the Partnership for Ohio's Future, which shares a mailing address and staff with the Ohio Chamber of Commerce, raised $1.3 million to back two Ohio judicial election candidates. *Id.* at 19. The Michigan Chamber of Commerce spent more than $700,000 on television advertising in support of a judicial election candidate. *Id.* at 20. The National Association of Manufacturers, through its "American Justice Partnership" and the Partnership-supported "Safety and Prosperity Coalition," spent $1.75 million on an independent expenditure campaign supporting a candidate for the Georgia Supreme Court. *Id.* Likewise, in addition to contributing $305,000 directly to the 2006 campaign committee of Illinois appellate court candidate Justice Stephen

McGlynn (Citizens for McGlynn), the American Justice Partnership gave an additional $220,000 to two Illinois PACs spending money to influence the state's 2006 judicial elections (the Illinois Chamber PAC and JUSTPAC). *See* Illinois State Bd. of Elections Campaign Disclosure Database, http://www.elections.il.gov/CampaignDisclosure/ContribListSearches.aspx. And independent groups in Washington spent nearly two dollars in independent expenditures for every one dollar raised by a high court candidate—totaling more than $2.7 million in independent expenditures—during Washington's record-breaking 2006 judicial election campaign; both business and labor interests contributed substantially to this total. *New Politics 2006* at 20.

The rapid growth of potentially corrupting judicial candidate fundraising is, unfortunately, not limited to state high court elections. Candidate fundraising is also on the rise in elections for trial and intermediate appellate judgeships. Two candidates running for an Illinois intermediate appellate court judgeship in 2006, for example, quadrupled the previous state record by raising a combined $3.3 million. *Id.* at 24. And a Missouri 2006 trial court race attracted $175,000 in television, radio and direct mail independent expenditures from an out-of-state interest group. *Id.* at 24.

In order to achieve the high levels of fundraising now needed to be competitive, judicial candidates must increasingly depend on large contributors to

support their campaigns. And the largest contributors are often precisely those individuals and interest groups with business before the courts. For the 2006 supreme court elections, business groups contributed more than $15 million (44% of total contributions) and lawyers together with labor unions contributed more than $8 million (25% of total contributions). *New Politics 2006* at 18 Fig. 11. Further, such figures likely underestimate contributions from such interest groups, as some contributors obscure their identities by making contributions to organizations that then pass the contributions on to the desired recipient candidate. Political parties, popular conduits for interest group political contributions, contributed more than $1.3 million to supreme court candidates during the 2006 election cycle. *Id*.

This skyrocketing judicial candidate fundraising shows no sign of letting up. Judicial candidate fundraising records will continue to be broken as more interest groups come to the realization reached by an Ohio AFL-CIO official: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators." J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. ST. B. J. 19, 20 (Winter 2002), *available at* http://www.ncbar.com/journal /archive/journal%207,4.pdf#3.

B. Large campaign contributions to judicial candidates present a serious threat of actual and apparent corruption and undermine public confidence in fair and impartial courts.

The Supreme Court has repeatedly recognized a government interest in preventing actual corruption that may result from large political contributions. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 143 (2003). This interest is not limited to the prevention of *quid pro quo* transactions in which public officials explicitly accept money in exchange for votes or decisions, but includes "the broader threat from politicians too compliant with the wishes of large contributors." *Id.* (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000)). Moreover, in addition to the prevention of actual corruption, the Court has consistently recognized that "[o]f 'almost equal' importance has been the Government's interest in combating the <u>appearance or perception of corruption</u> engendered by large campaign contributions." *Id.* at 143-44 (emphasis added) (citing *Buckley*, 424 U.S. at 27; *Shrink Missouri*, 528 U.S. at 390; *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985)). The Court reasoned, "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" *Id.* at 144 (citing *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., concurring)).

Of course, the threat of actual and apparent corruption is not confined to the legislative and executive election context. Large contributions to judicial candidates arguably present an even greater threat of actual and apparent corruption—given that fairness and impartiality are cornerstones of our nation's judicial system.

1. The relationship between judicial campaign contributions and court decisions has come under increasing public scrutiny in recent years.

