03-7250

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS J. SPARGO, JANE MCNALLY, AND PETER KERMANI,

PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE STATE COMMISSION ON JUDICIAL CONDUCT, AND HENRY T. BERGER, INDIVIDUALLY AND AS CHAIRPERSON OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

DEFENDANTS-APPELLANTS-CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE
THE CONSTITUTION PROJECT'S COURTS INITIATIVE
IN SUPPORT OF APPELLANTS AND
URGING REVERSAL OF THE DISTRICT COURT

Peter Vollmer
Vollmer & Tanck, LLP
350 Jericho Turnpike
Suite 206
Jericho, New York 11753
(516) 870-0335

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INTERESTS OF AMICUS CURIAE

This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a). *Amicus curiae* is the Constitution Project's Courts Initiative, which comprises the organization's board, its staff, and a nationwide, bipartisan blue-ribbon committee of scholars, policymakers, business leaders, and retired public officials who work to promote judicial independence while maintaining judicial accountability. The Constitution Project, affiliated with Georgetown University's Public Policy Institute, comprises four initiatives: the Courts Initiative, the Constitutional Amendments Initiative, the Death Penalty Initiative, and the Liberty and Security Initiative. Each initiative seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining scholarship and public education. The Courts Initiative conducts public education on judicial independence and develops educational materials to help ensure that America's state and federal courts remain independent institutions that dispense justice fairly. The Courts Initiative believes that access to impartial, independent courts that are free from political influence forms the bedrock of our constitutional guarantee of individual liberty.

The Constitution Project's Courts Initiative's interest in this case arises from its extensive public-policy work, at both the federal and state levels, on issues of judicial independence. The Courts Initiative has invested significant resources and effort in New York, consulting with the New York State Office of Court Administration and the New York State Bar Association on constitutional methods of oversight for judicial elections; providing assistance to Chief Judge Judith S. Kaye's recently-established Commission to Promote Public Confidence in Judicial Elections; and working with a variety of state and local organizations and bar associations on issues related to judicial independence generally. In addition, the members of the Initiative's

blue-ribbon committee comprise representatives from nearly every state, and the Initiative makes itself available for assistance to all states. The Courts Initiative members thus have an interest in this case for two primary reasons: First, its outcome will affect directly affect the actual and perceived independence of New York's courts, and thus has a direct impact on the Initiative's primary vocation. Second, it will to some extent affect the analogous rules of judicial conduct governing the Courts Initiative members' own jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the district court's injunction against enforcement of Sections § 100.5 (A)(1) (c-g) and § 100.5 (A) (4) (a) of Title 22 of the New York Codes, Rules and Regulations (N.Y.C.R.R.), because they are narrowly tailored to satisfy a compelling state interest. The Rules are designed to permit judges and judicial candidates the necessary latitude to campaign for judicial office while still adhering to the high standards required to uphold the dignity and integrity of the judiciary, and to instill public confidence in the judicial branch. This Court should also reverse the district court's injunction voiding 22 N.Y.C.R.R. § 100.1, § 100.2(A), and § 100.2(C), because these sections are not unconstitutionally vague. Rather, they are drafted in conformance with the codes of conduct that apply to the federal judiciary and to judges of 49 states and the District of Columbia. Moreover, significant interpretive guidance is available at a variety of levels, including commentary, previous opinions, advisory opinions from a host of state and national sources, and assistance from bar associations at the federal, state, and local levels.

This Court should also reverse the district court's ruling on abstention. It is a well-settled

principle that exhaustion of remedies, particularly where a state judicial proceeding is concerned, is required before the intervention of the federal courts is appropriate. Permitting the New York Court of Appeals to address this case resolves questions of consistency and comity, constitutes efficient use of scarce judicial resources, discourages forum-shopping, and preserves the right of the state to enact and enforce ethics regulations applicable to its own public officials.

ARGUMENT

Courts are able to protect the basic rights of individuals and decide cases fairly only when they are free to make decisions according to the law, without regard to political or public pressure. The judiciary can maintain the checks and balances essential to preserving a healthy separation of powers only when it is able to resist overreaching by the political branches. Indeed, the cornerstone of American liberty is the power of the courts to protect the rights of the people from the momentary excesses of political majorities. But judges are different. The job of the judicial branch is to resolve conflicts involving those laws, by interpreting and applying the law to the individual facts of each case, in accordance with the Constitution. Because judges play this unique role in the American system of government, the public expects them to remain above the political fray; independent of outside influences; and free to decide cases according to the rule of law, without regard for public opinion or political and financial interests.

