

THE
POLITICS
OF JUDICIAL
ELECTIONS
2015-16

Who Pays for Judicial Races?

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INTRODUCTION

It's no secret that the proliferation of big money in politics, abetted by 2010's *Citizens United* Supreme Court decision, has upended American elections from the smallest mayoral races to the most high-profile U.S. Senate battles. What has received far less attention, however, is that influence-seeking money has also made tremendous inroads into our courts — institutions that are constitutionally obliged to provide equal justice regardless of wealth, status, or political connections.

Thirty-eight states conduct elections for their state supreme courts, powerful entities that are generally the final word on interpreting state law. This report, the most recent edition in a series that has tracked and analyzed state supreme court elections since 2000, looks at the 2015-16 supreme court election cycle. We identified several disturbing new developments that sharpen questions about partisan and special interest pressures in judicial races and about the capacity of impacted courts to deliver evenhanded justice.

For the first time, we undertook an in-depth analysis of donor transparency

among interest groups and found that “dark money” spending, by groups whose funding sources are concealed from the

Influence-seeking money has also made tremendous inroads into our courts — institutions that are constitutionally obliged to provide equal justice regardless of wealth, status, or political connections.

public, is booming in state supreme court elections. Outside spending by interest groups also broke records again, while there were more high-cost races than ever before. Recognizing that expensive and politicized

supreme court elections are now a fixture in many states, this year we also changed the report's title, dropping the word "New" from *The New Politics of Judicial Elections*.

- **Outside spending by interest groups shattered records.** Rather than contributing to candidates or political parties, wealthy interests are increasingly relying on outside spending by groups as a way to influence state supreme court elections, mirroring the trend in elections for political offices since the Supreme Court's 2010 decision in *Citizens United v. FEC*. During the 2015-16 supreme court election cycle, political action committees, social welfare organizations, and other non-party groups engaged in a record \$27.8 million outside spending spree, making up an unprecedented 40 percent of overall supreme court election spending (as compared with only 29 percent in 2013-14). Funneling spending through outside groups may be attractive to donors because it often allows them to avoid campaign contribution limits and disclosure requirements.
- **Supreme court elections saw an influx of secret money.** The growth of outside spending by interest groups has brought with it a stunning lack of transparency. For the first time, this report quantified the amount of money in state supreme court elections coming from sources concealed from the public. We found that only 18 percent of interest groups' outside expenditures during 2015-16 could be easily traced to transparent donors. With respect to the remaining expenditures, donors were either undisclosed (54 percent), a type of spending known as "dark money," or buried

behind donations from one group to another (28 percent), making it difficult or impossible to discern the ultimate funding source, a type of spending known as "gray money." Such secrecy risks leaving voters uninformed about who is seeking to shape state high courts, and leaves litigants (and often even judges) without the tools to identify potential conflicts of interest.

- **There were more million-dollar supreme court races than ever before.** Twenty-seven justices were elected in \$1 million-plus races in 2015-16, compared with the previous high of 19 justices in 2007-08. Pennsylvania also set an all-time national record for its 2015 election, attracting a total of \$21.4 million in spending for three open seats. A greater number of justices elected in high-dollar races means more potential conflicts of interest and heightened pressure on all judges to curry favor with wealthy interests who can subsidize the increasingly high cost of a future election.
- **More than half of all states with elected high courts are now impacted by big-money elections.** By the start of 2017, 20 states had at least one sitting justice who had been involved in a \$1 million race during his or her tenure. By contrast, in 1999, the number was only seven. As of January 2017, one-third of all elected justices sitting on the bench had run in at least one \$1 million-plus election. These figures highlight that across the country, politicized state supreme court elections are no longer the exception, but the rule.

➤ **Campaign ads targeted judicial decisions, often in misleading ways.**

More than half of all negative television ads aired during the 2015-16 election cycle criticized judges for their rulings on the bench, often in a misleading way designed to stoke emotion and anger. Targeting judicial decisions poses worrying threats to judicial independence, and there is both anecdotal and empirical evidence that such election pressures impact how judges rule in cases.

Courts are powerful. Their rulings impact our health, our freedom, and our bank accounts — leaving behind winners and losers. Our system can only work if judges decide cases, in good faith, based on their understanding of what the law requires — and if the public believes that they are doing so. As powerful interests increasingly see the courts as an effective vehicle for furthering their political, ideological, or financial agendas, this promise of both the appearance and reality of evenhanded justice is at risk.

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CHAPTER ONE

Supreme Court Election Spending Reaches New Heights

State supreme court elections used to be low-cost, sleepy races. That era is over. In many states, they are now costly and politicized battles and the role of big money, with its attendant questions of special interest influence over the courts, is growing more pronounced. During the 2015-16 cycle, states that elect their judges reached several new spending milestones.

The number of justices elected in big-spending contests in 2015-16 was also higher than ever before — an ominous development suggesting that politicized supreme court elections may be ratcheting up.

Spending Overview: 2015-16 Supreme Court Election Cycle

Thirty-three states held state supreme court elections during 2015-16, for a total of 76 seats.¹ Nationwide, overall spending totaled an estimated \$69.3 million, including candidate fundraising and outside spending by interest groups and political parties — the second highest spending level (adjusted for inflation) since this report began tracking supreme court elections in 2000.²

Pennsylvania, which saw a remarkable \$21.4 million spent in contests for three open seats in 2015, set a national record for aggregate spending in a state supreme court election. In addition, Arkansas, Kansas, Louisiana, and Montana set new state spending records.

The number of justices elected in big-spending contests in 2015-16 was also higher than ever before — an ominous development suggesting that politicized supreme court elections may be ratcheting up. More justices were elected in \$1 million-plus elections during 2015-16 than

Estimated Spending on State Supreme Court Races, 2015-16

State	Candidate Fundraising	Public Financing	Outside Spending by Groups	Outside Spending by Political Parties	# of Seats	Grand Total
Pennsylvania (2015)	\$15,660,616	\$0	\$5,749,055	\$8,190	3	\$21,417,861
North Carolina	\$672,230	\$0	\$4,746,921	\$0	1	\$5,419,151
West Virginia	\$1,013,801	\$958,489	\$2,991,682	\$0	1	\$4,963,973
Louisiana	\$2,408,179	\$0	\$2,503,976	\$0	2	\$4,912,154
Wisconsin (2016)	\$2,249,071	\$0	\$2,474,373	\$0	1	\$4,723,444
Michigan	\$1,214,963	\$0	\$2,634,585	\$455,685	2	\$4,305,233
Texas	\$4,205,358	\$0	\$0	\$0	3	\$4,205,358
Ohio	\$3,117,471	\$0	\$233,960	\$2,210	3	\$3,353,641
Mississippi	\$2,004,464	\$0	\$1,233,410	\$0	4	\$3,237,874
Washington	\$1,060,942	\$0	\$1,480,455	\$249,365	3	\$2,790,762
Arkansas	\$1,729,476	\$0	\$675,290	\$0	2	\$2,404,766
Kansas	\$0	\$0	\$2,073,938	\$0	5	\$2,073,938
Montana	\$782,351	\$0	\$985,684	\$66,769	3	\$1,834,804
Wisconsin (2015)	\$1,149,686	\$0	\$46,934	\$0	1	\$1,196,620
Kentucky (2016)	\$488,700	\$0	\$0	\$0	1	\$488,700
New Mexico	\$40,375	\$423,891	\$0	\$0	2	\$464,266
Idaho	\$431,258	\$0	\$0	\$0	2	\$431,258
Kentucky (2015)	\$426,624	\$0	\$0	\$0	1	\$426,624
Alabama	\$262,319	\$0	\$0	\$0	3	\$262,319
Georgia	\$189,385	\$0	\$0	\$0	1	\$189,385
Tennessee	\$105,108	\$0	\$0	\$0	3	\$105,108
Minnesota	\$64,879	\$0	\$0	\$0	1	\$64,879
North Dakota	\$51,052	\$0	\$0	\$0	2	\$51,052
Totals	\$39,328,308	\$1,382,380	\$27,830,262	\$782,219	50	\$69,323,169

This chart estimates spending on high court races, including contested and retention elections, in the 21 states in which spending was documented. Unless otherwise noted, races occurred in 2016. Candidate fundraising figures were provided by the National Institute on Money in State Politics, and reflect available data as of August 4, 2017. Candidate fundraising includes contributions and self-financing by candidates. It excludes fundraising by judges that did not run for election in 2015-16. Sources for independent expenditures by political parties and interest groups include state campaign finance disclosures, television spending estimates from Kantar Media/CMAG, ad contracts posted on the FCC website, and FEC filings. The 2015 figures in this chart are lower than the totals reported in the historical charts throughout this report, because in those charts all data was converted to 2016 dollars to allow for historical comparison. The 2015 figures in this chart have not been converted to 2016 dollars.

in any previously recorded cycle since 2000 (inflation-adjusted)³ — 27 justices in 13 states, as compared with the previous high of 19 justices in 11 states in 2007-08.⁴ Seven justices in five states were also elected in races that exceeded \$3 million (Louisiana, North Carolina, Pennsylvania, West Virginia, and Wisconsin). Hitting a \$1 million or \$3 million threshold is signifi-

cant because such races are likely to require major infusions of campaign cash by donors or a substantial investment by outside spenders and to have many of the trappings of campaigns for political offices. Notably, this cycle set records even though the number of seats up for election was both the median and average⁵ for presidential election cycles since 1999-2000 (excluding retention elections).⁶

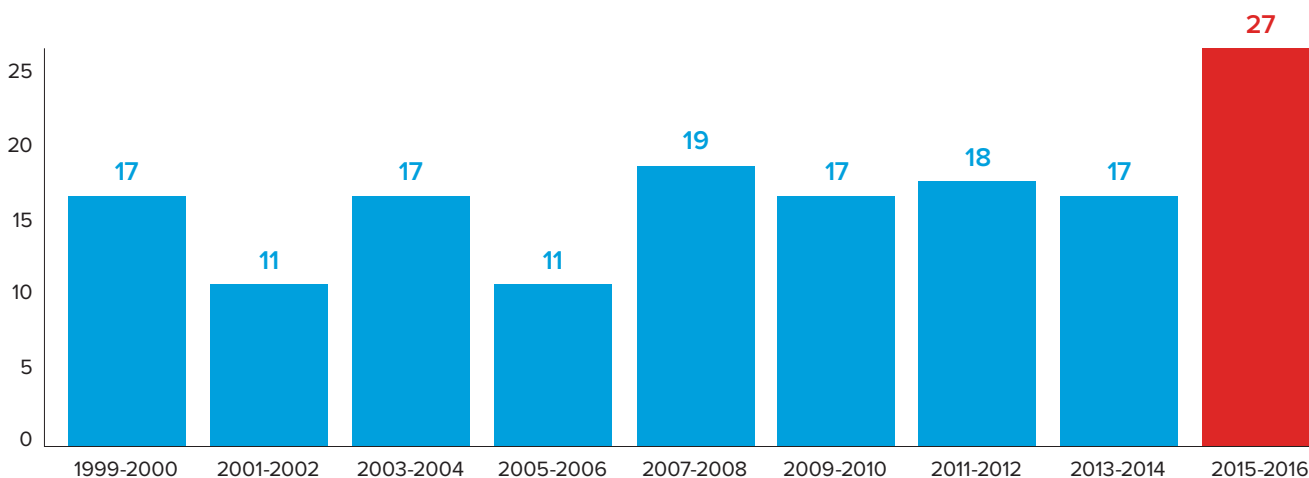
Different Types of Judicial Elections

In states with contested state supreme court elections, multiple candidates can vie for a seat on the bench. Some contested elections are partisan, meaning that the candidate's party affiliation is listed on the ballot. Others are nonpartisan, meaning that no affiliation is listed. Some other states use retention elections, in which a sitting justice is subject to a yes-or-no vote, without any opponents. For more information on judicial selection in the states, see the Brennan Center's interactive map: <http://judicialselectionmap.brennancenter.org>.

The amount spent on television also continued to grow, with a record \$36.9 million spent on TV ads in 16 states, an average of \$485,607 per seat — also a record.⁷ Spending on TV ads reached record levels in six states: Arkansas, Kansas, Louisiana, Montana, Pennsylvania, and West Virginia.

One exception to the upward trend was in retention elections, where documented total spending dropped this cycle, to an estimated \$2.2 million, as compared to \$6.5 million spent on retention elec-

Number of Judges Elected in \$1 Million-Plus Elections by Cycle



This graph reflects the number of high court judges, per two-year election cycle, who were elected in races that cost over \$1 million, including both candidate fundraising and independent expenditures. All spending data was adjusted into 2016 dollars.

tions in 2013-14.⁸ One recent pattern, beginning in the 2009-10 election cycle, has been that states that use retention elections, which were historically usually low-profile elections that attracted virtually no spending, have begun to experience high-cost elections as well. Kansas's 2016 retention elections were consistent with this trend, attracting over \$2 million in total spending. However, unlike other recent cycles in which two or three states saw heavy retention election spending, during 2015-16, Kansas was the only state with expensive retention elections.⁹ Despite the drop, total spending on retention elections during 2015-16 was still higher than in any cycle prior to 2009-10, when the cost of retention elections first jumped. From 1999-2008, retention election spending had never exceeded \$1.3 million (in 2016 dollars).¹⁰

Supreme court elections still generally attract less money than other statewide races.¹¹ However, because voters typically know little about state supreme court justices, heightened spending can have an outsized impact on who reaches the bench — a series of attack ads may be the only information a voter has about a judicial candidate.¹² And because, as discussed below, interests opening their wallets for supreme court elections are frequently regular players before those very courts — sometimes with cases pending at the same time elections are taking place — this spending can create vexing conflicts of interest, threatening the appearance (and reality) of judicial integrity.

Notable Trends: Secret Money and Record Outside Spending

One of the most striking aspects of the 2015-16 cycle was the sharp rise in outside spending — most of it non-transparent — by political action committees, “social welfare organizations” incorporated under 501(c)(4) of the Internal Revenue Code, and other non-party groups, mirroring the trends in regular political races, both state and federal.

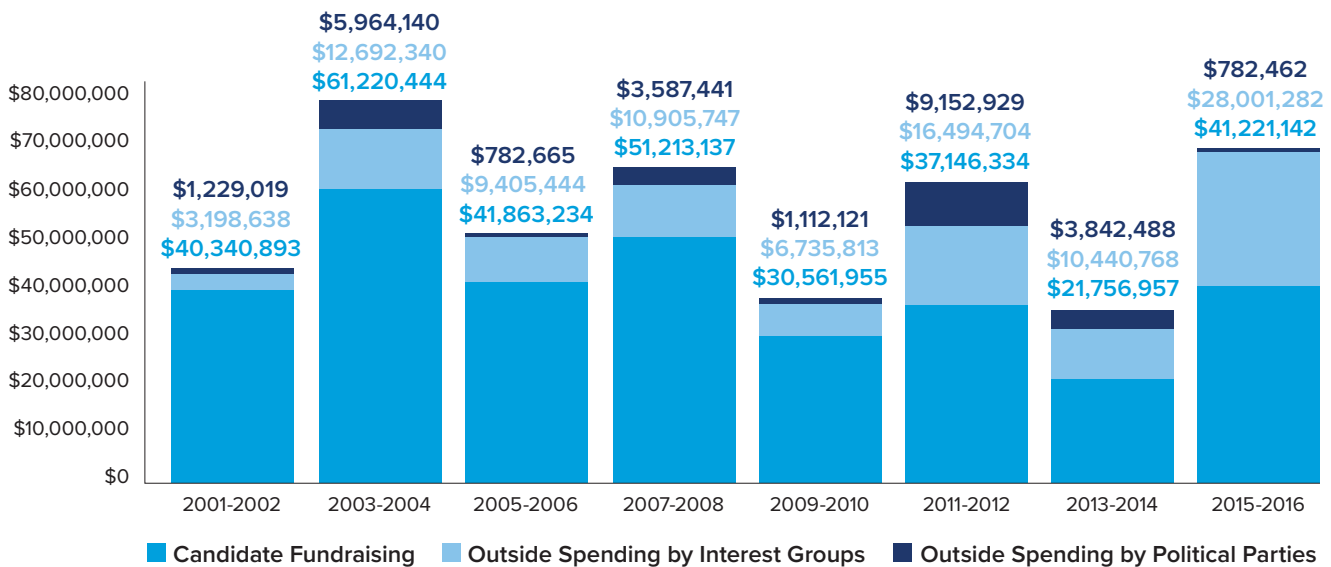
During 2015-16, outside spending by interest groups was a record \$27.8 million — over \$10 million more than the prior record from 2011-12. This outside spending by groups was also a much higher proportion of total supreme court election spending than ever before: 40 percent, as compared with the previous high of 29 percent in 2013-14.¹³

Spending Terminology

“Outside spending” refers to non-candidate expenditures during an election campaign, including television ad buys and other election activities. Outside spending figures for “groups” or “interest groups” exclude political parties, which are analyzed separately. This report also sometimes refers to “outside groups” as a short-hand for non-party groups that are engaged in outside spending during an election.