Unlike judicial candidates in North Carolina and New Mexico, who have the option of dramatically reducing their reliance on private contributions while retaining the ability to run competitive campaigns, judicial candidates elsewhere do not. Consequently, the relationship between large judicial campaign contributions and court decisions has come under justifiable scrutiny around the nation. Countless stories have come to light in recent years regarding the role of political contributions in the judicial process—understandably fueling the public's perception that courtroom justice has a price tag.

A recent study by the *New York Times* examining 12 years of judicial campaign finance data found that Ohio's Supreme Court justices "routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs," and that "[o]n average, they voted in favor of contributors 70 percent of the time." Adam Liptak and Janet Roberts, *Campaign*

Cash Mirrors a High Court's Rulings, N.Y. Times, Oct. 1, 2006, *available at* 2006 WLNR 16983797. One justice highlighted in the article, Justice O'Donnell, ruled in favor of his contributors 91 percent of the time. *Id.* One Republican member of the Ohio Supreme Court is quoted in the article as saying: "I've 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[.] . . . Everyone interested in contributing has very specific interests." *Id.* The justice added, "They mean to be buying a vote[.] . . . Whether they succeed or not, it's hard to say." *Id.* The article goes on to quote a retired chief justice of the West Virginia Supreme Court of Appeals, who said: "It's pretty hard in big-money races not to take care of your friends[.] . . . It's very hard not to dance with the one who brung you." *Id.*

Ohio's high court justices are not alone in their propensity to rule in favor of their campaign contributors. A petition for *certiorari* was filed with the U.S. Supreme Court late in 2005 detailing a highly controversial legal proceeding in which a candidate for the Illinois Supreme Court, Justice Lloyd Karmeier, had received more than $1 million in financial support from State Farm Mutual Automobile Insurance Company and its professional associates during his successful 2004 campaign, then refused to recuse himself from a case involving State Farm and cast the deciding vote overturning a $1.05 billion verdict against

the insurance company.[5] *See* Petition For A Writ of Certiorari, *Avery v. State Farm Mutual Automobile Insurance Co.*, No. 05-842 (U.S. Dec. 27, 2005), 2005 WL 3662285; *see also Avery v. State Farm Mutual Automobile Insurance Co.*, 547 U.S. 1003 (2006) (mem.) (denying petition for writ of certiorari). Justice Karmeier also cast the deciding vote in reversing a $10.1 billion judgment against Philip Morris USA, a company that reportedly, along with a business lobbying group backing it, spent more than $1 million supporting Karmeier in the 2004 election.

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[5] The question presented in the petition read:

> Illinois selects the judges of its highest court through partisan elections. This case reached that court on October 2, 2002 after a $1.05 billion verdict against Respondent, State Farm Mutual Auto. Ins. Co., was unanimously upheld by the Illinois Appellate Court. The case was argued before and submitted to the Supreme Court of Illinois in May of 2003. Illinois then held a regularly scheduled judicial election in November 2004 for a vacant seat on the Supreme Court. The winner of this election, then-trial judge Lloyd Karmeier, directly received over $350,000 of donations from Respondent, Respondent's Lawyers, and Respondent's *Amicus* and their lawyers. Over $1 million in additional funds came indirectly from groups with which Respondent State Farm was affiliated and a member. After his election, Justice Karmeier declined to recuse himself from this matter, and then cast the decisive fourth vote overturning the verdict against State Farm.
>
> May a judge who receives more than $1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Petition For A Writ of Certiorari *Avery v. State Farm Mutual Automobile Insurance Co.*, No. 05-842, i (U.S. Dec. 27, 2005), 2005 WL 3662285.

A newspaper editorial summed up the appearance of corruption generated by the Karmeier case:

> The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.

Editorial, *Illinois Judges: Buying Justice?,* St. Louis Post-Dispatch, Dec. 20, 2005, at B8.

A 2001 report revealed that the Texas Supreme Court was 750% more likely to grant discretionary petitions for review filed between 1994 and 1998 by contributors of at least $100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of $250,000 or more than for non-contributors. Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm.