There is currently a crisis in public confidence in the judiciary — a crisis of confidence in its independence and in its accountability. The evidence for this proposition is no longer anecdotal; a number of surveys conducted in recent years consistently support it. A 1998 Pennsylvania Supreme Court poll that found that 89% of respondents "believe that money buys

judicial favor most, some, or all of the time." Report of the Special Commission to Limit Campaign Expenditures, 1998, at 4. A 1999 survey commissioned by the Texas Supreme Court and the Texas State Bar found that not only did 69% of court employees and 79% of lawyers believed that campaign contributions significantly influence courtroom decisions, but 48% of Texas judges also believed that campaign contributions significantly influence judges' decisions. Supreme Court of Texas, Office of Court Administration, and State Bar of Texas, Public Trust and Confidence in the Courts and the Legal Profession in Texas Summary Report 6 (1999). Also in 1999, the National Center for State Courts conducted a nationwide survey specifically to gauge public trust and confidence in the justice system. According to its findings, approximately 80% of the public agreed that both campaign contributions and politics generally influence judges; 80% also believed that wealthy litigants receive better treatment by the courts; 66% believed that courts generally favor corporations at the expense of individuals; almost 55%, regardless of race or ethnicity, agreed that the courts gave "worse treatment" to litigants who did not speak English than to those who did; and nearly 50%, also regardless of race or ethnicity, agreed that African-American and Latino litigants received "worse treatment" than did white litigants. How the Public Views the State Courts: A 1999 National Survey (National Center for State Courts, 1999), 41-42. Finally, in 2002, the Justice at Stake Campaign, a network of independent organizations that partner on issues related to judicial independence, released the results of two surveys: one of the voting public; the other of state trial, appellate, and high-court judges across the country. It reported that 76% of the responding voters, and 26% of the judges, believed that campaign contributions have at least some influence on judicial decision-making. Justice At Stake National Public Opinion Survey Frequency Questionnaire 4 (2001). Among

both voters and judges, broad support (ranging from 70% to 97%, depending upon the question) existed for corrective measures in judicial elections, including oversight of judicial campaigns. *Id.*

I. THE COURT SHOULD REVERSE THE DISTRICT COURT'S INJUNCTION OF 22 N.Y.C.R.R. § 100.5 (A)(1) (c-g) and § 100.5 (A) (4) (a), BECAUSE THE SECTIONS WITHSTAND STRICT SCRUTINY

A. 22 N.Y.C.R.R. § 100.5 (A)(1) (c-g) and § 100.5 (A) (4) (a) Are Narrowly Tailored

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court did not determine the applicable level of review in cases involving a state's restriction of the speech and activities of judicial candidates; rather, because the parties in the case did not dispute that standard in the appellate court, the Court assumed strict scrutiny in hearing the case. *Id.* at 774. In a recent decision involving judicial campaign conduct, the New York Court of Appeals also noted: "We need not decide the question [whether strict scrutiny applies] in this case either because, even assuming strict scrutiny analysis is appropriate, the pledges or promises prohibition set forth in the New York Rules meets that exacting standard." *In the Matter of Watson*, No. 78, 2003 N.Y. LEXIS 1415 (June 10, 2003).

Assuming a strict scrutiny standard of review, the challenged sections must be narrowly tailored. *Id.* at 774-75. Only this month, the New York Court of Appeals held in two separate cases that 22 N.Y.C.R.R. § 100.5 (A)(1) (c-g) and § 100.5 (A) (4) (a) are indeed "narrowly constructed to address the interests at stake, including the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary." *In the Matter of Raab*, No. 91, 2003 N.Y. LEXIS 1411 (June 10, 2003); *In the Matter of Watson*, No. 78, 2003 N.Y. LEXIS 1415 (June 10, 2003). The court also noted that

"New York's Rules Governing Judicial Conduct do not include a provision analogous to Minnesota's 'announce clause,'" *Watson*, No. 78, 2003 N.Y. LEXIS 1415 (June 10, 2003), which was overturned last year in Republican Party of Minnesota v. White. *White*, 536 U.S. 765. Rather, the Rules forbid "pledges or promises" of specific conduct related to judicial duties, 22 N.Y.C.R.R. § 100.5 (A) (4) (d) (i), which the Court in *White* noted was not raised and thus explicitly declined to address. *White*, 536 U.S. at 770. In the instant case, the conduct at issue does not involve the announcement of Justice Spargo's views on disputed legal or political issues; rather, it involves other restricted forms of political activity, including allegedly offering items of value in exchange for votes, and engaging in prohibited partisan activities. Thus, as the Court of Appeals also held in *Watson*, "White does not compel a particular result here." *Watson*, No. 78, 2003 N.Y. LEXIS 1415 (June 10, 2003).