This shift toward outside spending by interest groups has been a consistent trend since the U.S. Supreme Court's 2010 ruling in *Citizens United v. FEC*, which barred restrictions on independent spending by corporations and unions, and a subsequent lower court ruling that allowed independent spenders to collect unlimited con-

State Supreme Court Election Spending by Cycle (2016 Dollars)



Data sources include reports from the *New Politics of Judicial Elections* series, as well as updated candidate fundraising and television spending estimates from the *National Institute on Money in State Politics* and *Kantar Media/CMAG*, respectively. All figures have been converted to 2016 dollars. Because of this inflation adjustment, totals in this graph may be different than figures that were published in previous reports.

tributions.¹⁴ In every election cycle since *Citizens United*, spending by outside groups as a portion of total spending in supreme court elections has set a new record.¹⁵

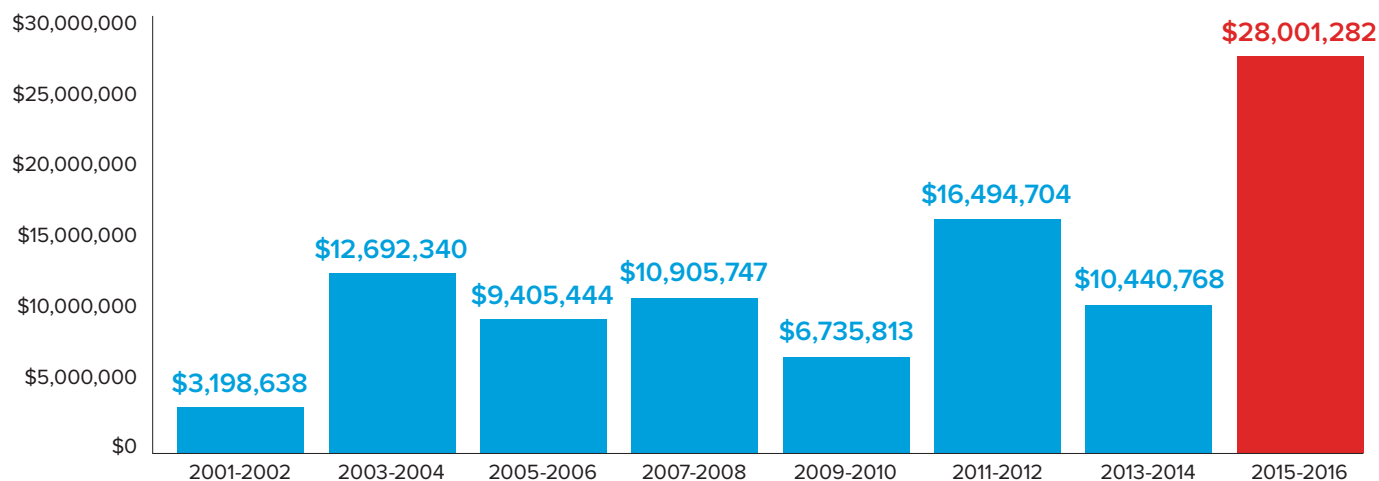
One result of this rise in outside spending by interest groups is that voters have less information about who is trying to influence supreme court elections. Remarkably, only 18 percent of the dollars spent by interest groups in 2015-16 had transparent sources (meaning that the underlying donor could be easily identified from campaign finance filings). More than half of interest group expenditures were completely “dark,” meaning that the underlying donors were not disclosed at all. Weak state campaign finance laws also meant that many expenditures were never reported to campaign finance authorities in the first place: one-third of the outside spending documented in this report never appeared in

In every election cycle since *Citizens United*, spending by outside groups as a portion of total spending in supreme court elections has set a new record.

state campaign finance filings. [See Chapter 2 for more details about secret spending in supreme court elections.]

While the U.S. Supreme Court in *Citizens United* touted “prompt disclosure of expenditures” as a way to “provide shareholders and citizens with the information needed

Outside Spending by Interest Groups (2016 Dollars)

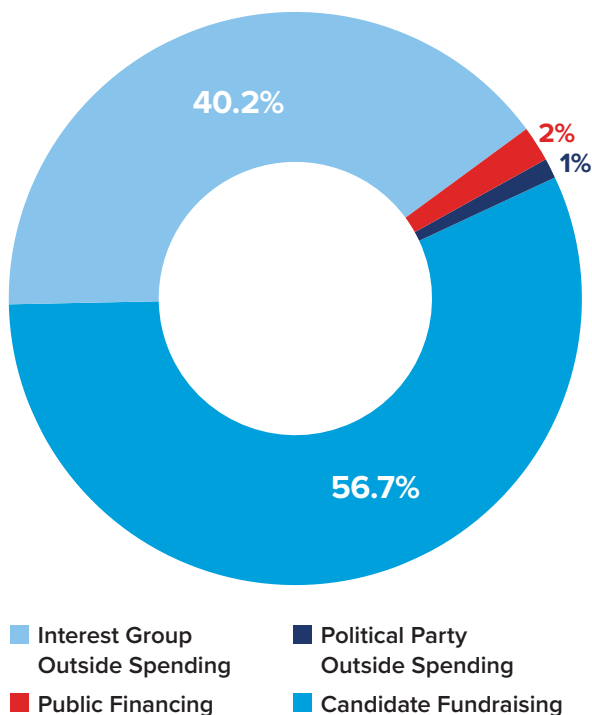


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to hold corporations and elected officials accountable for their positions and supporters,” the prevalence of secret spending highlights how gaps and loopholes in state and federal law make it easy for those seeking to influence judicial campaigns to stay in the shadows.¹⁶ For state courts, the result is a public increasingly left in the dark about who is seeking to influence judicial decisionmaking — including when judges hear cases involving major spenders.

The rise in outside spending by interest groups during 2015-16 also corresponded with a smaller role for state political parties, whose spending made up a lower proportion of total spending than ever before.¹⁷ This diminished role for political parties mirrored broader outside spending trends at the state level¹⁸ and also in key U.S. Senate races in 2016.¹⁹

Spending Breakdown for 2015-16 Supreme Court Races



For data sources, see notation in “Estimated Spending on State Supreme Court Races, 2015-16.”

While the benefits and costs of strong state parties are complex, the shift in power from parties to interest groups raises several accountability concerns. First, political parties are typically more strictly regulated than outside groups; for example, party organizations are often subject to campaign finance laws that do not apply to groups, including contribution limits and donor disclosure.²⁰ In addition, parties are repeat electoral players with a reputational interest that generally draws strength from appealing to a broad population.²¹ At times, this will oblige parties to go against the shorter-term interests of a narrow constituency. This distinguishes political parties from outside groups that may appear — and disappear — in a single election cycle.²²

Finally, rising spending by outside groups leaves candidates with less control over the tenor of their campaigns and may contribute to even greater negativity and politicization in supreme court elections. During the 2015-16 supreme court election cycle, 64 percent of spots aired by interest groups were negative in tone, compared with 15 percent of candidate ads (political parties aired virtually no TV advertisements). Overall, 2015-16 had far more negative TV ads than did other recent election cycles. [See Chapter 3 for more on television ads and the tenor of races.]

During the 2015-16 supreme court election cycle, 64 percent of spots aired by interest groups were negative in tone, compared with 15 percent of candidate ads (political parties aired virtually no TV advertisements). Overall, 2015-16 had far more negative TV ads than did other recent election cycles.

A Closer Look at Candidate Fundraising

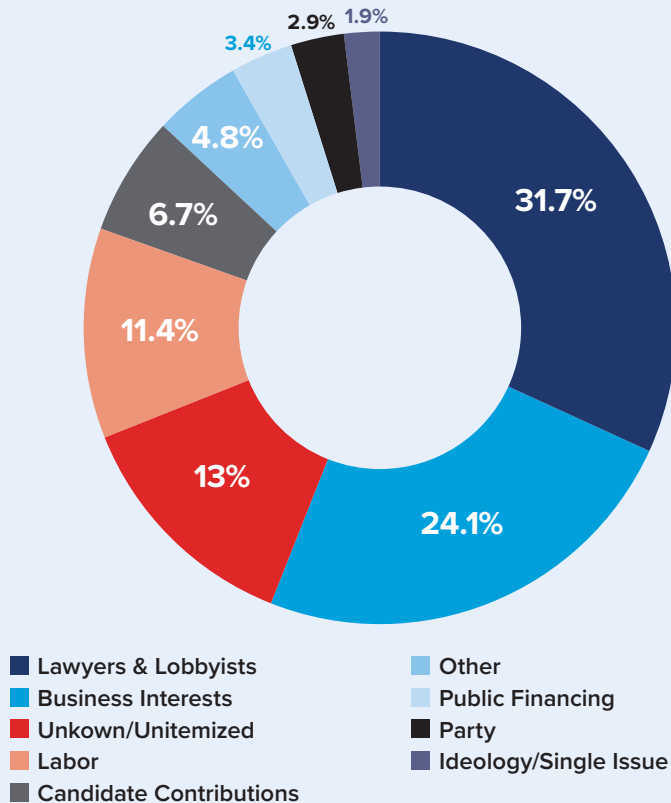
Total candidate fundraising in 2015-16 was approximately \$40.7 million (including public financing), slightly higher than in the last presidential election cycle, but short of totals from earlier presidential election cycles in 2003-4 and 2007-08.

About 56 percent of contributions to state supreme court candidates during the 2015-16 cycle came from lawyers, lobbyists, and business interests, a cohort regularly involved in state court matters.

Two states, New Mexico and West Virginia, offered supreme court candidates the option to accept public financing for their supreme court campaigns. In New Mexico, both candidates opted into the system, and nearly all of the expenditures in the race came from public funds. In West Virginia, however, while two of five candidates received public financing, individual candidates were far outspent by outside groups.

While total fundraising during the cycle did not match prior highs, a number of state high court candidates nevertheless raked in huge sums. Of the top ten candidate fundraisers nationwide, nine raised more than \$1 million apiece. Pennsylvania Supreme Court candidate Kevin Dougherty topped the list, raising nearly \$5.7 million, principally from labor interests and lawyers and lobbyists.

Contributions to Candidates by Sector, 2015-16



Data from National Institute on Money in State Politics as of August 4, 2017.

Top 10 Candidate Fundraisers, 2015-16

Candidate	State	Total Contributions Raised
1. Dougherty, Kevin M	PA	\$5,650,148
2. Wecht, David N	PA	\$3,642,568
3. Donohue, Christine L	PA	\$2,107,886
4. Genovese, James (Jimmy)	LA	\$1,395,721
5. Dewine, Pat	OH	\$1,144,634
6. Guzman, Eva	TX	\$1,126,348
7. Bradley, Rebecca Grassl	WI	\$1,096,907
8. Covey, Anne	PA	\$1,045,478
9. Goodson, Courtney Hudson	AR	\$1,025,445
10. Lehrmann, Debra	TX	\$994,854

Data from National Institute on Money in State Politics as of August 4, 2017.

Profiled Races: What Factors Contribute to High-Cost Elections?

An analysis of this cycle's state supreme court elections also suggests why certain states attract special interest attention while others do not. Many big spenders characterize their efforts as bolstering the judiciary by supporting quality candidates. Not surprisingly, however, races in which a court's ideological control is on the line, or where the court is involved in a highly-contentious issue that is important to deep-pocketed interests, tend to be the elections that attract heavy spending. Some illustrative races from the 2015-16 cycle highlight these dynamics.

The most expensive supreme court elections during 2015-16 occurred in Pennsylvania and North Carolina, two "swing" states in national politics where state court rulings on issues like redistricting have national implications, and where the election determined the court's ideological balance. [For details on each state's election, see "State in Focus" for Pennsylvania and North Carolina.] Looking back, spending barrages have

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corresponded with shifts in the ideological composition of at least nine state supreme courts since 2000.²³

In several states, particular cases on the docket appeared to attract heavy spending, including tangles over tort reform, education funding and charter schools, and the environment. Some justices were targeted over their prior rulings on these issues, while other elections appeared focused on creating a more favorable court lineup for an upcoming case:

➤ In Louisiana, interests in so-called "legacy lawsuits" that seek to compel oil and gas companies to pay for restoring environmentally-damaged properties and repair coastal degradation, appeared to be an important factor in the race between lower court judges Jimmy Genovese and Marilyn Castle for an open seat on the state supreme court. While the largest outside spender in the race, the Virginia-based Center for Individual Freedom (supporting Castle), did not disclose its donors, Castle's own contributors included oil and gas interests defending against ongoing legacy lawsuits. Genovese received outside support from the Restore Our Coast PAC, which in turn received donations from lawyers representing plaintiffs in these cases.

Another ongoing lawsuit challenging public funding of charter schools²⁴ was likely an additional spending driver. A newly created PAC, Citizens for Judicial Excellence, which spent over \$600,000 opposing Genovese, was funded primarily by businessman Lane Grigsby, a charter school-proponent who had previously spent money on school board races and heavily contributed to a pro-charter

school group, Stand for Children.²⁵ Genovese won the race, which saw nearly \$5 million in overall spending.

- ▶ In Kansas, supposedly-nonpartisan retention elections saw unusual involvement from the state Republican party and opaque outside groups. Four of the five justices standing for retention were subject to vocal opposition from the state GOP, and groups ran attack ads criticizing the justices for voting for a new sentencing hearing in a high-profile death penalty case, a decision subsequently reversed by the U.S. Supreme Court.

While a lack of donor transparency makes it difficult to identify the underlying interests, during the election, the state supreme court was enmeshed in a lawsuit in which it had already found that the state was failing to sufficiently fund K-12 education, with a potential price tag for the state of between \$400 and \$900 million.²⁶ Even before the election, the case had generated pointed attacks against the court from the governor and several powerful legislators, as well as legislative efforts to weaken the court's power and give the political branches more power over judicial selection.²⁷ A case about whether the Kansas constitution protects abortion rights was also working its way through the lower courts during the period.²⁸ More than \$2 million was spent overall, an estimated \$971,760 in support of retention and \$1.1 million in opposition. The four targeted incumbent justices were retained, as was a fifth, an appointee of the state's Republican governor who was not targeted.



- ▶ In Arkansas, a race for two open seats occurred against the backdrop of a decade-long battle over tort reform, including a 2011 decision in which one of the candidates for the Chief Justice seat, Courtney Goodson, who was already an associate justice on the high court, drafted an opinion for a unanimous court striking down a state cap on punitive damages that was passed in 2003. The Judicial Crisis Network, a dark-money group based in Washington, D.C., targeted Goodson, with ads stating that she accepted gifts and donations from trial lawyers and then benefited them with her rulings. The Republican State Leadership Committee's Judicial Fairness Initiative bought airtime in a second race, characterizing candidate Clark Mason, a plaintiffs' lawyer, as "the ultimate jackpot justice personal injury trial lawyer" in a TV ad. Both Mason and Goodson lost their races; overall, \$2.4 million was spent in the two contests.

"Not for Sale," paid for by the Judicial Crisis Network. Copyright 2016, Kantar Media/CMAG.



State in Focus

Pennsylvania's Record-Setting Election

Three vacancies on the Pennsylvania Supreme Court — two of which were created when justices left the court in scandal²⁹ — led to a hard-fought election in 2015, which set a new national record for state supreme court election spending. The contest also exemplified key trends in judicial elections today: Big spending by business interests, labor unions, and plaintiffs' lawyers — all groups that are regularly involved in cases before the court; millions of dollars in attack ads; and extensive spending funded by anonymous donors.

