No. 12-35816

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE,
Plaintiff – Appellant,

v.

STEVEN BULLOCK, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF MONTANA; JAMES MURRY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER FOR POLITICAL PRACTICES FOR THE STATE OF MONTANA,
Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF DEFENDANTS-APPELLEES

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RULE 26.1 STATEMENT

Amicus curiae the Brennan Center for Justice at NYU School of Law is organized as a not-for-profit corporation. Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTERESTS OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Party involvement in judicial elections is correlated with increased spending, threatening the impartiality and appearance of impartiality of elected judges 3

II. Party involvement in judicial elections is characterized by increased partisanship and negativity in campaign advertising, threatening judicial independence and weakening public confidence in the judicial branch 12

CONCLUSION 18

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases:

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009) 2, 9

Gregory v. Ashcroft,
501 U.S. 452 (1991) 17

Mayberry v. Pennsylvania,
400 U.S. 455 (1971) 10

Mistretta v. United States,
488 U.S. 361 (1989) 14

Nev. Comm'n on Ethics v. Carrigan,
131 S. Ct. 2343 17

Offut v. United States,
348 U.S. 11 (1954) 10

Signorelli v. Evans,
637 F.2d 853 (2d Cir. 1980) 17

U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,
413 U.S. 548 (1973) 17

Federal Rules:

Fed. R. App. P. 35(a)(2) 1

Other Authorities:

20/20 Insight LLC, *National Registered Voter Survey*,
Oct. 10-11, 2011 11

Other Authorities – (continued):

20/20 Insight LLC, *Wisconsin Registered Voter Survey*, Jul. 18-20, 2011 14

ABA Comm'n on the 21st Century Judiciary, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* (2003) 15

Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006 10

Adam Skaggs et al., *The New Politics of Judicial Elections 2009-10* (2011) 8, 13

Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. Legal Stud. 431 (2004) 16

Brennan Ctr. for Justice, *2012 Supreme Court Contestable Seats* (Oct. 18, 2012) 6

Buying Time 2012—State by State Spending, Brennan Ctr. for Justice 6, 8

Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190 (1993) 16

Greenberg Quinlan Rosner Research, Inc. et al., Justice at Stake—State Judges Frequency Questionnaire (Nov. 5, 2001-Jan. 2, 2002) 9

James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* (2010) 5, 7, 13

Jim Provance, *O'Neill Leading GOP Incumbent Cupp for Ohio Supreme Court Seat*, Toledo Blade, Nov. 6, 2012 14

Letter from Maxine Thomas, Chair, Judicial Election Campaign Adver. Monitoring Comm., Ohio State Bar Ass'n, to Robert Bennett, Ohio Republican Party (Oct. 26, 2012) 13, 14

Other Authorities – (continued):

Methods of Judicial Selection, Am. Judicature Soc'y 4

Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69 (2011) 5, 9, 10

Mich. Judicial Selection Task Force, *Report and Recommendations* 1 (2012) 16

Nat'l Inst. on Money in State Politics, *Montana 2012: Candidates,* FollowTheMoney.org 4

Press Release, Brennan Ctr. for Justice & Justice at Stake, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 2, 2010) 7

Press Release, Brennan Ctr. for Justice, Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize the Judiciary (Nov. 7, 2012) 7

Sandra Day O'Connor, *Justice for Sale*, Wall St. J., Nov. 15, 2007 11

TNS Media Intelligence/CMAG, Campaign Summary – 2012 State Supreme Court (updated Nov. 5, 2012) 12, 13

IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law is a non-profit, nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through empirical research, counseling, and advocacy, the Brennan Center works to protect the judiciary from politicizing forces, including the undue influence of money and partisan politics.

Amicus has an interest in this case because of its important implications for the ability of all states, and particularly those like Montana that have nonpartisan judicial elections, to maintain both the reality and appearance of judicial impartiality and independence.

SUMMARY OF ARGUMENT

Amicus respectfully submits this brief because the question whether Montana may constitutionally prohibit partisan involvement in its nonpartisan judicial elections is an issue of exceptional importance. *See* Fed. R. App. P.

[1] This *amicus curiae* brief is filed with the consent of all parties to this proceeding. No counsel to any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief contains only the position of the Brennan Center and does not purport to represent the position of NYU School of Law.