B. 22 N.Y.C.R.R. § 100.5 (A)(1) (c-g) and § 100.5 (A) (4) (a) Serve a Compelling State Interest

To withstand strict scrutiny, these sections must also serve a compelling state interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

It is well settled that states have a compelling interest in ensuring an independent, high-quality judiciary. Indeed, an indication of how central this principle is to our system of government is demonstrated in the writings of Alexander Hamilton:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. Alexander Hamilton, FEDERALIST No. 78

Hamilton added:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. *Id.*

Likewise, the U.S. Supreme Court has upheld the importance of an independent judiciary. In *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (1990) (hereinafter *LULAC*), the Court found that it was "factually false" to characterize judges as representatives because public opinion is "irrelevant to the judge's role," *id. at 622*, and because "the judiciary serves no representative function whatever: the judge represents no one," *LULAC, at 625.* In a subsequent case, the Court found:

> The *LULAC* majority was, of course, entirely correct in observing that . . . ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

Justice Stevens, writing for the Court, also invoked a passage from his own scholarship, noting that "[f]inancing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates" because "it is the business of judges to be indifferent to popularity." *LULAC* at 401, n. 29, quoting Stevens, The Office of an Office, Chicago Bar Rec. 276, 280, 281 (1974).

Judicial independence is thus related to the perception of the quality of the judiciary, which courts have also traditionally recognized as a compelling state interest in and of itself: There could "hardly be a higher governmental interest" than that of a state in the "quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring). Indeed, this Court has held that "[t]he state's interest in the quality of its judiciary . . . is an interest of the highest order." *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110 (2d Cir. Conn.) (1994). These principles are cited by the New York Court of Appeals in the foregoing cases addressing judicial campaign conduct.

In *Watson*, the New York Court of Appeals held that "New York's pledges or promises clause not only is sufficiently narrow to withstand strict scrutiny analysis but also effectively and appropriately balances the interests of litigants and the rights of judicial candidates and voters." *Watson*, No. 78, 2003 N.Y. LEXIS 1415 (June 10, 2003). Indeed, in commenting that the petitioner in Watson did not dispute "that such interests are compelling," the court added, "nor could he reasonably do so." *Id.*

II. THE COURT SHOULD REVERSE THE DISTRICT COURT'S INJUNCTIONS OF 22 N.Y.C.R.R. § 100.1, § 100.2(A), AND § 100.2(C), BECAUSE THE SECTIONS ARE NOT UNCONSTITUTIONALLY VAGUE

The District Court enjoined 22 N.Y.C.R.R. § 100.1, § 100.2(A), and § 100.2(C)[1] on grounds that they were void for vagueness. However, these sections are standard canons of judicial conduct, and some form of them is present in virtually every judicial conduct code in the nation. *See generally* Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, American Judicature Society (2002); Cynthia Gray, *Ethical Standards for Judges*, American Judicature Society (1999). Indeed, the New York Rules provide more guidance than their analogues in many other states. They are also represented at the federal level: The Code of Conduct for United States Judges provides, variously: "A Judge Should Uphold the Integrity and Independence of the Judiciary," Canon 1; "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities," Canon 2; and "A Judge Should Refrain from Political Activity," Canon 3. At both the federal and state levels, considerable interpretive guidance exists for application and enforcement of these canons. Such guidance includes commentary accompanying the Rules themselves; previous opinions of the Commission and the Court of Appeals; commentary and decisions involving the ABA Model Code of Judicial Conduct and analogous codes in other states; advisory opinions of the New York Unified Court System's Advisory Committee on Judicial Ethics; the opinions of a multitude of ethics

[1]The disputed sections are as follows:
§ 100.1: A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

§ 100.2(A),(C): A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.
(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall testify not voluntarily as a character witness.

committees of the New York State Bar Association and numerous county and local bar associations; and in many judicial districts, local judicial campaign conduct committees.

Moreover, not every such guideline need be accompanied by a laundry list of examples in order to be understood by those to whom it is applied. With the exception of New York town and village court justices (who nonetheless must undergo certification and specialized training), every judge in New York State must be a lawyer who has been licensed to practice for a minimum number of years. It is well settled that lawyers are subject to a wide array of regulations and restrictions that do not apply to non-lawyers; this is even more true of those lawyers who become judges. In a case earlier this year involving the removal of a justice from the bench, the Court of Appeals held: "We measure the necessity for removal 'with due regard for the fact that Judges must be held to a higher standard of conduct than the public at large.'" *In the Matter of Tamsen*, No. 33, 2003 N.Y. LEXIS 368 (April 3, 2003) (quoting *In Re Going*, 97 N.Y.2d 121, 127 (2001)(additional citations omitted)). The Court of Appeals added, "We have recognized that even 'relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke.'" *In Re Tamsen*, No. 33, 2003 N.Y. LEXIS 368 (April 3, 2003) (quoting *Aldrich v. State Comm'n on Judicial Conduct*, 58 N.Y.2d 279, 283 (1983)). "In addition to the gravity of any wrongdoing, the effect of petitioner's conduct upon public confidence in his character and judicial temperament must also be considered." *Aldrich*, 58 N.Y.2d 283. Even when the sanction is as serious as removal, the notion that higher standards apply is brought to bear: "We have recognized, however, 'that the "truly egregious" standard is measured with due regard to the fact that Judges must be held to a higher standard of conduct than the public at