Prior to the three vacancies, Pennsylvania's seven-member supreme court had been controlled by Republicans. The court was left evenly split in the lead-up to the 2015 election, giving voters the opportunity to determine the ideological balance of the state's high court, potentially for years. Raising the contest's already high stakes was its potential to impact Pennsylvania's

redistricting process after the 2020 Census. In Pennsylvania, the state supreme court appoints a fifth member to the state's Legislative Reapportionment Commission, which includes two GOP and two Democratic representatives, if the other members cannot agree on a person.

A TV ad war that included attacks on candidates as soft on crime marked the Pennsylvania election, as did calls to "restore ethics to the bench" in light of the state's recent scandals. Ultimately, the candidates who spent the most won the election, and voters delivered Democrats a 5-2 court majority.

Sweeping the open seats were Democrats Christine Donohue, Kevin Dougherty, and David Wecht, who collectively outspent Republican rivals Anne Covey, Michael George and Judith Olson by \$11,400,601 to \$2,694,809. Independent candidate Paul Panepinto spent \$150,202.

The election also featured major, though lopsided, independent spending by two opposing interest groups. Pennsylvanians for Judicial Reform spent \$4.1 million supporting Democrats, while the Republican State Leadership Committee's (RSLC) Judicial Fairness Initiative, supported Republicans with \$1.5 million in spending. Pennsylvanians for Judicial Reform received substantial funding from labor unions and plaintiffs' trial lawyers, as well as dark money groups. The Judicial Fair-

"Failed to Protect," paid for by the Republican State Leadership Committee's Judicial Fairness Initiative. Copyright 2016, Kantar Media/CMAG.



ness Initiative was funded entirely by the RSLC, whose donors include the U.S. Chamber of Commerce (which does not disclose its donors) and major corporations.

In all, the election made history. Total spending reached \$21.4 million, easily shattering the previous national record set in Illinois in 2004.³⁰ The three winning candidates were the highest fundraisers in the nation during the 2015-16 cycle, and were also among the top ten overall spenders (including outside groups and political parties), with Dougherty first (\$5,650,148), Wecht fourth (\$3,642,568), and Donohue sixth (\$2,107,886).

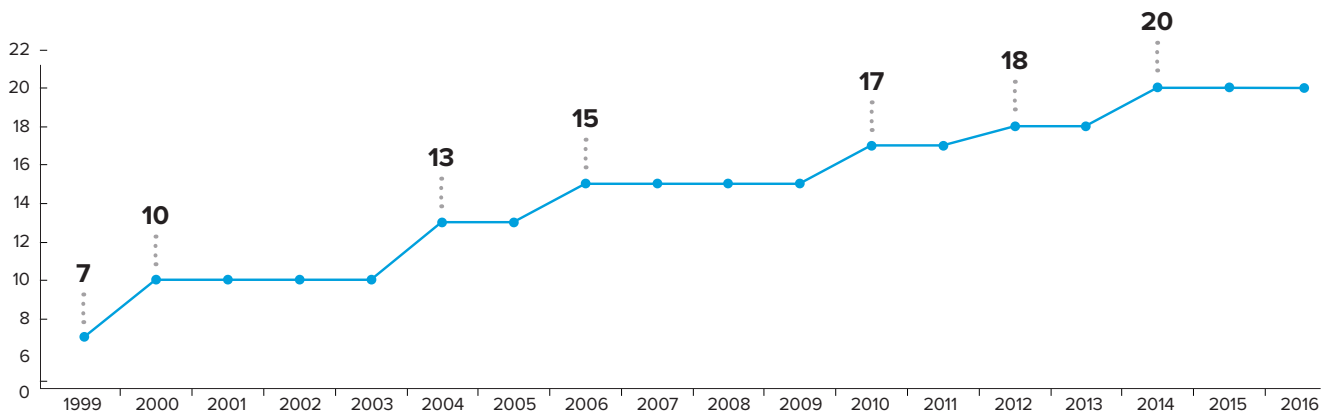
The Bigger Picture: Big Money Races Leave A Mark On A Majority of Elected Courts

At the start of 2017, more than half of all states that elect their justices had at least one sitting justice who had taken part in a \$1 million-plus election during his or her tenure (20 out of 38 states). By contrast, in 1999, only seven states fell into this category.

As of January 2017, one-third of sitting, elected state justices had been involved in a big-money election at some point in their tenure (88 out of 268). In 11 states, more than half of the state supreme court was made up of justices who participated in these high-cost races. This proliferation of states and judges impacted by high-cost elections leaves a cloud hanging over much of the nation's state court system, with the effects of such elections lingering beyond any particular election year.

This proliferation of states and judges impacted by high-cost elections leaves a cloud hanging over much of the nation's state court system, with the effects of such elections lingering beyond any particular election year.

The Rise of Million Dollar Courts



This graph reflects the number of states each year in which at least one sitting supreme court justice had been elected in a race that cost over \$1 million at some point during his or her tenure. Figures from elections prior to 2016 were converted into 2016 dollars, and include candidate fundraising and independent expenditures.

While further research is needed, existing anecdotal and empirical evidence supports the observation that the effects of big-money elections can cascade beyond the immediate race, putting an entire court on notice that its members could well be targeted in future elections — thereby heightening pressure judges may feel to avoid rulings that might either make them a target or alienate wealthy supporters. “Whether subtle or unintentional or not, there may be a tendency in the future for appellate judges to have one eye looking over their shoulder,” now-retired Tennessee Chief Justice Gary R. Wade has observed, after narrowly surviving a 2014 retention election where the court’s record on the death penalty was at issue.³¹

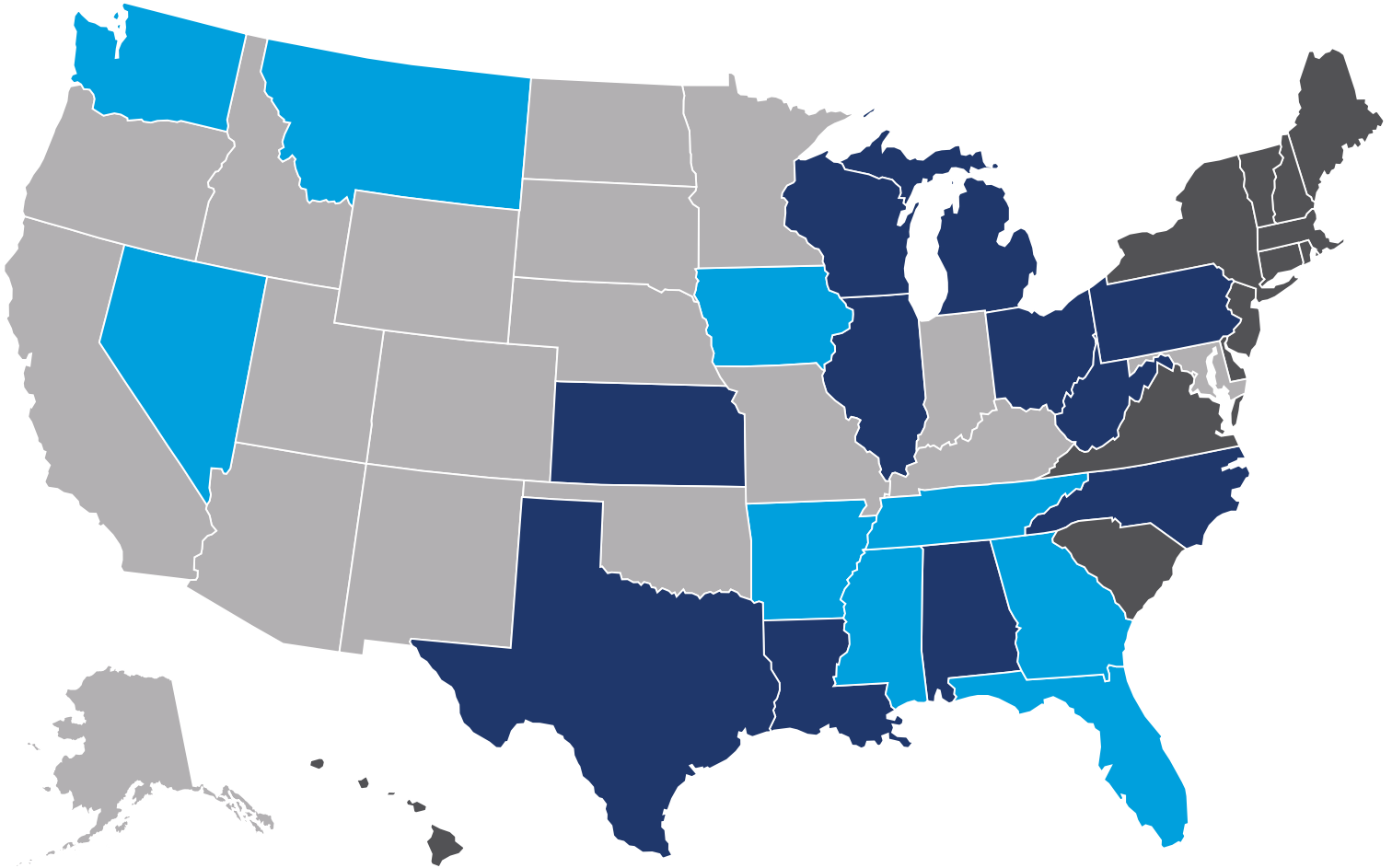
One notable study issued by the American Constitution Society found that as the number of television ads increased in a state’s supreme court elections, justices

in that state were less likely to cast a vote in favor of criminal defendants, owing, the study suggested, to a concern that they would later be subjected to distorted, soft-on-crime attacks.³² Another study concluded that campaign finance pressures exacerbate partisan behavior by judges, finding that judges who receive more campaign money from political parties and allied interest groups are more likely to favor their own party in election cases. When judges no longer face future elections due to a mandatory retirement age, the study found the influence of campaign money largely disappears.³³

Million Dollar Courts in 2016

States with sitting justices elected in a \$1 million-plus race during their tenure.

- At Least 1 Justice (9)
- More than Half of the Court (11)
- State Does Not Use Elections (12 + DC)
- No Justices (18)



While further research is needed, existing anecdotal and empirical evidence supports the observation that the effects of big-money elections can cascade beyond the immediate race, putting an entire court on notice that its members could well be targeted in future elections.



State in Focus

North Carolina's Election and Partisan Aftermath

One of the most politicized judicial elections in the nation unfolded in 2016 in North Carolina, where the ideological balance of the state supreme court was at stake, the supercharged issue of racial gerrymandering infused attack ads, and President Barack Obama took the unprecedented step of endorsing a judicial candidate. When the votes were counted, lower court judge Michael Morgan defeated incumbent Justice Robert Edmunds Jr., giving the North Carolina Supreme Court its first Democratic majority since 1998 and putting a second African-American justice on the court.

The election attracted \$5.4 million in spending overall, only \$672,230 of which was spent by the candidates themselves. While North Carolina's 2016 supreme court election was technically nonpartisan, the parties made their candidates-of-choice clear. Edmunds benefited from higher outside spending than his rival, including

\$1.45 million in TV spending by the North Carolina Chamber of Commerce, and more than \$1.18 million by Fair Judges, a group funded by the Republican State Leadership Committee's Judicial Fairness Initiative, the state GOP, and corporate interests.

Morgan, meanwhile, benefited from more than \$1.7 million in TV spending by North Carolina Families First (NCFE), a group that also supported Democratic candidates in state legislative races. Make NC First, a dark money group, donated more than \$1 million dollars to NCFE for the production of pro-Morgan ads. Obama's endorsement of Morgan in a video posted on YouTube also contributed to the election's high profile. A review of newspaper articles could not find any other example of a state judicial candidate endorsed by a U.S. President.

A decision in a redistricting case also emerged as a major issue during the campaign. NCFE targeted Edmunds for writing a 2014 opinion in which the state supreme court upheld North Carolina's congressional map, which the plaintiffs argued was an unconstitutional racial gerrymander. (A federal court later found that the maps were discriminatory, and the U.S. Supreme Court affirmed the ruling.³⁴) The North Carolina Supreme Court had split 4-3 on party lines, and ads depicted Edmunds' 2011 decision as "supporting his party's discrimination."³⁵

*"Redistricting 2,"
paid for by North
Carolina Families
First. Copyright 2016,
Kantar Media/CMAG.*



Partisan wrangling over the North Carolina courts did not end on election day. Since Democrats captured both the state supreme court and the governor's office in November 2016, the Republican-controlled legislature has passed a series of troubling bills that have the effect of building a partisan advantage in the courts — including reintroducing partisan elections at all court levels, and reducing the size of North Carolina's intermediate appellate court from 15 to 12 seats, in order to prevent the Democratic governor from filling anticipated vacancies.³⁶ A measure to redraw lower court judicial districts was considered in a special October 2017 session and is expected to be taken up again in 2018, along with a bill that would introduce a legislative appointment system for state judges.

State Courts as Political Targets

High-cost elections are not the only way to politicize state courts. Between 2015 and 2017, as documented by the National Center for State Courts, state legislatures have introduced a deluge of bills that risk entrenching partisan interests or weakening judicial independence in state courts across the country. By October 2017, a review by the Brennan Center for Justice identified at least 48 bills targeting courts in 24 states introduced in 2017 alone.³⁷

One recent trend has been court-packing (or shrinking): partisan efforts to change the number of state court seats, in order to grant (or deny) the governor an opportunity to appoint additional judges — and thus blurring the line between politics and judging. In Georgia³⁸ and Arizona,³⁹ for example, Republican-dominated legislatures passed bills in 2016 to expand their state supreme courts by two justices each, making possible additional appointments by their states' Republican governors. In North Carolina,⁴⁰ a Republican-dominated legislature (with a veto-proof majority) passed a law in 2017 reducing the size of its intermediate appellate court from 15 to 12 judges, thus denying the new Democratic governor the opportunity to fill new seats when vacancies emerge. Oklahoma⁴¹ and Washington⁴² also had recent unsuccessful efforts to reduce the size of their state supreme courts from nine to five justices.

Several states have also recently considered bills that would allow legislatures to override judicial decisions or refuse to enforce court orders,⁴³ or that would make it easier to impeach judges for unpopular decisions.⁴⁴ While unsuccessful to date, they

reflect a worrying trend of legislative efforts that would weaken judicial independence.

Lawmakers have also used electoral pressures as a way to exert political influence on courts. For example, one recent Texas case addressing benefits for same-sex spouses included a notable self-reversal by the Texas Supreme Court, in the face of substantial pressure from lawmakers and the public that included explicit electoral threats. There, the court originally refused, 8-1, to consider a challenge to same-sex spousal benefits afforded by the City of Houston. The court of appeals had thrown out a trial court order prohibiting Houston from providing benefits to same-sex couples, and instructed the trial court to reconsider the case in light of the U.S. Supreme Court's decision on marriage rights for same-sex couples in *Obergefell v. Hodges*.

After declining to hear the appeal, the Texas Supreme Court received an outpouring of letters opposing its decision and criticism from GOP leaders,⁴⁵ including an amicus brief from Republican state legislators noting that “elections have consequences” and that “Judicial candidates, especially those in a party primary, campaign on the issues. They give their opinions on the political concerns of the day and pledge allegiance to their party platform.”⁴⁶ Following the public outcry, the state supreme court reversed course, accepting the case for review and ultimately reviving the case and sending it back to the trial court for further consideration, concluding that the U.S. Supreme Court's ruling in *Obergefell* had not resolved the question of spousal benefits.⁴⁷

CHAPTER TWO

A Closer Look at Interest Groups

Three full election cycles after *Citizens United*, there is a clear trend line: interest groups are increasingly engaging in outside spending in an effort to influence state supreme court elections. This chapter further explores what we know — and don't know — about the groups that are transforming elections for powerful state high courts.

Overview

In total, 59 interest groups, mostly PACs, Super PACs, 527s, and so-called “social welfare” organizations, tapped their treasuries to engage in outside spending in the 2015-16 election cycle. More than a quarter (16 groups) were new organizations created during the 2015-16 election cycle, many with generic names like “Fair Judges,” which spent nearly \$1.2 million in North Carolina’s supreme court election, or “Citizens for Judicial Excellence,” which spent over \$600,000 in Louisiana.