The story behind contributions made to a judicial candidate for the Washington Supreme Court in the 2004 election makes clear that special interest contributors use political contributions not only as carrots, but also as sticks. In that election, an attorney named James Johnson defeated Judge Mary Kay Becker, a state court of appeals judge. A company called Cruise Specialists, Inc. (CSI) contributed $112,000 to Johnson's campaign, but not to any other candidate in

2004. A study for the American Judicature Society highlighted that CSI contributed to Johnson's campaign after the court of appeals, in a decision written by Judge Becker, affirmed a verdict against the company. It is difficult to see CSI's contributions as anything other than retribution against Judge Becker. As the study's author commented: "The CSI contributions send a chilling message to judges who must decide cases involving wealthy litigants." Peter Callaghan, *Why Donations in Judicial Races Demand Limits*, Tacoma News Trib., Jan. 20, 2006, *available at* http://www.thenewstribune.com/news/columnists/callaghan/story /5459887p-4927316c.html.

Moreover, solicitations for contributions by judges to attorneys and businesses can be coercive. A Nevada judge was recently censured by the state Judicial Discipline Commission for pressuring lawyers into giving him contributions for his 2002 reelection campaign. A complaint filed in 2004 with the Commission alleged that the judge, while in conference with a lawyer, suggested that the lawyer contribute to his campaign and asked another lawyer why he had attended a fundraiser for his opponent. *Former Vegas Judge Censured*, Assoc. Press Alert—Political, June 30, 2005, *available at* http://www.krnv.com/Global /story.asp?S=3546295&nav=8faObgVv.

Regardless of whether any of these instances entailed actual *quid pro quo* corruption (*i.e.*, judges deciding cases in exchange for contributions), one thing is

certain—the growing role of private money in judicial elections creates an understandable and inevitable perception that, in state courts, "large donors call the tune." *McConnell*, 540 U.S. at 144.

2. The apparent influence of judicial campaign contributions on court decisions has shaken the public's trust in the fairness and impartiality of our courts.

Skyrocketing judicial election fundraising and spending over the past decade, combined with scandals of the sort described in the preceding section, has engendered a widespread public perception that due process of law has a price tag. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 public opinion survey conducted by Zogby International. Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out On Judicial Elections (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf. More than 80 percent of the African Americans surveyed expressed this view, including 51 percent who believe that judicial election contributions carry a "great deal" of influence. *Id.*

These 2004 data are consistent with the results of a 2001 nationwide poll, in which 76 percent of those surveyed believe that campaign contributions influence judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake Frequency Questionnaire 4 (2001), *available at*

www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf [hereinafter 2001 Greenberg Quinlan Rosner Research]. According to the poll, more than 80 percent of those surveyed are concerned that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case," while 86 percent of those surveyed are concerned that "lawyers are the biggest campaign contributors to judicial candidates, and they often appear in court before judges they've given money to." *Id.* As a result, 79 percent of the registered voters polled believe that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 10.

Following the judicial campaign finance record-breaking election for Illinois Supreme Court in 2004, in which two candidates raised a combined $9.3 million in political contributions[6] and the winner went on to cast highly controversial deciding votes that benefited some of his largest contributors,[7] Illinois voters were even more jaded than the average American about the influence of campaign contributions on the integrity of their state judiciary. A 2004-05 poll showed that over 90 percent of the Illinois voters polled believe that campaign contributors influence the decisions of judges in Illinois to at least some degree. Center for State Policy and Leadership at the University of Illinois at Springfield, *Illinois*

[6] *See supra* Part I(A).
[7] *See supra* Part I(B)(1).

Statewide Survey on Judicial Selection Issues 23 (Winter 2004-05), *at* http://www.ilcampaign.org/issues/judicial/judicial_poll/FullJudicialSurvey.doc. Only 52 percent of those voters polled thought that the phrase "fair and impartial" described judges, and less than half the voters polled believed the term "independent" described judges. *Id.* at 6-7.

The widespread belief that campaign contributions influence judges' decisions naturally leads to the belief that "justice" is more attainable for the wealthy and the connected. According to the 2001 nationwide poll, only 33 percent of those surveyed believe that the "justice system in the U.S. works equally for all citizens," while 62 percent believe that "[t]here are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else." 2001 Greenberg Quinlan Rosner Research at 7. Yet 78 percent of those surveyed believe that "[c]ourts are unique institutions of government that *should* be free of political and public pressure." *Id.* (emphasis added). Americans from coast to coast believe that the judicial system in this nation has been corrupted by private campaign contributions.