large.'" *In Re Tamsen*, No. 33, 2003 N.Y. LEXIS 368 (April 3, 2003) (citing *Matter of Assini*, 94 N.Y.2d 26, 31 (1999), quoting *Matter of Collazo*, 91 N.Y.2d 251, 255 (1998)).

III. THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM THE CASE

The U.S. Supreme Court has held that there is "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (citing *Younger v. Harris*, 401 U.S. 37 (1971)). Younger establishes a three-prong test: 1) The state proceeding must be judicial; 2) it must implicate an important state interest; and 3) the constitutional claims must be determinable in the state proceeding. *Younger* at 432-35.

All three prongs are satisfied here. First, the proceeding is indisputably judicial. Although the New York State Commission on Judicial Conduct is not a court in the usual sense of the word, the challenge to its determination, by law, should be brought in court. Indeed, the law provides that it should be brought in a specific court: the New York Court of Appeals. Second, as discussed above in Point I, the proceeding clearly involves a compelling state interest, that of a state to ensure that its judiciary remains independent and of high quality. Third, despite the district court's finding to the contrary, the constitutional claims are indeed determinable by the New York Court of Appeals. The district court analyzed this requirement in the context of whether the Commission itself could determine the constitutional issues. That question has not been resolved, nor need it be resolved here, because determining the constitutional claims involved in this case would properly have occurred upon appeal to the New York Court of Appeals. The district court also found that the language of the rules was sufficiently ambiguous to call into question whether a judge disciplined by the Commission was

entitled to review as of right. *Spargo v. N.Y. Comm'n on Judicial Conduct*, 244 F.Supp. 2d 72, 83 (2003). Indisputably, a right to request an appeal exists. However, the right to request an appeal does not guarantee that the court will agree to hear the appeal; even if the appeal is heard, there is still no guarantee that the appellant will win. A right to file an appeal is simply that; it may be dismissed for a variety of reasons, including a lack of grounds to disturb the decision. Moreover, as a practical matter, in the 28 years that the Commission on Judicial Conduct has existed, the Court of Appeals has never failed to hear an appeal of a determination by the Commission. This argues strongly in favor of the State's construction of the Rules - *i.e.*, that such an appeal exists as of right.

There are a number of reasons to require exhaustion of state remedies in a case such as this: to ensure consistency in application of state law; to promote comity between the judicial branches; to maintain our system of dual sovereignty; and to promote efficient use of scarce judicial resources. Requiring exhaustion of remedies also prevents forum-shopping, so that litigants are not tempted to circumvent state law and procedures in an attempt to obtain a more favorable ruling. There is another reason why this case should first be heard by the New York Court of Appeals: the constitutional issues about which the district court was so concerned. States may broaden constitutional rights beyond those guaranteed by the federal government; they may not narrow them. Thus, not only is the Court of Appeals able to address these issues, but to provide a more generous result, if applicable.

Finally, unless the district court's decision is reversed, the canons of conduct in every state within the Second Circuit will be imperiled, and those in the remaining states may be at risk. With the exception of Montana, every state has adopted a variant of the ABA Model Code

of Judicial Conduct. The canons of each of those 49 states include analogues of 22 N.Y.C.R.R. §§ 100.1, 100.2(A), and 100.2 (C). *See generally* Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, American Judicature Society (2002); Cynthia Gray, *Ethical Standards for Judges* American Judicature Society (1999). These most fundamental rules help to ensure that each state's judicial officers maintain the integrity and dignity of the office and promote public confidence in the judiciary by adhering to the highest ethical standards of conduct, whether on or off the bench. If these sections are invalidated, the states risk losing the very foundations of their duly-enacted regulatory systems to keep judges independent and accountable.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the judgment of the district court be reversed.

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PETER VOLLMER
VOLLMER & TANCK, LLP
350 Jericho Turnpike
Suite 206
Jericho, New York 11753
(516) 870-0335
Attorney for Amicus Curiae,
The Constitution Project's Courts Initiative

BARBARA E. REED
DIRECTOR, COURTS INITIATIVE
THE CONSTITUTION PROJECT
1120 19th Street, N.W.
Eighth Floor
Washington, D.C. 20036

(202) 721-5620