In total, 12 states saw outside spending by groups during the 2015-16 cycle, one more than during the last presidential election cycle. Nine groups spent more than \$1 million. Pennsylvania, North Carolina,

and West Virginia were the states with the highest outside spending totals. However, there is also plenty of room for outside spending to grow. In eight states, only spending by candidates was documented.

A quarter of all spending by outside groups came from national groups or their state affiliates, which spent more than \$6.8 million (excluding contributions by national groups to state-based organizations, candidates, or parties).¹ While the presence of national groups in state court elections may suggest a multi-state courts strategy, interestingly, only two groups, the Republican State Leadership Committee and the Center for Individual Freedom, engaged in outside spending in more than one state during 2015-16, suggesting another area where outside spending might have the potential to grow.

The Transparency Problem

While the U.S. Supreme Court has repeatedly made clear that Congress and the states have the power to adopt robust campaign finance disclosure laws, the reality is that loopholes abound, even as outside spending has grown increasingly dominant.² As a result, ballooning spending by outside groups in supreme court elections has corresponded with greater secrecy as well.

Again mirroring the trends in elections for political offices, state high court elections during the 2015-16 cycle saw two different forms of shadowy spending by groups: expenditures that lack donor transparency, and spending by groups that failed to report expenditures to campaign finance authorities at all, taking advantage of state laws with reporting loopholes for certain kinds of outside spending deemed independent from the candidate.

The rise of this secret spending means that voters may increasingly lack essential information about who is trying to influence judicial races.

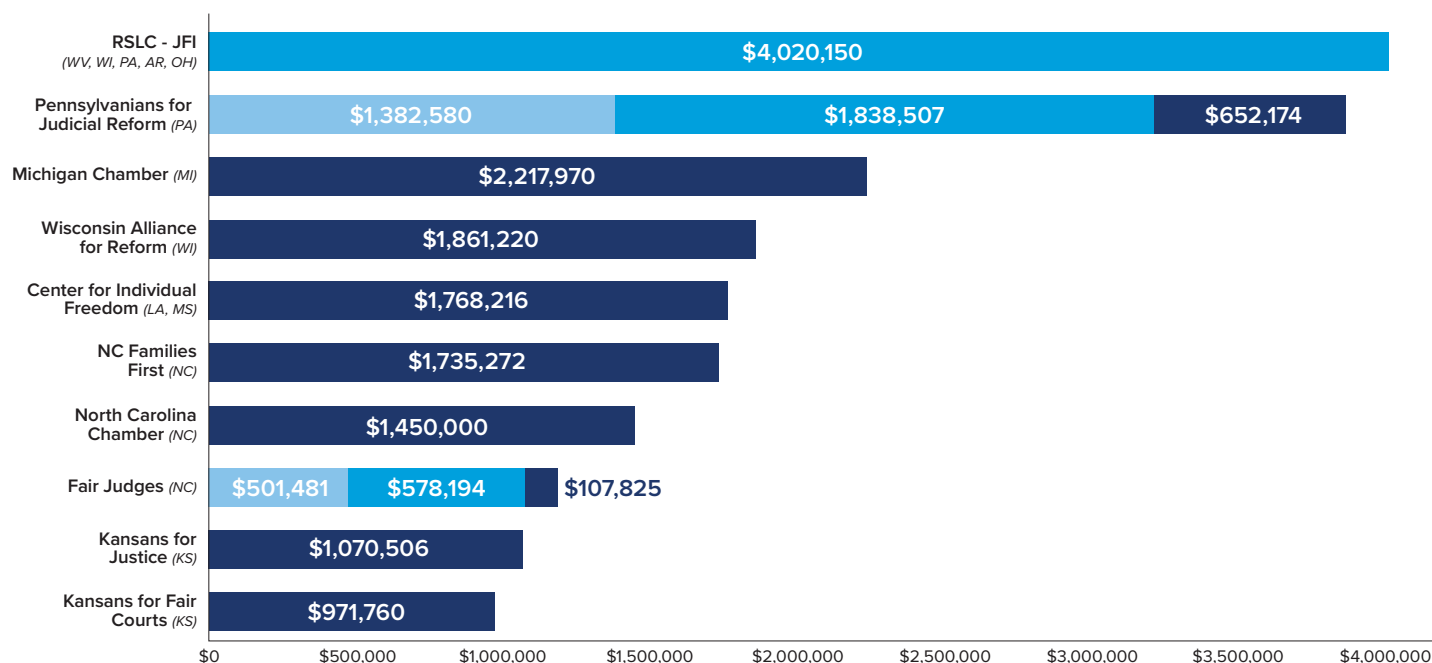
The rise of this secret spending means that voters may increasingly lack essential information about who is trying to influence judicial races. And, while judges often have ethical duties to step aside from hearing cases involving major campaign supporters, secret spending means that litigants (and sometimes even judges hearing cases) may be unaware of potential conflicts of interest warranting judicial recusal.

Dark and Gray Money

With respect to donor transparency, during the 2015-16 cycle, only 18 percent of expenditures by outside groups could be easily traced to transparent donors.³ Fully 54 percent of expenditures by outside groups consisted of “dark” money where donor information was unavailable. An additional 28 percent of expenditures was “gray” money, where reporting groups listed other groups as donors, making it impossible to identify the original contributors without sifting through multiple layers of disclosures. Overall, the total amount of dark and gray money expenditures during the 2015-16 supreme court election cycle was greater than *all* outside group spending in any previous cycle.

Of the ten highest-spending groups during 2015-16, *none* was fully transparent, and seven were completely dark, meaning that none of the underlying donors could be identified. In two states (Kansas in 2016, and Wisconsin in 2015), all of the outside spending by groups was nontransparent (i.e., either dark or gray).

Top 10 Outside Spenders and Secret Money, 2015-16



■ Transparent Money
■ Gray Money
■ Dark Money

This graph is based upon the Brennan Center's analysis of the transparency of outside spending by groups in 2015-16. For details on methodology, see the box, "Methodology for Categorizing Dark and Gray Money Expenditures." Note: The report used Pennsylvanians for Judicial Reform's state campaign finance disclosures for purposes of this dark and gray money analysis, while in other sections, it relied on spending estimates from Kantar Media/CMAG. For this reason, the amount that appears here is slightly lower than the number that appears in other sections of the report.

Methodology for Categorizing Dark and Gray Money Expenditures

This report's dark and gray money figures are based on an analysis of all independent expenditures related to state high court elections, and closely track the methodology used in an earlier Brennan Center report on secret spending.⁴

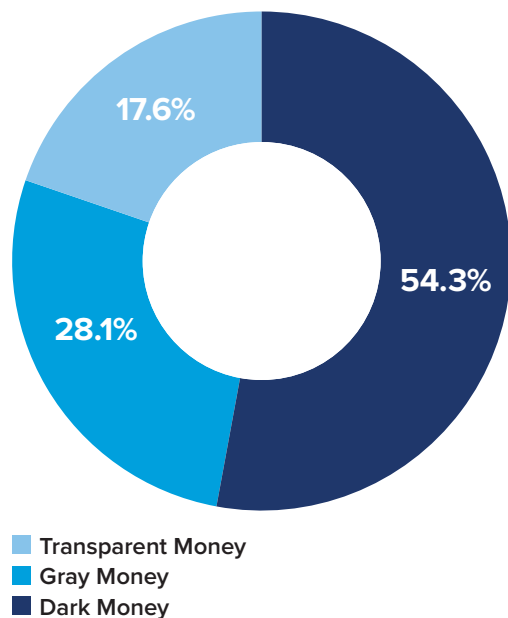
If the spender was an individual, corporation, LLC, political party, or labor union, we treated that spending as transparent. For all other spenders, we reviewed state disclosure databases, as well as FEC and IRS filings, to determine whether the spender disclosed its donors.

If the group did not disclose its donors to any regulator, then we categorized its spending as "dark" money. If a spender disclosed its donors, we then evaluated the transparency of those donors. Contributions from

individuals, corporations, LLCs, political parties, or labor unions were considered fully transparent. Contributions from donors outside of these categories were labeled either "dark" or "gray." Contributions were coded as "dark" if the contributor, based on a review of state disclosure databases, and FEC and IRS filings, did not disclose its donors. Contributions were coded as "gray" if the contributor was another entity that disclosed its donors, such that a researcher would need to review at least one additional layer of disclosures to determine the true source of the spender's funds.

Finally, we determined what percentage of the group's funding was transparent, dark, and gray and applied those percentages to the total amount that the group spent on the relevant supreme court election. If disclosures indicated that a contribution was earmarked for use in a specified race, we treated that contribution accordingly.

Outside Group Spending: Dark, Gray, and Transparent Money, 2015-16



The interests underlying secret spending are, by design, hard to discern. However, a recent Brennan Center study examining trends with respect to secret money in state and local elections (including, but not limited to, judicial elections), found, unsurprisingly, that undisclosed donations often came from entities or individuals with “a direct and immediate economic stake” in the election outcome.⁵

In Montana, for example, an investigation by the state campaign finance authority recently revealed that the Montana Growth Network, a dark money group that spent hundreds of thousands of dollars on attack ads in the state’s 2012 supreme court election, had financial backing by oil and gas companies in the state — frequent players in state court. Two out-of-state billionaires who owned estates in Montana, Charles Schwab, the founder of the eponymous discount brokerage firm, and James Cox Ken-

nedy, who chairs a media group called Cox Enterprises, also gave six-figure donations to the group. Both Schwab and Kennedy had been engaged in long-standing legal fights in state court about access to waterways on their estates.⁶

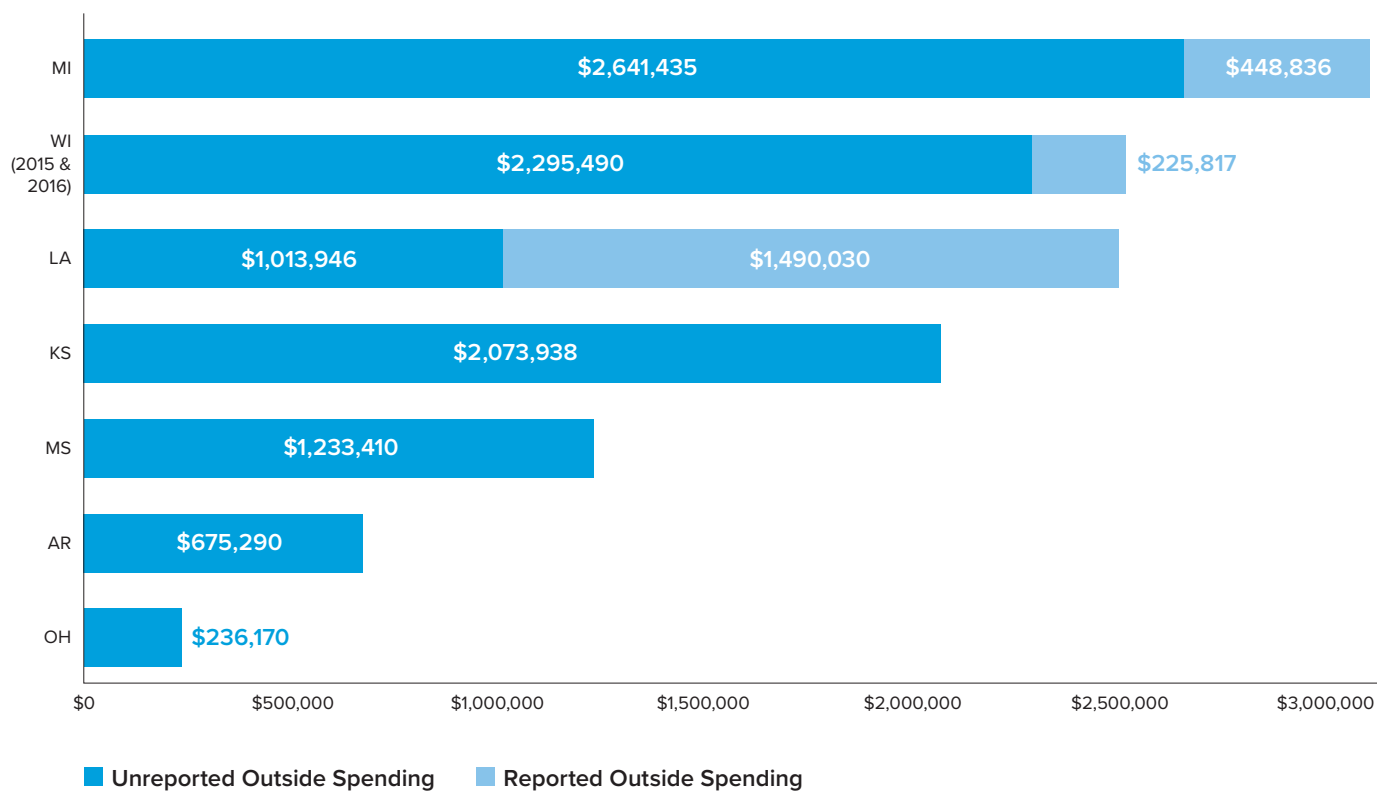
The Montana Growth Network-backed candidate, lower court judge Laurie McKinnon, captured the supreme court seat. Later, she was one of two justices to dissent in an unsuccessful lawsuit challenging the constitutionality of Montana’s stream access law, which had been brought by Kennedy prior to McKinnon’s election. There is no evidence that McKinnon was aware of Kennedy’s involvement in her campaign. However, given these circumstances, Montana voters might reasonably be left to wonder what McKinnon knew about the Montana Growth Network’s donors and whether campaign support played any role, even unconsciously, in her vote.

Unreported Spending

A second source of secrecy during the 2015-16 election cycle derived from state law loopholes that enable outside groups to completely avoid reporting their expenditures to campaign finance authorities. Prior to this cycle, a 2014 report by the National Institute on Money in State Politics found that 24 states failed to ensure meaningful disclosure of outside spending. Either the states did not require disclosure absent ads containing “magic words” explicitly calling for the election or defeat of a candidate, or they did not require reporting of outside spending at all.⁷

Remarkably, during the 2015-16 election cycle, nearly \$10.2 million in outside spending — more than one third of *all*

States with Unreported Outside Spending, 2015-16



“Unreported spending” reflects television spending estimates from Kantar Media/CMAG and ad contracts posted on the FCC website, in which the corresponding spending by groups or political parties could not be found in searches of state campaign finance databases. Note: Pennsylvania was excluded from this graph, as it only had \$8,190 of unreported outside spending.

documented outside spending⁸ — was never disclosed to the public in any campaign finance filing.

The only way we were able to identify this spending was through estimates of television ad buys provided by Kantar Media/CMAG under a paid contract with the Brennan Center, or through reviewing individual ad contracts posted online with the Federal Communications Commission (FCC). Ads appeared on TV — and spending on them was documented by Kantar Media/CMAG or in ad buy contracts — but those numbers eluded campaign finance authorities.

In total, the costs of 32 different TV ads, out of 167 unique TV ads aired in elections nationwide, were not reported by sponsors. These unreported ads included an attack ad against Kansas Supreme Court justices for not “following the law,” a claim that a judicial candidate in Arkansas “profits from your pain” as a personal injury lawyer, and an ad criticizing a supreme court candidate and appellate judge in Wisconsin for “letting criminals off on technicalities.” Six states had at least \$500,000 in unreported spending that was only captured by Kantar Media/CMAG or identified in ad contracts posted on the FCC website: Arkansas, Kansas, Louisiana, Michigan, Mississippi, and Wisconsin.

Wisconsin’s Weak Recusal Standards Undermine Fair Courts

State recusal rules govern when judges are required to step aside from cases in order to avoid potential biases. More than 9 in 10 voters think that judges should step aside from cases when one of the litigants has spent substantial sums to get them elected.⁹ But recusal rules have not kept up with the realities of high cost judicial elections — and particularly the growing importance of outside spending. Only six states have rules governing when outside spending is grounds for recusal.¹⁰

Wisconsin’s recent “John Doe” investigation presented a particularly egregious example of how expensive judicial races can fuel conflicts of interest for judges, and how weak recusal rules can risk undermining the integrity of state courts.