The general public is not alone in its perception that campaign contributions influence judges' decisions. Attorneys and their clients feel pressure to "pay to play." The large percentage of contributions to judicial candidates by lawyers and businesses is consistent with the belief among those contributors that such

contributions will affect the outcome of their cases. Put differently, donors often feel coerced into making contributions to judicial candidates. A study by the Texas State Bar and Texas Supreme Court found that 79 percent of attorneys surveyed believe that campaign contributions have a significant influence on a judge's decision. *See Republican Party of Minn. v. White*, 416 F.3d 738, 774 (8th Cir. 2005) (en banc) (Gibson, J. dissenting) (citing Alexander Wohl, *Justice for Rent*, Am. Prospect, May 22, 2000, at 34). In an *amici* brief urging the U.S. Supreme Court to grant certiorari in *Dimick v. Republican Party of Minnesota*, thirty-nine large corporations stated: "*Amici* often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they . . . have not contributed to . . . judicial candidates." Brief of *Amici Curiae* Concerned Corporations in Support of Petitioners at 3, *Dimick v. Republican Party v. Minn.*, No. 05-566 (U.S. Jan. 4, 2006), 2006 WL 42102.

Unfortunately, occasional punishment of the most blatant instances of coercion—such as the censuring of a Nevada judge detailed in Part I(B)(1), above—does nothing to address the pervasive, more subtle coercion that lawyers and companies simply endure as a cost of doing business in court and the toll it takes on the perception of justice rendered. As reflected in the *American Prospect* article cited by Judge Gibson, rather than file a complaint with a judicial

disciplinary commission in response to requests for contributions, many attorneys instead feel compelled to pull out their checkbook. They "simply [can] not afford to risk offending whichever judge [is] eventually elected." Wohl, *supra*. And as the above-mentioned corporations stated in their *amici* brief supporting the grant of certiorari in *Dimick*, "refusing to give may create a real or perceived disadvantage that neither the *Amici* nor their shareholders can lightly disregard." Brief of *Amici Curiae* Concerned Corporations, *supra*, at 3. These contributors understand that such coercion is intimately tied to the due process afforded to litigants. The concerned corporations explained that "direct and personal solicitations of campaign contributions by a judge or judicial candidate are likely to be coercive [and] contribute to a widespread—and reasonable—perception of bias in the administration of justice." *Id.* at 5. The concerned corporations supported that belief with statistics, citing the Texans for Public Justice report detailed in Part I(B)(1), above. *Id*. at 6-7.

Members of the judiciary share the concern of the public, attorneys and the business community regarding the influence—perceived or real—of political contributions on the judicial process. According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half of the judges surveyed (46%) *themselves* believe that campaign contributions to judges influence their decisions. Greenberg Quinlan Rosner Research & American Viewpoint, Justice At

Stake State Judges Frequency Questionnaire 5 (2002), *available at* http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. And more than 70 percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. As a result, more than 55 percent of state court judges believe that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

In short, the large contributions necessary to compete in privately-financed judicial elections may lead to actual corruption and, at the very least, create an appearance of corruption that undermines the faith of the general public, litigants, attorneys, and judges alike in the fairness and impartiality of our nation's courts.

II. NORTH CAROLINA'S JUDICIAL PUBLIC FUNDING SYSTEM DIRECTLY ADVANCES THE STATE'S INTEREST IN DETERRING ACTUAL AND APPARENT CORRUPTION WHILE LIKEWISE ADVANCING THE STATE'S INTEREST IN OPEN AND ROBUST CAMPAIGNS.

The nationwide trend of skyrocketing judicial election private fundraising, combined with the fact that campaign funds are typically raised in huge amounts from individuals and interest groups with business before the courts, undeniably undermines public faith in the fairness and impartiality of our nation's courts. In this context, the State of North Carolina enacted the public financing law:

> to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.

N.C. Gen. Stat. § 163-278.61.

North Carolina's public financing law directly advances the state's interest in deterring corruption of the judicial system resulting from large private contributions. Further, the law advances the state's interest in open and robust election campaigns by providing qualified candidates with sufficient public funds to wage competitive campaigns regardless of their access to wealthy special interest donors.