The John Doe investigation considered whether several political groups had illegally coordinated with Governor Scott Walker’s 2012 recall campaign in violation of state campaign finance laws. The Wisconsin Supreme Court halted the investigation in July 2015, striking down the state’s coordination law in the process. The special prosecutor in the case had sought the recusal of two justices, David Prosser and Michael Gableman, whose own supreme court campaigns had benefited from millions of dollars in outside spending from the very groups under investigation. The justices denied the recusal motion, and then joined the majority in a 4-2 ruling.¹¹

In a letter explaining why he denied the recusal request, Justice Prosser cited recent changes the state supreme court had made

to Wisconsin’s recusal rules, which excluded “campaign contributions” as a basis for recusal.¹² One of the groups that spent millions to support both Justice Prosser and Governor Walker, Wisconsin Manufacturers and Commerce, had helped draft those rules.¹³

In January 2017, 54 former members of the Wisconsin judiciary petitioned the state Supreme Court to strengthen its recusal standards. The former jurists wrote that judges should be required to step aside if they received either campaign contributions or help in the form of independent spending from a party or lawyer before them. (The Brennan Center submitted a letter supporting their petition.) The state supreme court voted 5-2 to reject the proposed change.¹⁴

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The Major Players

At the top of the roster of big-spending groups during the 2015-16 supreme court election cycle were the **Republican State Leadership Committee's Judicial Fairness Initiative**, which supported Republican or conservative candidates in nine states and won in four,¹⁵ and **Pennsylvanians for Judicial Reform**, which backed three Democratic candidates who won seats in Pennsylvania's record-setting 2015 supreme court election.

The Judicial Fairness Initiative spent more than \$4 million on TV ads and other election activities directly, and contributed an additional \$850,000 to other outside spending groups, according to disclosures — an increase from its reported spending in prior election cycles. Its actual spending may have been even more than that. According to its website, the Judicial Fairness Initiative spent “more than \$6.1 million” in its 2015 and 2016 efforts.¹⁶ As for Pennsylvanians for Judicial Reform, state disclosures indicate the group spent more than \$4.1 million on TV and radio ads, mailers, field work, polling, research, and consultants in Pennsylvania's 2015 election.

The spending profile of both groups is consistent with historical trends, in which the perceived “business” or “plaintiff”-friendliness of judicial candidates has been a major driver of special interest spending.¹⁷ Business interests and conservative groups have tended to back candidates with Republican ties, often spending via national organizations as part of a multi-state strategy. Plaintiffs' lawyers and unions have tended to support candidates with Democratic ties, typically organizing on the state level.¹⁸

The Judicial Fairness Initiative, as background, was started in 2014 by the Washington-D.C.-based Republican State Leadership Committee, whose mission is to “elect Republicans to multiple down-ballot, state level offices.”¹⁹ (Once part of the Republican National Committee, the RSLC reorganized as an independent organization in 2002 in response to the McCain-Feingold campaign finance reform law, which banned “soft money” contributions to national party committees.) Explaining the Judicial Fairness Initiative, RSLC leaders said that conservative policies passed by state legislatures were “running into a hard stop with judges who aren't in touch with the public.”²⁰ The Judicial Fairness Initiative's donations during 2015-16 came entirely from the RSLC, which is in turn funded by the U.S. Chamber of Commerce (which does not disclose its donors), along with corporations and industry groups, including Reynolds American, Altria Group, Blue Cross/Blue Shield, and the Pharmaceutical Research & Manufacturers of America.

Pennsylvanians for Judicial Reform, by contrast, is a state-based group, led by the former chair of the Pennsylvania Demo-

“Ka-Ching,” paid for by The Republican State Leadership Committee's Judicial Fairness Initiative. Copyright 2016, Kantar Media/CMAG.



cratic Party.²¹ Much of its funding during 2015 came from the Philadelphia Trial Lawyers Association, public employee unions, and the National Education Association (NEA). The group also received over \$500,000 from a dark money group, the PA Alliance.

It bears noting, however, that not every state's supreme court election this cycle fit easily into the traditional divide between business interests and trial lawyers. In Washington State, for example, where outside groups spent nearly \$1.4 million in an unsuccessful attempt to unseat three justices, a ruling about charter schools appears to have prompted the involvement of several wealthy interests.

Bill Gates, along with former Microsoft CEO Steve Ballmer (and his wife Connie Ballmer), Microsoft's current president, Brad Smith, and Vulcan Inc., which was founded by Microsoft co-founder Paul Allen, donated a total of \$542,000 to **Citizens for Working Courts Enterprise Washington**. Armed with those donations, the newly formed group then spent nearly \$540,000 opposing Justice Charles Wiggins and supporting his opponent Judge David Larson. Although the donors did not publicly disclose their reasons for intervening in the race, Gates, Vulcan Inc., and Connie Ballmer had all previously backed a successful ballot measure establishing charter schools in the state. The Washington Supreme Court (including Justice Wiggins) struck down this measure in 2015, ruling that it was unconstitutional because it funded charter schools controlled by appointed boards using resources reserved for schools controlled by elected boards.²²

Another outside group, **Judicial Integrity Washington**, which was backed by billionaire investor Ken Fisher and spent \$450,000 on the election, also described the charter school decision as among its reasons for challenging the justices, along with a recent court ruling upholding a \$15 minimum wage and another striking down a law requiring a two-thirds legislative majority to raise taxes.²³

Other major players during the 2015-16 election cycle included the following groups:

- ▶ **Judicial Crisis Network (JCN)**, a national, conservative group founded in 2004 as the Judicial Confirmation Network to support President George W. Bush's U.S. Supreme Court nominees, spent \$554,840 in Arkansas' 2016 supreme court election, and contributed \$200,000 to the North Carolina Chamber of Commerce for spending in the 2016 North Carolina Supreme Court election. According to an IRS filing by JCN, the group also contributed \$325,000 in "general support" to the Republican State Leadership Committee and \$1.4 million to the Wisconsin Alliance for Reform, two groups that made substantial expenditures in state supreme court elections during this cycle. JCN does not disclose its donors, but IRS filings indicate it receives substantial support from another dark money organization, the Wellspring Committee, which also funds the conservative law group the Federalist Society.²⁴
- ▶ **Wisconsin Alliance for Reform**, a group founded in 2015 by former GOP staffers to promote lower taxes and

limited government²⁵ ran ads supporting Justice Rebecca Bradley’s successful 2016 bid for a full 10-year term on the Wisconsin Supreme Court. The group, which is structured as a 501(c)(4) and does not disclose its donors, spent more than \$1.8 million on the election. As discussed above, the Judicial Crisis Network reported in an IRS filing that it contributed \$1.4 million in “general support” to the Wisconsin Alliance for Reform.

- ▶ The Virginia-based **Center for Individual Freedom**, a dark money group that advocates for tort reform and reduced campaign finance disclosure, among other positions, spent more than \$1.7 million in Louisiana and Mississippi during 2015-16. The group ran TV ads in Louisiana characterizing Judge Jimmy Genovese’s decisions in criminal cases as “sid[ing]” with “sexual predators” and praising Judge Marilyn Castle for “locking up child sex offenders for good.” In Mississippi, its ads described the incumbent Justice Jim Kitchens as having “repeatedly sided with predators and murderers.” Neither of the group’s preferred candidates won their races.
- ▶ **NC Families First**, a group principally funded by North Carolina Citizens for Protecting Our Schools,²⁶ pumped more than \$1.7 million into North Carolina’s supreme court election in support of Judge Michael Morgan, who defeated incumbent Justice Robert Edmunds Jr. The group was also active in supporting Democratic candidates in state legislative races. On the other side, **Fair Judges**, which spent nearly \$1.2 million in support of Edmunds, received more than \$500,000 from the Republican

State Leadership Committee’s Judicial Fairness Initiative, as well as additional funds from state GOP and business and corporate interests.

- ▶ **Color of Change**, a national racial justice organization focused on economic, criminal justice, and democracy reform, also spent \$220,000 supporting Judge Morgan in North Carolina. Color of Change, which channeled this money through its PAC, received funding from George Soros and another group, Make NC First, whose board includes prominent boosters of North Carolina Democrats.²⁷
- ▶ **Kansans for Justice**, which was founded in 2014 and opposed the retention of two justices that year, spent an estimated \$1.07 million on advertisements opposing the retention of four Kansas Supreme Court justices in 2016. The group cited a ruling in which the seven-member court overturned the death sentences of brothers convicted of committing grisly murders, ordering a new sentencing hearing. The group, which does not disclose its donors, identified itself as a collection of “friends and family members” of the victims in that case.
- ▶ **Kansans for Fair Courts**, an initiative of the Kansas Values Institute, which advocates for greater education

Not every state’s supreme court election this cycle fit easily into the traditional divide between business interests and trial lawyers.

and infrastructure funding, as well as independent courts, spent an estimated \$970,000 supporting the retention of all five of Kansas' justices up for retention in 2016. The group does not disclose its donors. (The Brennan Center has worked with the Kansas Values Institute on various fair courts initiatives, but took no position on the retention election.)

A Parallel Problem: Dark Money and Judicial Nominations

At the same time state supreme courts are awash with secretive outside money, federal judicial confirmation battles in the Senate are experiencing a similar phenomenon, illustrating how deep-pocketed and secretive interests risk undermining the integrity of federal as well as state courts.

When President Obama first nominated Judge Merrick Garland to succeed Justice Antonin Scalia on the U.S. Supreme Court in 2016, the Judicial Crisis Network (JCN) announced it would spend \$7 million to oppose him. When President Trump announced Judge Neil Gorsuch as his Supreme Court pick, after Senate Republicans refused to consider Obama's nominee, JCN announced an additional \$10 million of spending in support of Gorsuch.²⁸ (JCN's actual spending has not been confirmed, although IRS filings show that the group received more than \$23 million from the Wellspring Committee during this timeframe, which in turn received a

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\$28.5 million contribution from a single, unnamed donor.²⁹) The group targeted vulnerable Senators, broadcasting ads in Republican-leaning states with Democratic senators up for reelection in 2018: Indiana (Sen. Joe Donnelly), Missouri (Sen. Claire McCaskill), Montana (Sen. Jon Tester), and North Dakota (Sen. Heidi Heitkamp).³⁰

As detailed previously, JCN, a dark money group, has also been a repeat player in state supreme court elections. The other major spender in connection with the Gorsuch nomination was the National Rifle Association, which announced a \$1 million ad campaign.³¹ (Actual NRA spending has not been verified, and there was very little spending by Gorsuch opponents.³²)

Similar interest group spending is also playing a role in supporting President Trump's lower court nominees.³³ JCN reportedly purchased \$140,000 in airtime for TV ads supportive of Trump's nominee to the Sixth Circuit Court of Appeals, Michigan Supreme Court Justice Joan Larsen.³⁴ A nonprofit named Concerned Veterans for America, a 501(c)(4) organization affiliated with the billionaire Koch brothers, aired advertising in support of Third Circuit Court of Appeals nominee Stephanos Bibas.³⁵ (Both Larsen and Bibas were later confirmed by the Senate.) On the other side, NARAL Pro-Choice America announced a six-figure campaign, including ad buys, against Sixth Circuit nominee John Bush, who was later confirmed.³⁶

While hard numbers are difficult to come by, the Gorsuch confirmation was not the first time a U.S. Supreme Court confirmation triggered significant spending — outside groups have made expenditures dating at least as far back as the Bork nomination,

and the Judicial Crisis Network was first founded as the Judicial Confirmation Network, where it supported the nominations of Justices Roberts and Alito. However, major expenditures on lower court nominations appear to have been rarer until recently.³⁷

The discomfiting backdrop of secret spending in connection with federal nominations also occasioned a tense exchange between then-Judge Gorsuch and Sen. Sheldon Whitehouse, D-R.I., during Gorsuch's 2017 confirmation hearing, echoing concerns applicable to state judicial races as well: When Whitehouse asked if Gorsuch would ask donors to JCN's \$10 million confirmation campaign to identify themselves "so we can evaluate who is behind this effort," Gorsuch responded that "It would be a politics question" and demurred.³⁸ Whitehouse then asked why people would want to spend \$10 million to see Gorsuch on the U.S. Supreme Court. Gorsuch replied that Whitehouse would have to ask the spenders. "I can't," Whitehouse said, "because I don't know who they are. It's just a front group."³⁹

*"Justice Joan Larsen,"
paid for by the Judicial
Crisis Network.*



CHAPTER 3

Television Ads and the Politicization of Supreme Court Races

Over the past decade and a half, television advertisements have helped transform state supreme court races, and not for the better. The expanded use of 15- and 30-second ads, combined with the growing involvement of outside groups in purchasing TV time, has driven up costs and imported some of the worst aspects of regular politics into judicial campaigns. In 2000, only four states saw television ads broadcast during their supreme court elections, according to data from Kantar Media/CMAG. In 2016, TV ads appeared in 15 states (16 states when the 2015 elections are included).¹

States also saw more ads go negative than in other recent election cycles, contributing to an increasingly politicized tenor in supreme court elections across the country.

Overview

Candidates, parties, and outside groups spent an estimated \$36.9 million on TV ads in 2015-16, topping the previous record of \$35.9 million in 2011-12 (inflation-adjusted), the last presidential election cycle.² Ten states saw high court races exceed \$1 million in TV spending. Outside groups spent a record \$20.9 million on TV ads, constituting an unprecedented 57 percent of all dollars spent on television ads during the two-year period. The prior record was 38 percent during the 2011-12 cycle.³

The heightened TV spending in 2015-16 infused ad wars with a new level of intensity. In total, 71,571 ad spots flooded the airwaves, the second highest ad count since tracking began in 2000.⁴

Pennsylvania led the nation in overall TV spending (a record \$12.4 million) with three Democratic candidates and Pennsylvanians for Judicial Reform, an outside group supporting them, each investing more than \$1 million apiece and outspending Republican rivals and allies. The Republican State Leadership Committee's Judicial Fairness Initiative also spent over \$900,000 on TV in the state.

Total TV Spending, 2015-16

State	Estimated TV Spending	Spot Count
Pennsylvania (2015)	\$12,400,720	19,764
West Virginia	\$4,203,576	10,155
North Carolina	\$3,493,320	3,641
Wisconsin (2016)	\$3,207,070	10,949
Michigan	\$2,715,890	2,768
Louisiana	\$2,511,800	4,193
Kansas	\$2,041,220	3,159
Mississippi	\$1,858,710	3,555
Ohio	\$1,321,670	4,490
Arkansas	\$1,240,730	2,931
Wisconsin (2015)	\$530,590	1,747
Montana	\$418,340	1,627
Texas	\$341,130	230
Washington	\$237,690	857
New Mexico	\$212,590	973
Kentucky (2016)	\$129,680	326
Idaho	\$39,730	199
Kentucky (2015)	\$1,640	7
Total	\$36,906,096	71,571

Television spending estimates and spot counts reflect data from Kantar Media/CMAG, except for West Virginia, which comes from data from state campaign finance disclosures. Unless otherwise noted, all races took place in 2016.

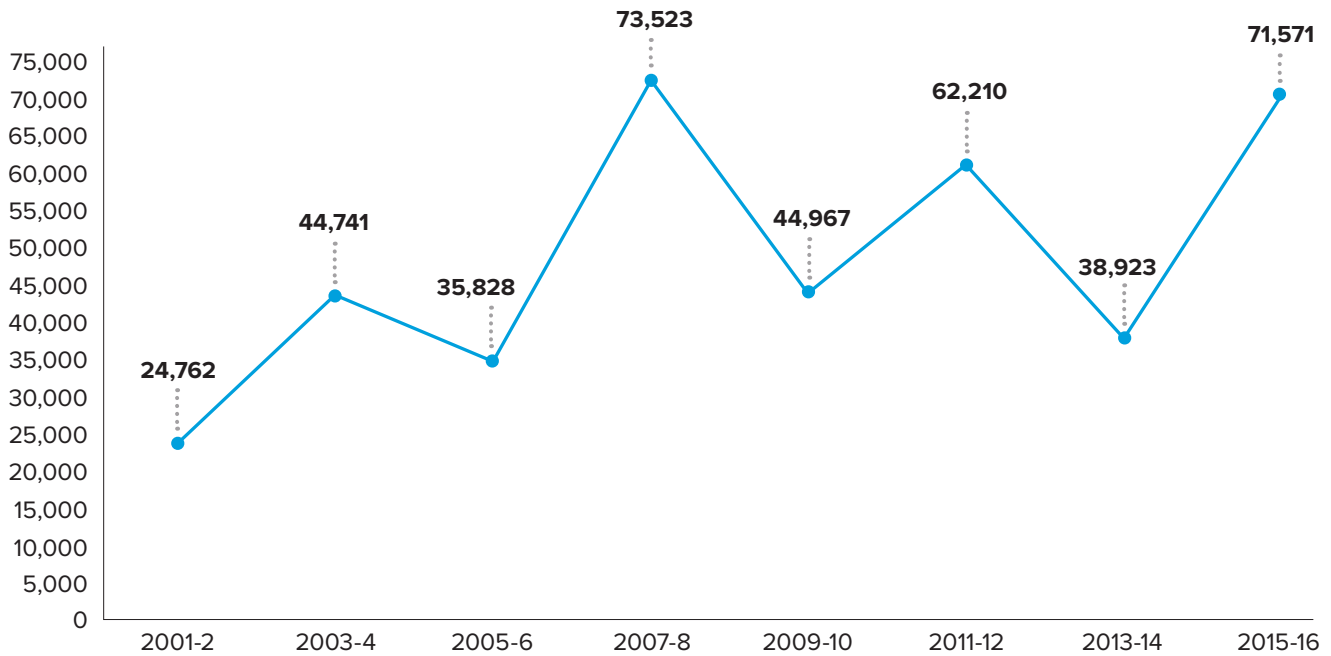
A More Pervasive Negative Tone

States were not only flush with ads in the 2015-16 cycle — they also saw more ads go negative than in other recent election cycles, contributing to an increasingly politicized tenor in supreme court elections across the country. Thirty-five percent of all advertising spots (or more than one out of every three) were negative during 2015-16, up from 21 percent in 2013-14 and 24 percent in 2011-12.⁵ Wisconsin had the most negativity overall, with negative ads making up 70 percent of all ad spots in its 2015 and 2016 elections.

Ad Tone

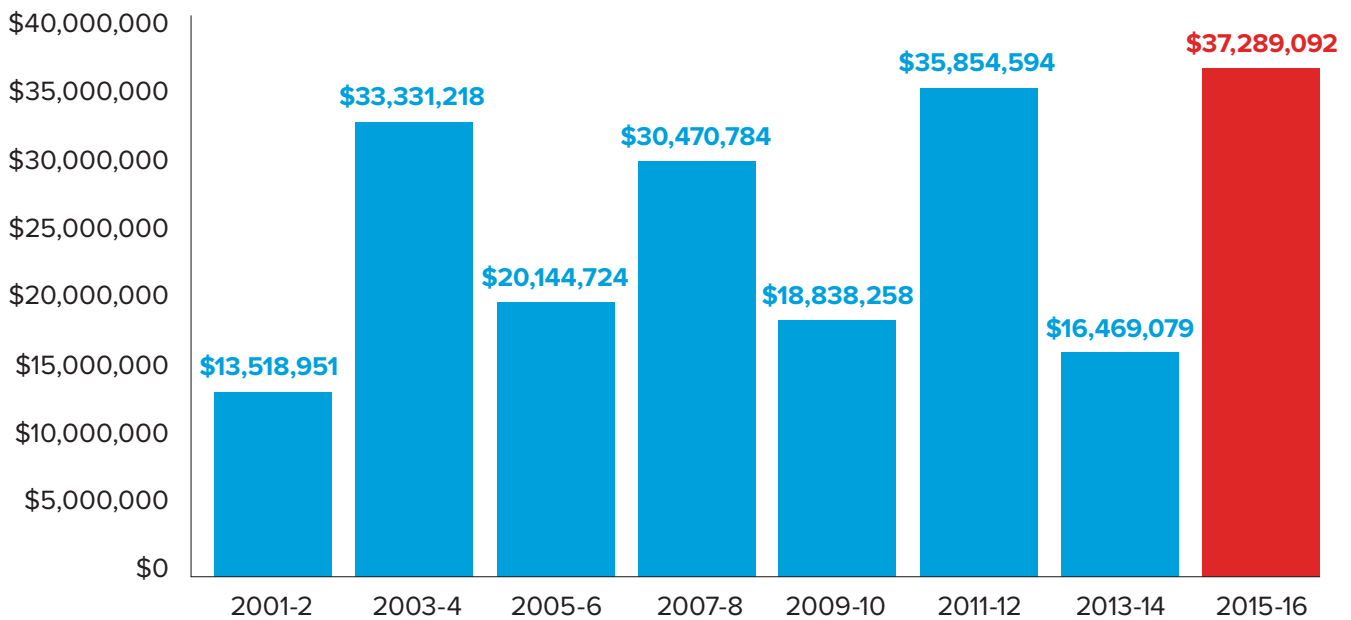
“Positive” ads promote a candidate and highlight their background, experience, and/or accomplishments. “Attack” ads, on the other hand, criticize an opponent. “Contrast” ads promote one candidate while criticizing an opponent. Both attack and contrast ads are considered to be “negative” ads, and they are included in this chapter’s calculation of negative ad totals.

Number of Television Ad Spots by Cycle



Television spot count data courtesy of Kantar Media/CMAG.

Total TV Spending by Cycle (2016 Dollars)



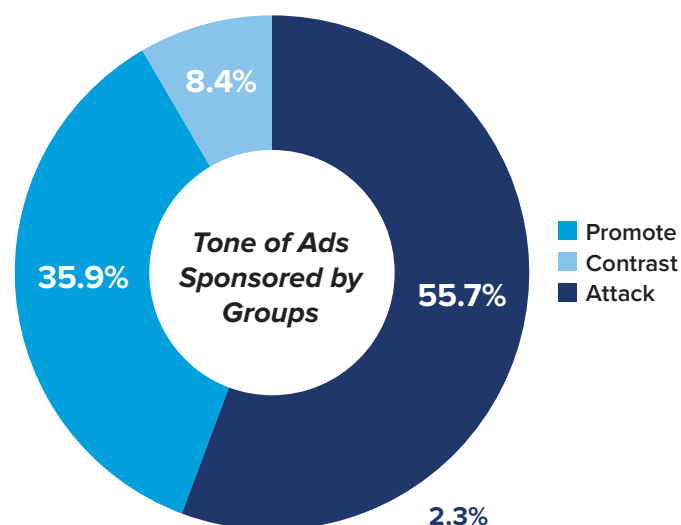
Television spending estimates are from Kantar Media/CMAG, except for West Virginia's 2016 election, which relied upon state campaign finance disclosures. All figures have been converted into 2016 dollars, including TV spending figures for 2015. For this reason, the 2015-16 total in this chart is slightly higher than the figure that appears elsewhere in this report.

This heightened negativity is likely another byproduct of the record outside spending by interest groups in 2015-16. A notable 73 percent of all negative ad spots aired during this cycle were paid for by outside groups. Tellingly, only 15 percent of candidates' own ads had negative content, while 64 percent of spots paid for by groups were negative in tone. This divergence between candidates and groups is not surprising: Judicial candidates are bound by judicial conduct rules that constrain their behavior and may also have a reputational interest in avoiding mudslinging. In some cases, candidates may also forego negativity expecting that an outside group will go on the attack on their behalf.

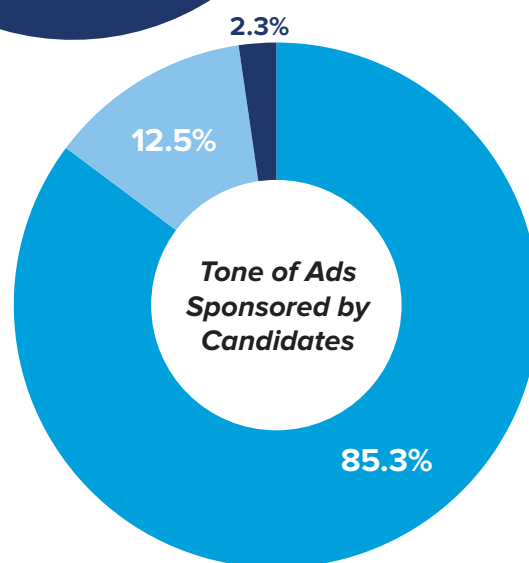
It is important to recognize that some negative ads, while perhaps unpleasant, are fact-based and may raise legitimate issues for voters. For example, a series of ads in Wisconsin's 2016 supreme court race accurately described past writings by the winning candidate, Justice Rebecca Bradley, in which she said she had no sympathy for "queers" living with AIDS.⁶

But such ads are atypical. Far more representative was an ad put out by an outside group in Washington State's 2016 supreme court election, criticizing a justice seeking reelection as "enabl[ing] child predators" and "letting dangerous people do dangerous things,"⁷ referring to his participation in a 5-4 decision that the police had not given adequate warning when they sought to search a private home without a warrant.⁸ The ad drew a rebuke from a retired Washington Supreme Court justice and a former U.S. Attorney, who wrote a public letter describing the ad as "misrepresent[ing] both the impacts — and motives" of the opinion and "borrow[ing] tactics from some of our country's ugliest political moments."⁹

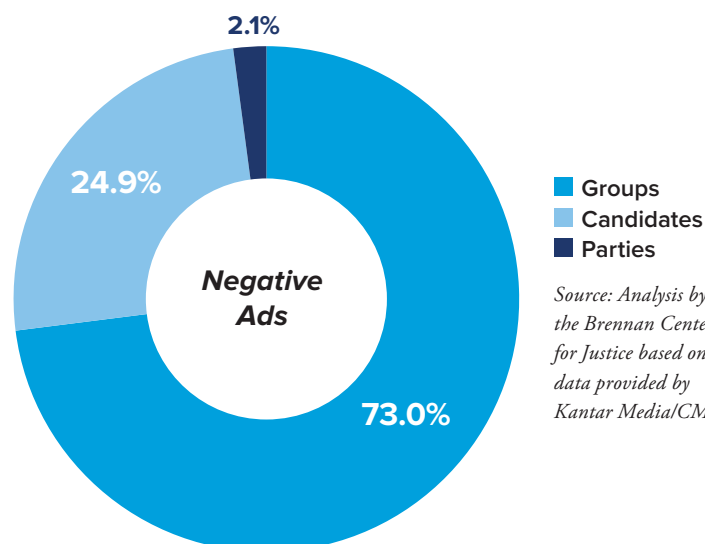
Ad Tone Analysis: Groups vs. Candidates



Source: Analysis by the Brennan Center for Justice based on data provided by Kantar Media/CMAG. Parties' ads were not included because there were fewer than 1000 ad spots run by parties in total.



Percentage of Negative Ads by Sponsor



Source: Analysis by the Brennan Center for Justice based on data provided by Kantar Media/CMAG.



*"Can't Be Trusted,"
paid for by Judicial
Integrity WA PAC.
Copyright 2016,
Kantar Media/CMAG.*

In total, more than half of all negative ads aired in 2015-16 attacked judges for rulings on the bench, often in a misleading way designed to stoke emotion and anger, rather than honestly inform voters. The trend of targeting judges for their decisions can also cast a long shadow. As discussed earlier, a growing body of research suggests that fears about election attacks can impact how judges rule in cases, particularly on criminal justice issues.¹⁰ Negative campaigning may also further blur the line between politics and judging — making it harder for judges to focus on doing what the law requires, rather than what is politically popular or expedient.

Heightened negativity may also impact the courts on the front end, making it harder to attract strong judicial candidates to run in elections. As retired Montana Supreme Court Justice James C. Nelson asked in a recent op-ed: “Why would a qualified and experienced attorney choose to run for a judicial office that pays a fraction of that in the private sector; that requires the candidate to raise and spend a small fortune; and that demands the candidate, for months on end, subject herself or himself (along with

their families) to a barrage of lies, misinformation and abuse from out-of-state organizations that know nothing — and care less — about the targeted candidate, Montana, its people or its Constitution and laws?”¹¹

Ad Themes

As in the prior election cycle, the most common theme in supreme court election ads during 2015-16 was criminal justice, with candidates described as being “tough” or “soft” on crime. Ads typically highlighted a candidate’s record prosecuting criminals, standing up for victims’ rights, and/or upholding death sentences. A third of all ad spots (34 percent) used criminal justice themes, including 42 percent of all negative ads.

Notably, groups that paid for criminal justice-centered ads often had little apparent institutional interest in the area. Ten of the organizations that spent money on criminal-justice-themed ads this cycle had websites or other public statements about their mission or focus. Of these, only two listed criminal justice-related topics among their priorities.

The share of criminal justice-themed ads in 2015-16 dropped substantially from the 2013-14 cycle, where a record 56 percent of ad spots discussed criminal justice issues. It is consistent, however, with previous highs prior to 2013-14. (In both 2007-08 and 2009-10, criminal justice themes made up 33 percent of total ad spots.)

“Traditional” ads, which highlight a candidate’s experience, personal and professional qualifications, education, character, family, and community involvement, were a close second among ad types during 2015-16,

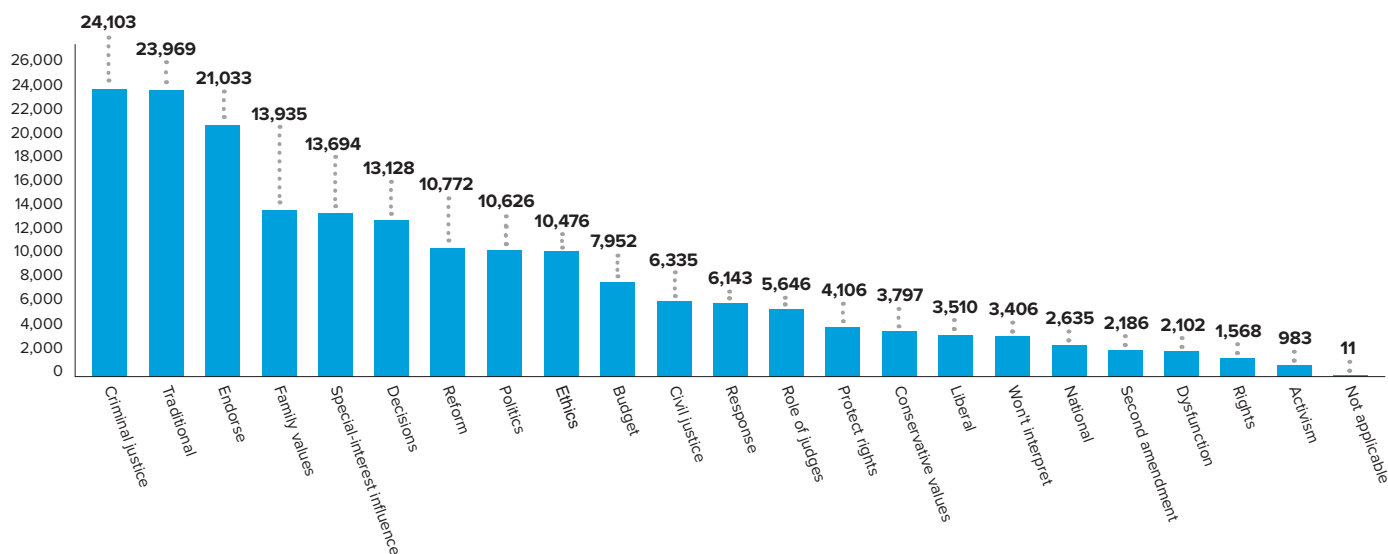
making up 33 percent of ad spots. The vast majority of traditional ads, 85.9 percent, were run by candidates themselves.

Ads touting endorsements by prosecutors, police unions, or other law enforcement groups were also common, accounting for 29 percent of all 2015-16 TV ad spots.

These ads highlight the often-close relationship between law enforcement and judges — in an environment where state courts adjudicate the overwhelming majority of criminal cases.¹² (Because ads can have multiple angles, some were coded as both criminal justice and endorsement-focused.)

Ad Themes for State Supreme Court Elections, 2015-16

Television spot count data courtesy of Kantar Media/CMAG.