Maintaining the integrity of the judiciary and respect for its judgments is a vital state interest "of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); *see also Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (explaining that a state may protect against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process"). Moreover, as the Supreme Court has repeatedly recognized, states have an important interest in preventing actual corruption and "the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell*, 540 U.S. at 136.

As the Defendants-Appellees and the Intervenors-Defendants-Appellees have made clear, the Supreme Court and other courts around the nation have consistently upheld as constitutional systems of voluntary legislative and executive office public campaign financing incorporating contribution limits, disclosure requirements and so-called "trigger" provisions such as those at issue in this case. *See Buckley*, 424 U.S. at 96; *Daggett*, 205 F.3d at 464; *Rosenstiel*, 101 F.3d at 1553. While the state interest in deterring actual and apparent corruption, cited by these courts repeatedly as supporting the constitutionality of public financing systems, is significant with respect to legislative elections, the interest is even more heightened in the context of judicial elections. In response to contributions, a legislator may cast one vote of many on a policy decision that favors one group over another. In addition, legislation is often complex and may contain positive and negative implications for different groups of contributors. In contrast, in the judicial system, only two litigants are before a judge and it is a zero sum game—one litigant will win, one will lose, and the prize at stake may be a large amount of money, one's freedom or even one's life. If one litigant has contributed a significant sum to a judge and the other has not, the danger of corruption or the appearance of corruption could not be more palpable.

The U.S. Supreme Court's landmark decision in *Buckley* is the only decision in which the Court has examined the constitutionality of public financing. The

Buckley Court made clear that voluntary systems of public financing are constitutional, stating unequivocally:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Buckley, 424 U.S. at 57 n.65. The federal public financing law upheld in *Buckley* provides qualified major party presidential candidates with partial public financing in the primary election, and with full public financing in the general election. Appellants in *Buckley* argued, *inter alia*, that "any scheme of public financing of election campaigns is inconsistent with the First Amendment." *Buckley*, 424 U.S. at 90. The Court found "no merit" to this contention. *Id.*

In upholding the federal law against constitutional challenge, the *Buckley* Court noted with approval that Congress had enacted the law "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91. In rejecting the appellants' claim "that public financing of election campaigns, however meritorious, violates the First Amendment," the *Buckley* Court explained that the public financing law:

> is a congressional effort not to abridge, restrict, or censor speech, but rather <u>to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-</u>

> governing people. Thus, [the public financing law] furthers, not abridges, pertinent First Amendment values.

Id. at 92-93 (footnotes omitted) (emphasis added). The Court explained further:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.

Id. at 93 n.127.

In short, the Supreme Court in *Buckley* held that public campaign financing programs advance First Amendment values without restricting First Amendment rights.

Plaintiffs-Appellants in the present case erroneously equate the state's facilitation of candidate speech, through its public financing system generally and through its provision of "rescue funds" specifically, with some perceived restriction of their own speech. *See* Opening Brief of Appellants at 27-33. Put differently, Plaintiffs-Appellants mistake the state giving candidates small carrots with the state beating the Plaintiffs-Appellants with a large stick. In doing so, they misconstrue the purpose of the First Amendment. Plaintiffs-Appellants "do[] not, of course, have the right to be free from vigorous debate." *Pac. Gas and Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 14 (1986); *see also Daggett*, 205 F.3d at 464 (plaintiffs "have no right to speak free from response"). On the contrary, the purpose of the First Amendment is "to secure 'the widest possible

dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964), *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945), and *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

The State of North Carolina was the first to recognize the immense value of full public campaign financing in the judicial election context, but other states are following suit. As mentioned above, New Mexico recently became the second state to enact a system of judicial election public financing. *See* N.M. Stat. § 1-19A-1 *et seq.* (West 2007). With judicial election campaign fundraising skyrocketing around the nation, other states are likewise following the lead of North Carolina. Legislators in Georgia, Illinois, Michigan, Montana and Washington have put forth proposals for judicial election public financing. *New Politics 2006* at 39. The Court's decision in the present case will undoubtedly influence the consideration of judicial public financing proposals in these states beyond the Fourth Circuit and we urge the Court to encourage, rather than impede, these constitutionally permissible efforts.