Ad Themes

NO. 1

Criminal Justice

Ads describing a candidate as being “tough” or “soft” on crime. Highlights a candidate’s record prosecuting criminals, standing up for victims’ rights, and/or upholding death sentences.

NO. 2

Traditional

Ads highlighting a candidate’s experience, personal and professional qualifications, education, character, family, and community involvement.

NO. 3

Endorse

Ads highlighting a candidate’s endorsements by and/or support from law enforcement personnel, including police officers and prosecutors.

NO. 4

Family Values

Ads that praise a candidate for protecting children and families. May deal with issues such as child predators and domestic violence.

NO. 5

Special-Interest Influence

Ads claiming that judges are “for sale” or “in the pocket” of big corporations. May praise a judge for ignoring special interests, or criticize a candidate for favoring outside groups and giving in to political pressure.

NO. 6

Decisions

Ads that criticize a judge for a ruling in a past case, or for their rulings in a specific type of case.



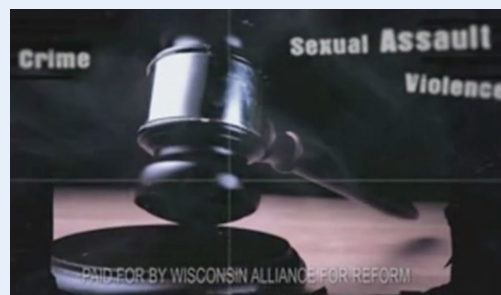
Ad Spotlight

Highlights from some of the most notable ads of the 2015-16 election cycle.

Wisconsin

An ad from the Wisconsin Alliance for Reform criticized a ruling by Judge Joanne Kloppenburg for granting a new hearing to a person convicted of sexual assault. The ad drew a “Mostly False” rating from PolitiFact Wisconsin, “[f]or a statement that contains an element of truth but ignores critical facts that would give a different impression.”¹³

“We’ve heard it before: Liberal judges letting criminals off on technicalities....Tell Judge Kloppenburg courts should protect children, not criminals.”



“Technicalities,” paid for by Wisconsin Alliance For Reform. Copyright 2016, Kantar Media/CMAG.

Mississippi

An ad by the Center for Individual Freedom accused Justice Jim Kitchens of “siding with child predators.” The ad highlighted a case in which Kitchens called for a criminal defendant to receive a new trial because of the ineffectiveness of his appointed attorney. The ad did not note that the entire Mississippi Supreme Court ruled in favor of the defendant in that case, granting him an evidentiary hearing on his claims, just short of the new trial Kitchens would have granted.¹⁴

“On our Supreme Court, Jim Kitchens is putting criminals ahead of victims.”



“Stand Up for Victims,” paid for by the Center for Individual Freedom. Copyright 2016, Kantar Media/CMAG.

North Carolina

North Carolina Families First attacked Justice Bob Edmunds for his role in a decision upholding North Carolina’s congressional districts against claims it was an illegal racial gerrymander. A federal court later found the districts discriminated against the state’s black voters, a ruling affirmed by the U.S. Supreme Court. One ad focused on a district it called “The Snake” based on its shape, as a snake slithered across the screen.

“Justice Bob Edmunds...wrote the decision supporting his party’s discrimination.”



“Redistricting,” paid for by North Carolina Families First. Copyright 2016, Kantar Media/CMAG.

Kansas

An ad aired by Kansans for Justice showed photos of defendants who had been convicted of murder and sentenced to death and stamped the word “OVERTURNED” over each image. The ad characterized the justices on the Kansas Supreme Court as having “repeatedly pervert[ed] the law to side with murderers and rapists.” The ad instructed viewers to “STAND WITH VICTIMS,” and “vote NO on the Kansas Supreme Court.”

“The Kansas Supreme Court has chosen sides. They repeatedly pervert the law to side with murderers and rapists.”



“Stand with Victims,” paid for by Kansans for Justice. Copyright 2016, Kantar Media/CMAG.

CONCLUSION

The corrosive effect of money in politics on democratic values is certainly not unique to state supreme court elections. But these elections are a powerful object lesson, precisely because the courtroom is supposed to be a place where everyone is equal before the law. The growth of high-cost and politicized state supreme court elections, exacerbated by the rise of outside spending by non-transparent and unaccountable interest groups, threatens courts' ability to play this role.

The U.S. Supreme Court's campaign finance jurisprudence looms large over this slow-motion justice crisis — and limits the menu of responses available to states. But the good news is that states retain powerful tools to ensure that judges are not merely politicians in robes.

Strengthening recusal rules and disclosure laws can help avoid the most severe conflicts of interest, while promoting accountability when outside groups choose to weigh in on elections. Public financing of judicial races can give judicial candidates the opportunity to run competitive races without big-money support, so that wealth,

connections, and fundraising acumen are not the only pathway to the bench. The adoption of voter guides and judicial performance evaluations can give voters tools to make informed choices, ensuring that a 30-second attack ad is not the only information available about a judicial candidate.

Yet, it is also increasingly clear that politicized supreme court elections are here to stay — and with them, serious threats to judicial integrity. For this reason, states should also look more closely at how they select and retain supreme court justices, and consider structural changes that may better promote important values, including judicial independence and legitimacy.

One key reform would be to adopt a lengthy single term for justices — so that they can decide controversial cases without worrying that it will become fodder for the next election. Another would be to replace elections with a publicly-accountable appointment process, where a nominating commission with diverse membership recruits and vets judicial candidates, and then presents a slate from which the governor can choose. Such a system, some version of

which is already used in 22 states, ensures that democratically accountable actors retain a role in choosing judges, while reducing special interest pressures and the risk of cronyism.

“The founders realized there has to be someplace where being right is more important than being popular or powerful, and where fairness trumps strength,” former U.S. Supreme Court Justice Sandra O’Connor has explained. “And in our country, that place is supposed to be the courtroom.”¹ Special interest dollars bidding for justice is fundamentally at odds with this basic principle. As it becomes increasingly clear that the politics of judicial elections is entrenched in states across the country, states must consider — with urgency — how to ensure their courts are capable of ensuring equal justice for all.

As it becomes increasingly clear that the politics of judicial elections is entrenched in states across the country, states must consider — with urgency — how to ensure their courts are capable of ensuring equal justice for all.

APPENDIX

State Profiles



Alabama

The all-Republican Alabama Supreme Court saw no change in its political composition when three incumbents won re-election in 2016. Michael F. Bolin and Kelli A. Wise, both Republicans, faced no opposition, and Tom Parker defeated his Republican rival, attorney Donna J. Beaulieu, in a primary.

	Spending	Rank
Total spending/rank:	\$262,319	19
Candidate fundraising total/rank:	\$262,319	18
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	0	N/A

Arkansas



In contested races for two Arkansas Supreme Court seats in 2016, overall spending of \$2.4 million and TV spending of \$1.2 million set state records. The Republican State Leadership Committee's Judicial Fairness Initiative spent an estimated \$120,450 on airtime for broadcast TV ads opposing attorney Clark Mason in his race with Circuit Judge Shawn Womack, and the Judicial Crisis Network spent an estimated \$554,840 to air TV ads opposing Justice Courtney Goodson, running against Circuit Judge Dan Kemp for chief justice. Goodson was a top 10 fundraiser, pulling in more than \$1.02 million, yet she lost to Kemp. Mason lost to Womack.

	Spending	Rank
Total spending/rank:	\$2,404,766	11
Candidate fundraising total/rank:	\$1,729,476	8
Group spending total/rank:	\$675,290	11
Party spending total/rank:	0	N/A
TV spending total/rank:	\$1,240,730	10

Georgia

Justice David E. Nahmias won reelection to the Georgia Supreme Court without an opponent in 2016, raising \$186,429. Other new justices joined the court after the legislature voted to approve Republican Gov. Nathan Deal's plan to expand the court from seven to nine justices. In November 2016, Deal appointed Appeals Court Judge Nels Peterson and state Solicitor General Britt Grant to newly created seats and Appeals Court Judge Michael Boggs to succeed a justice who retired.



	Spending	Rank
Total spending/rank:	\$186,429	20
Candidate fundraising total/rank:	\$186,429	19
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	0	N/A

Idaho

After a May 2016 primary that saw the defeat of state Sen. Curtis McKenzie and Court of Appeals Judge Sergio A. Gutierrez, attorney Robyn Brody and Deputy Idaho Attorney General Clive J. Strong advanced to an autumn runoff for an open seat on the high court. Brody spent more than \$308,000 and defeated Strong, who spent approximately \$64,000. Justice Roger S. Burdick was unopposed in his successful re-election bid. Total spending was \$431,258.



	Spending	Rank
Total spending/rank:	\$431,258	17
Candidate fundraising total/rank:	\$431,258	16
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	\$39,730	17

Kansas



The nation's most costly and contentious retention election during the 2015-16 cycle occurred in Kansas. Four justices were targeted by interest groups and elected officials over a controversial ruling in a death penalty case and over political issues; all of the justices were given a new term by voters in 2016. Justices Lawton Nuss, Marla Luckert, Carol Beier and Daniel Biles retained their seats, as did a fifth who was not targeted, Caleb Stegall. Approximately \$2.07 million was spent on the election, a state record, according to TV spending estimates from Kantar Media/CMAG and ad contracts posted to the FCC's website. Total spending was likely higher, however, because Kansas does not require candidate committees or outside groups to disclose judicial election spending to campaign finance authorities. Total TV spending hit a Kansas record of an estimated \$2.04 million, all of it by outside groups. It was the first time since at least 2000, when the Brennan Center began collecting data, that Kansas saw TV spending in a supreme court retention election.

	Spending	Rank
Total spending/rank:	\$2,073,937	12
Candidate fundraising total/rank:	0	N/A
Group spending total/rank:	\$2,073,937	7
Party spending total/rank:	0	N/A
TV spending total/rank:	\$2,041,220	7

Kentucky (2016)



Appeals Court Judge Larry VanMeter outspent fellow Judge Glenn E. Acree by \$449,846 to \$38,854 in a 2016 race for a single-district seat and defeated Acree.

	Spending	Rank
Total spending/rank:	\$488,700	15
Candidate fundraising total/rank:	\$488,700	14
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	\$129,680	16

Kentucky (2015)

Appeals Court Judge Janet L. Stumbo marginally outspent Circuit Judge Sam Wright III in a race for another single-district seat. Wright won election.



	Spending	Rank
Total spending/rank:	\$426,624	18
Candidate fundraising total/rank:	\$426,624	17
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	\$1,640	18

Louisiana

Charter schools and energy corporations appeared to be at the center of spending in the 2016 Louisiana Supreme Court election, which set an overall record for the state at nearly \$5 million and a state TV spending record of \$2.5 million. Court of Appeals Judge Jimmy Genovese received over \$1.39 million in contributions in his successful campaign for an open seat, while his opponent, state district court Judge Marilyn Castle, received more than \$670,000. Both sides attracted major outside spending, and Genovese was outspent on the airwaves. The largest outside spender was the Center for Individual Freedom, which does not disclose its donors, which supported Castle. Incumbent Justice Marcus R. Clark also ran unopposed for a new term on the court.



	Spending	Rank
Total spending/rank:	\$4,912,154	4
Candidate fundraising total/rank:	\$2,408,179	4
Group spending total/rank:	\$2,503,976	5
Party spending total/rank:	0	N/A
TV spending total/rank:	\$2,511,800	6

Michigan



Incumbent Republican Justices David Viviano and Joan Larsen won reelection in 2016 after benefitting from heavy dark-money spending and amassing lopsided fundraising totals over their opponents. The Michigan Chamber of Commerce spent more than \$2.2 million in support of the incumbents; meanwhile, Viviano outraised Judge Frank Szymanski, a Democrat, and Doug Dern of the Natural Law Party by 23:1, and Larsen outraised Circuit Judge Deborah A. Thomas, a Democrat, by 8:1. Of \$3.1 million in documented independent spending, 86 percent was not reported in state campaign finance filings.

	Spending	Rank
Total spending/rank:	\$4,326,234	6
Candidate fundraising total/rank:	\$1,214,963	9
Group spending total/rank:	\$3,111,271	4
Party spending total/rank:	\$455,685	1
TV spending total/rank:	\$2,715,890	5

Minnesota



Spending was relatively low (\$64,879) in a three-way 2016 contest for a Minnesota Supreme Court seat that saw incumbent Justice Natalie E. Hudson defeat attorney Michelle L. MacDonald in the general election. Attorney Craig Foss was defeated in an earlier primary. It was the first state supreme court election for Hudson, appointed to the court in 2015; she raised \$64,669, and MacDonald, \$210.

	Spending	Rank
Total spending/rank:	\$64,879	22
Candidate fundraising total/rank:	\$64,879	21
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	0	N/A

Mississippi

Unions and trial lawyers lined up in 2016 in support of incumbent Mississippi Supreme Court Justice Jim Kitchens. Court of Appeals Judge T. Kenneth Griffis, the challenger, received contributions from medical, insurance, and corporate defense lawyers and business interests, and benefitted from outside spending by a PAC supported by the Mississippi Manufacturers Association and Mississippi Realtors, among others. Kitchens won reelection despite \$1.2 million in independent spending that benefitted his opponent; Kitchens raised over \$724,000, compared to over \$519,000 reported by Griffis. Elections for three other seats attracted far less spending. Incumbents Dawn H. Beam and James D. Maxwell won new terms, while Circuit Judge Robert Chamberlin prevailed in a run-off election.



	Spending	Rank
Total spending/rank:	\$3,237,874	9
Candidate fundraising total/rank:	\$2,004,464	6
Group spending total/rank:	\$1,233,410	9
Party spending total/rank:	0	N/A
TV spending total/rank:	\$1,858,710	8

Montana

District Judge Dirk Sandefur defeated law professor Kristen Juras for an open seat on the Montana Supreme Court in 2016. Sandefur was heavily supported by trial lawyers, while Juras received her support from conservative and business interests, including StopSetem-FreeSandefur.com, which was almost entirely funded by the Republican State Leadership Committee's Judicial Fairness Initiative. Outside groups invested \$985,684 in independent expenditures, the vast majority in support of Sandefur. Overall spending of more than \$1.8 million set a record for the state, as did TV spending of more than \$418,000. Also winning election were incumbents Jim Shea and Mike McGrath. They ran unopposed.



	Spending	Rank
Total spending/rank:	\$1,834,804	13
Candidate fundraising total/rank:	\$782,351	12
Group spending total/rank:	\$985,684	10
Party spending total/rank:	\$66,769	3
TV spending total/rank:	\$418,340	12

New Mexico



When Justice Judith K. Nakamura won election over Court of Appeals Judge Michael E. Vigil in 2016, Nakamura became the first Republican woman elected to the New Mexico Supreme Court. Both candidates participated in the state's public financing program, and their race was marked by relatively low spending, positive television ads, and no outside TV advertising. Incumbent Justice Barbara J. Vigil also won a new term in a retention election.

	Spending	Rank
Total spending/rank:	\$464,266	16
Candidate fundraising total/rank:	\$464,266	15
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	\$212,590	15

North Carolina



In a high-profile 2016 election rife with tensions over racial gerrymandering, Superior Court Judge Michael Morgan defeated incumbent Justice Robert Edmunds Jr., flipping the ideological balance of the North Carolina Supreme Court from a Republican to Democratic majority. Both candidates benefitted from millions of dollars in outside spending. Morgan received an endorsement from President Obama. Total TV spending approached \$3.5 million, and overall spending surpassed \$5.4 million. Three leading outside spenders, North Carolina Families First (\$1.7 million in support of Morgan), the North Carolina Chamber of Commerce (\$1.45 million in support of Edmunds), and Fair Judges (\$1.18 million) ranked among the top 10 outside spenders nationally.

	Spending	Rank
Total spending/rank:	\$5,419,151	2
Candidate fundraising total/rank:	\$672,230	13
Group spending total/rank:	\$4,746,921	2
Party spending total/rank:	0	N/A
TV spending total/rank:	\$3,493,320	3

North Dakota

With two North Dakota Supreme Court seats on the ballot, incumbent Justice Lisa Fair McEvers was reelected without an opponent in 2016, and District Judge Jerod Elton Tufte defeated attorney Robert V. Bolinske Sr. The latter race was the first for an open seat on the court in 24 years.¹



	Spending	Rank
Total spending/rank:	\$51,052	23
Candidate fundraising total/rank:	\$51,052	22
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	0	N/A

Ohio

Republicans retained their 6-1 majority on the Ohio Supreme Court after the 2016 election, as Chief Justice Maureen O'Connor secured re-election without an opponent and Appeals Court Judges Pat Fischer and Pat DeWine defeated Democrats John P. O'Donnell, a common pleas court judge, and Cynthia Rice, an appeals court judge, respectively. The Republican State Leadership Committee's Judicial Fairness Initiative spent \$233,960 in support of the three winning candidates. Overall spending was over \$3.3 million.



	Spending	Rank
Total spending/rank:	\$3,353,641	8
Candidate fundraising total/rank:	\$3,117,471	3
Group spending total/rank:	\$233,960	12
Party spending total/rank:	\$2,210	5
TV spending total/rank:	\$1,321,670	9

Pennsylvania



With the partisan balance of the scandal-plagued Pennsylvania Supreme Court at stake, candidates and outside groups engaged in a 2015 spending free-for-all (\$15.6 million and \$5.7 million respectively) that easily set a new national record (\$21.4 million). Democrats Kevin Dougherty, David Wecht and Christine Donohue outspent their Republican rivals and swept three open seats, giving Democrats a 5-2 majority on the court. The winners, along with Pennsylvanians for Judicial Reform, a group funded by trial lawyers and unions that supported the Democratic candidates, were four out of the nation's five biggest spenders. Outside spending by Pennsylvanians for Judicial Reform (\$4.1 million) and the Republican State Leadership Committee's Judicial Fairness Initiative (\$1.5 million), when combined, surpassed total spending in any other state supreme court contest in 2015-16. TV spending of \$12.4 million also set a national record for a state supreme court election.

	Spending	Rank
Total spending/rank:	\$21,417,860	1
Candidate fundraising total/rank:	\$15,660,616	1
Group spending total/rank:	\$5,749,055	1
Party spending total/rank:	\$8,190	4
TV spending total/rank:	\$12,400,720	1

Tennessee



Three Tennessee Supreme Court justices, all initially appointed by a Republican governor, won new terms after facing no organized anti-retention effort. It was a sharp contrast to two years earlier when three justices first appointed by Democratic governors faced a rigorous ouster drive but stayed on the court amid record spending. Justices Jeff Bivins, Holly Kirby and Roger A. Page easily won their 2016 retention votes.

	Spending	Rank
Total spending/rank:	\$105,108	21
Candidate fundraising total/rank:	\$105,108	20
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	0	N/A

Texas

When three incumbents ran for re-election to the Texas Supreme Court in 2016, their sweep maintained 9-0 Republican control of the court. Justices Paul Green, Eva Guzman, and Debra Lehrmann all won new terms after contested primary and general elections.



	Spending	Rank
Total spending/rank:	\$4,205,358	7
Candidate fundraising total/rank:	\$4,205,358	2
Group spending total/rank:	0	N/A
Party spending total/rank:	0	N/A
TV spending total/rank:	\$341,130	13

Washington

Despite \$1.4 million spent by outside groups and the state's Republican party to unseat them, incumbent Justices Barbara Madsen, Charles Wiggins, and Mary Yu won reelection to the Washington Supreme Court in 2016. The justices saw only \$349,000 in outside group support. The court had ruled in 2015 that charter schools controlled by appointed boards could not receive public funds, and the justices seeking reelection were vigorously opposed by pro-charter school groups and individuals. Charter school enthusiast Bill Gates and other Microsoft executives wrote checks to help fund anti-incumbent groups.



	Spending	Rank
Total spending/rank:	\$2,790,726	10
Candidate fundraising total/rank:	\$1,060,942	11
Group spending total/rank:	\$1,480,455	8
Party spending total/rank:	\$249,365	2
TV spending total/rank:	\$237,690	14

West Virginia



A five-way contest for one seat on the West Virginia Supreme Court in 2016 attracted nearly \$3 million in outside spending, including over \$2 million from the Republican State Leadership Committee’s Judicial Fairness Initiative, and saw TV ad spending of \$4.2 million for a state record. Attorney Beth Walker, who benefitted from the Judicial Fairness Initiative effort, defeated incumbent Justice Brent Benjamin, ex-state legislator William “Bill” Wooton, attorney Wayne King, and former state Attorney General Darrell McGraw Jr. Both Benjamin and Wooton participated in the state’s public financing system.

	Spending	Rank
Total spending/rank:	\$4,963,973	3
Candidate fundraising total/rank:	\$1,972,290	7
Group spending total/rank:	\$2,991,682	3
Party spending total/rank:	0	N/A
TV spending total/rank:	\$4,203,576	2

Wisconsin (2016)



Often a state supreme court election battleground, Wisconsin saw over \$4.7 million spent in the fight for a single seat. Incumbent Justice Rebecca Bradley defeated state Court of Appeals Judge JoAnne Kloppenburg, who had previously challenged Justice David Prosser in 2011. Bradley’s campaign was boosted by nearly \$1.9 million in outside spending by the Wisconsin Alliance for Reform, one of the top 10 spenders in the biennium, and from \$114,000 spent by the Republican State Leadership Committee’s Judicial Fairness Initiative. An outside group supporting Kloppenburg, the Greater Wisconsin Committee, spent \$389,360 on television ads, and its affiliate The Greater Wisconsin Committee Political Independent Expenditure Fund spent \$107,000 on other advertising.

	Spending	Rank
Total spending/rank:	\$4,723,444	5
Candidate fundraising total/rank:	\$2,249,071	5
Group spending total/rank:	\$2,474,373	6
Party spending total/rank:	0	N/A
TV spending total/rank:	\$3,207,070	4

Wisconsin (2015)

In another million-dollar-plus election, incumbent Justice Ann Walsh Bradley outspent her challenger, Rock County Circuit Judge James Daley, by more than two-to-one margin and won her third 10-year term. Voters also passed a constitutional amendment to change the way the court chooses its chief justice — from a seniority system to a vote among the justices. Following the amendment, Shirley Abrahamson was replaced as chief justice by Patience Roggensack.



	Spending	Rank
Total spending/rank:	\$1,196,620	14
Candidate fundraising total/rank:	\$1,149,686	10
Group spending total/rank:	\$46,934	13
Party spending total/rank:	0	N/A
TV spending total/rank:	\$530,590	11

NOTES

Chapter 1

1. The election cycle's races for 76 court seats included 30 retention races and 15 non-retention races in which only a single candidate ran. Zero spending was recorded in races for 29 seats, 22 of them in retention-election states.
2. All historical comparisons in this report reflect figures converted to 2016 dollars. Unless otherwise noted, historical comparisons and statements about records reflect data beginning with the 1999-2000 election cycle.
3. This analysis counts any justice whose race for a seat on a state high court saw at least \$1 million in total spending, including campaign fundraising and independent expenditures on both sides. For retention elections, when multiple justices were standing for retention at the same time and television ads indicated there was a joint campaign supporting or opposing the justices collectively, justices were included in this count if the *aggregate* spending on the retention election surpassed \$1 million total. If an incumbent was ousted in a retention election, the justice's replacement was counted toward the total number of judges elected in \$1 million-plus races.
4. While 2003-04 holds the record for total overall spending in a supreme court election cycle, only 17 justices were involved in \$1 million-plus election during that cycle, as compared with 27 justices during 2015-16. Notably, the 2003-04 spending record is largely driven by a few very high-cost races, including an election for a single seat in Illinois that attracted \$19.7 million (inflation-adjusted). In contrast, spending on individual races in 2015-16 was far more diffuse.
5. The number of non-retention seats up for election was 52 in 1999-2000; 46 in 2003-04; 42 in 2007-08; 43 in 2011-12; and 46 in 2015-16. There were also *fewer* total candidates standing for election in 2015-16 than in all but one earlier presidential election cycle. This holds true both including and excluding retention elections.
6. The report excluded retention-election seats for purposes of this comparison because until the 2009-10 election cycle, virtually no retention elections saw substantial spending and even in more recent cycles, most retention-election seats do not attract any spending.
7. When all spending is converted to 2016 dollars, TV spending in the 2015-16 cycle was \$37.3 million, as compared with \$35.9 million in 2011-12, the last presidential election cycle.
8. In 2016 dollars, the total for the 2013-14 cycle was \$6.7 million.
9. Kansas's relatively inexpensive media market also likely kept spending figures down, while actual expenditures were also likely higher than documented in this report because a state campaign finance loophole meant that groups and candidate committees were not required to disclose their spending to state campaign finance authorities. This report's Kansas data is therefore limited to estimates of television spending from Kantar Media/CMAG and ad con-

- tracts posted to a website maintained by the Federal Communications Commission.
10. In inflation-adjusted terms, spending in retention elections during 2015-16 was more than one-and-a-half times higher than retention election spending in any cycle prior to 2009-10.
 11. In most states, high court judges stand for election statewide, though in six — Illinois, Kentucky, Louisiana, Maryland, Mississippi and Nebraska — justices are elected by geographic district. See Melinda Gann Hall, *Attacking Judges: How Campaign Advertising Influence State Supreme Court Elections*, 2015, 39-40.
 12. See Melinda Gann Hall and Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Elections*, *American Journal of Political Science* 50, no. 1 (2006): 20 (finding that “differences in campaign spending between incumbents and challengers are important in determining incumbents’ electoral performance in state supreme court elections”); see also Chisun Lee et al., *Secret Spending in the States*, Brennan Center for Justice, 2016, 17-19 (discussing the outsize impact of spending in low information elections).
 13. Prior to the 2005-06 cycle, this analysis of outside spending was limited to outside TV spending.
 14. *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010); *SpeechNow.org v. Federal Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).
 15. This statistic excludes the 2009-10 election cycle, which was ongoing at the time *Citizens United* was decided in January 2010.
 16. See Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 7, https://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%205_%20Years_%20Later.pdf.
 17. When political parties’ expenditures were included, total outside spending rose to \$28.6 million and the share of total state supreme court spending increased marginally to 41 percent. This ties the all-time record for non-candidate spending from the 2011-12 cycle.
 18. See Edwin Bender et al., *Funding the State Political Party Committees Pre- and Post-BCRA, 1996-2016*, National Institute on Money in State Politics, 2017, 29-36, <https://www.followthemoney.org/assets/Uploads/PartyCmteAnalysis6.16.17BauerGinsberg.pdf>.
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 21. *Ibid.*; Raymond J. La Raja and Brian F. Schaffner, “The Hydraulics of Campaign Money,” chap. 5 in *Campaign Finance and Political Polarization: When Purists Prevail* (Ann Arbor, MI: University of Michigan Press, 2015), <https://quod.lib.umich.edu/u/ump/13855466.0001.001/1:7/--campaign-finance-and-political-polarization-when-purists?rgn=div1;view=fulltext>.
 22. Vandewalker and Weiner, *Stronger Parties, Stronger Democracy*, 4.
 23. Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice, 2016, 8, https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf. In addition to the eight states listed in that report, in 2016, North Carolina’s supreme

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 26. Suzanne Perez Tobias and Dion Lefler, “Kansas Supreme Court rules school funding inadequate,” *Wichita Eagle*, March 2, 2017, <http://www.kansas.com/news/politics-government/article135967648.html>.
 27. The Brennan Center represented Kansas state judges in lawsuits challenging several of these provisions.
 28. See *Hodes & Nausser v. Schmidt*, 368 P.3d 667 (Kan. Ct. App. 2016). In March 2017, the Kansas Supreme Court heard oral arguments in the state’s appeal. Dan Margolies, “Kansas Supreme Court Hears Arguments in ‘Right to Abortion’ Case,” *KCUR*, March 16, 2017, <http://kcur.org/post/kansas-supreme-court-hears-arguments-right-abortion-case#stream/0>.
 29. Republican Joan Orié Melvin was suspended in 2012 and convicted the following year for misuse of state funds; then Democrat Seamus McCaffery resigned in 2014 over his role in an e-mail scandal; and later that year Republican Ronald D. Castille stepped down after reaching the mandatory retirement age of 70.
 30. Inflation-adjusted, the prior national record for spending in a state supreme court election was Illinois’ 2004 election for a single seat on the high court, where total spending was \$19.7 million.
 31. Christie Thompson, “Trial by Cash,” *The Atlantic*, Dec. 11, 2014, <https://www.theatlantic.com/politics/archive/2014/12/trial-by-cash/383631/>.
 32. Joanna Shepherd and Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices’ Decisions in Criminal Cases*, American Constitution Society, 2014, <http://skewedjustice.org/>.
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40. 2017 N.C. Sess. Laws 7, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=h239>.
41. H.J.R. 1699, 56th Leg., 1st Sess. (Ok. 2017), <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1699&Session=1700>.
42. H.B. 2784, 64th Leg., Reg. Sess. (Wa. 2016), <http://app.leg.wa.gov/billsummary?BillNumber=2784&Year=2015>.
43. A 2016 bill in Oklahoma proposed allowing a popular vote to overturn decisions made by the state supreme court. H.J.R. 1069, 55th Leg., 2d Sess. (Ok. 2016), <http://www.oklegislature.gov/BillInfo.aspx?Bill=hjr1069&Session=1600>. In 2017 in Missouri, a proposed constitutional amendment would have allowed voters and the legislature to submit federal laws to a ballot initiative regarding their constitutionality. H.J.R. 41, 99th General Assembly (Mo. 2017), <http://www.house.mo.gov/bill.aspx?bill=HJR41&year=2017&code=R>. A Florida legislator commenting on whether to give the Florida legislature or U.S. Congress authority to override or nullify court rulings wrote, “It is my concerted view that such provisions, if enacted by the people would curtail the tendency of activist judges to manipulate the law to suit their political views and agendas.” “Striking at Balance of Powers, Florida Lawmaker Files Measures to Nullify Court Decisions,” *FlagerLive.com*, December 28, 2016, <https://flagerlive.com/103153/nullification-gonzalez/>.
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Chapter 2

1. At least 11 national groups or their state affiliates engaged in outside spending in 2015-16 supreme court election cycle.
2. Lee et al., *Secret Spending in the States*, 23-28.
3. For this analysis we examined all independent expenditures documented in this report, including those that the spender did not disclose to state campaign finance regulators but that nevertheless appeared in

- data provided by Kantar Media/CMAG or in contracts on file with the FCC.
4. Lee et al., *Secret Spending in the States*, 31-32. Further details of the researchers' methodology are on file with the authors.
 5. Lee et al., *Secret Spending in the States*, 3.
 6. Paul Blumenthal, "Two of America's Richest Men Secretly Tried To Sway Montana's Judicial Elections," *Huffington Post*, May 10, 2016, http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race_us_572b9f4ce4b016f378951c8f.
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 11. Patrick Marley and Mary Spicuzza, "Wisconsin Supreme Court ends John Doe probe into Scott Walker's campaign," *Milwaukee Journal Sentinel*, July 16, 2015, <http://archive.jsonline.com/news/statepolitics/wisconsin-supreme-court-ends-john-doe-probe-into-scott-walkers-campaign-b99535414z1-315784501.html/>.
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 16. "JFI-RSLC," accessed August 7, 2017, <https://rslc.gop/jfi/>. Some of the Judicial Fairness Initiative's spending may not appear in state campaign finance filings if, for example, the group made contributions to nonprofit groups spending on judicial elections that are not required to disclose their donors under state law, or if it spent on ads that referenced a candidate for judicial office but did not unambiguously call for her election or defeat. See Lee et al., *Secret Spending in the States*, 5.
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 18. Ibid.

19. "About RSLC," accessed August 1, 2017, https://rslc.gop/about_rslc/.
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21. Christie Thompson, "Will Pennsylvania Do Away With Elections for Supreme Court?," *The Marshall Project*, November 3, 2015, <https://www.themarshallproject.org/2015/10/29/will-pennsylvania-do-away-with-elections-for-supreme-court>.
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Chapter 3

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2. Unless otherwise noted, the television spending estimates in this chapter were provided to the Brennan Center by Kantar Media/CMAG, and are based on captured satellite data in the nation’s largest media markets. CMAG’s calculations do not reflect ad agency commissions or the costs of producing advertisements, nor do they reflect the cost of ad buys on local cable channels.
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Conclusion

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Appendix

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