CONCLUSION

For the reasons set forth above, and in the briefs of the Appellees and Intervenors-Appellees, the district court correctly dismissed Plaintiffs'-Appellants' claims. *Amici* respectfully urge this Court to affirm the decision below.

RESPECTFULLY SUBMITTED this 14th day of August, 2007.

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APPENDIX

The American Judges Association is the largest independent association of judges in the United States. Formed in 1959, it has about 2,500 members from all levels of the judiciary—state and federal, trial, appellate, and administrative. The majority of its membership consists of state trial-court judges. The American Judges Association is governed by a 45-member Board of Governors and an eight-member Executive Committee; the decision to join this brief was made by the Executive Committee after receipt of emailed comments from members of the full Board of Governors. The American Judges Association supports a variety of programs and initiatives that promote fair and impartial courts.

The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization which works in the areas of campaign finance, communications, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's campaign finance and related media laws are enforced: at the Federal Election Commission (FEC), the Federal Communications Commission (FCC), the Internal Revenue Service (IRS), and in the courts. In the campaign finance area, CLC generates legal and policy debates about public financing, disclosure, political advertising, contribution limits, enforcement issues, and many other matters.

The Center for Civic Policy is a nonprofit, nonpartisan organization based in Albuquerque, New Mexico. The Center seeks to educate New Mexicans about important public policy issues such as ethics in government, energy and health care. The Center also seeks to increase civic participation. To achieve its mission, the Center engages in public education initiatives and produces research.

Demos: A Network for Ideas and Action is a non-profit, non-partisan organization whose purpose is to help build a society in which America can achieve its highest ideals. Demos works to build a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Public financing programs such as that adopted by North Carolina for its judicial elections help foster these goals by reducing the appearance of impropriety in electoral campaigns, broadening the opportunities for participation, and reducing the influence of wealth on elections for judicial office.

The Illinois Campaign for Political Reform (ICPR) is a non-partisan public interest group that conducts research and advocates reforms to promote public participation in government, address the role of money in politics and encourage integrity, accountability, and transparency in government. Founded in 1997 by former Senator Paul Simon and Lieutenant Governor Bob Kustra, the Illinois Campaign for Political Reform works on a non-partisan basis to reform Illinois'

political process, to reduce the influence of special interest money on public institutions and restore voters to their rightful place at the center of state government. In 2007, ICPR joined the Illinois State Bar Association in co-hosting a day long conference aimed at reforming the increasingly expensive and politicized system for electing state judges. ICPR supports public financing of judicial elections as one method of achieving that goal.

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, including North Carolina, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. The League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Progressive Maryland is a grassroots, nonprofit organization of more than 15,000 members and supporters as well as 40 affiliated religious, community, and

labor organizations. Through research, public education, and direct political action it strives to improve the lives of working families in our state.

Public Citizen, Inc., is a non-profit membership advocacy group. On behalf of its members nationwide, it appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns are ensuring equal access to the judicial system and combating the corruption of the political process that results when those running for office must turn to monied interests to be elected. As a result, Public Citizen promotes campaign finance reform, including public financing of elections, through education, legislative advocacy, and participation in litigation.

The Reform Institute is a not-for-profit 501(c)(3) educational organization, representing a unique, independent voice working to strengthen the foundations of our democracy. The Institute champions the national interest by formulating and advocating meaningful reform in vital areas of public policy, including campaign finance and election reform, energy independence and climate stewardship, homeland and national security, economic opportunity, and immigration reform. Former Congressman Charles Bass (R-NH) serves as Chair of the Board. The Reform Institute's campaign and election reform agenda has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in

order to increase transparency, competition, and meaningful citizen participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state may enact and implement a system of judicial election public financing and it directly implicates the Reform Institute's first role of reducing political corruption and the appearance of corruption.

[Court form CERTIFICATE OF COMPLIANCE included in printed copies. Word count 6,924 in Times New Roman 14pt. type.]

CERTIFICATE OF FILING AND PROOF OF SERVICE

This is to certify that, pursuant to local rule 31, on August 14th, 2007, I sent for filing the original and eight copies of the foregoing brief by first class mail via the United States Postal Service to:

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