35(a)(2) (en banc consideration is appropriate when, *inter alia*, "the proceeding involves a question of exceptional importance"). Empirical research that *amicus* has conducted over the last dozen years in states around the country that select judges in partisan and nonpartisan elections suggests that political party involvement in judicial elections can have a transformative—and negative—effect on these races.

Amicus submits this brief to provide the Court with data demonstrating how party involvement can politicize judicial elections and threaten states' critical interests in preserving a judiciary that is fair, impartial, and independent, and perceived to be so by the public. As the Conference of Chief Justices, which represents 58 chief justices from every state and U.S. territory, expressed in a 2009 amicus brief to the U.S. Supreme Court: "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled." Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at 4, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22), *available at* http://brennan.3cdn.net/d6274e472669a87b58_dqm6ii1z9.pdf.

In states where judges are elected, partisan involvement in judicial elections is characterized by dramatically higher spending on campaign advertisements and a more partisan and negative tenor in campaign advertising. This is so even in

states such as Michigan and Ohio where party affiliation is not permitted to appear on the ballot, but where political parties may endorse candidates and make independent expenditures in support of their election. The nature of political parties as conduits of special interest money and influence and their uniquely close ties to the political branches of government mean that their involvement in judicial races poses a singular risk for the independence and impartiality of elected judges.

Because this case raises issues that impact the very integrity of Montana's judicial system—and of other state judiciaries in this Circuit—this Court should grant en banc review.

ARGUMENT

I. Party involvement in judicial elections is correlated with increased spending, threatening the impartiality and appearance of impartiality of elected judges.

As reflected by the experiences of states around the country and over time, states that allow political party involvement in judicial campaigns have races with dramatically higher spending than those in nonpartisan states, threatening both the impartiality and the appearance of impartiality of elected judges. By opening the door to partisan endorsements and independent expenditures by political parties in judicial races, the panel decision here thus has the potential to transform the character of Montana's judicial election system and usher in unprecedented levels of spending, demonstrating both the exceptional importance of the issues raised by

this case and Montana's own compelling interest in avoiding partisan influences in its judicial races.[2]

Although high court judges face elections in 38 states, only six states elect supreme court justices in partisan elections: Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. *See Methods of Judicial Selection*, Am. Judicature Soc'y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Nov. 5, 2012).[3] In addition, in Michigan and Ohio the ballots are nonpartisan, but the nominees are selected by the political parties, *id.,* and parties are permitted to endorse and make independent expenditures in support of judicial candidates. Strikingly, supreme court elections in these eight states have consistently been characterized by significantly higher campaign spending than in states with nonpartisan elections.

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[2] Montana's Supreme Court elections are generally characterized by modest fundraising and spending. For example, the candidates for the 2012 judicial election raised a total of $316,787, according to campaign finance disclosures. *See* Nat'l Inst. on Money in State Politics, *Montana 2012: Candidates,* FollowTheMoney.org, http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?f=J&y=2012&s=MT (last visited Nov. 5, 2012).

[3] In New Mexico, Supreme Court justices are appointed by the Governor, and then run in a partisan election to serve the remainder of the unexpired term. Two states that previously held partisan elections, Arkansas and North Carolina, switched to nonpartisan elections in 2002.

From 2000-2009, among states that elect supreme court justices, all eight of these partisan states were among the ten highest states for total supreme court fundraising. *See* James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* 6-7, 12 (2010), *available at* http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf. Indeed, from 2000-2009, candidates in 13 nonpartisan states raised $50.9 million, approximately 25% of the total amount raised in supreme court races, compared to nearly $153.8 million raised by candidates in the eight partisan states plus New Mexico (which holds partisan retention elections for appointed supreme court justices), approximately 75% of the total. *Id*. at 14, 23 n.13. Likewise, between 1990 and 2004, the eight partisan states were the eight most expensive states in average spending per supreme court campaign. *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69, 83-84 (2011). During this period, average campaign spending in nonpartisan races doubled, from approximately $300,000 to $600,000, while average campaign spending in partisan races increased more than 250%, from approximately $425,000 to $1.5 million. *See id.* at 82 (citing Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, *in Running for Judge: The Rising Political,*

Financial, and Legal Stakes of Judicial Elections 59, 63 fig. 4.1 (Matthew J. Streb ed., 2007)).

Data on spending on television advertisements from the 2012 election cycle confirms these trends. This year, seven partisan election states (including Michigan and Ohio) had contestable seats, and 13 nonpartisan states had contestable seats (excluding retention elections). *See* Brennan Ctr. for Justice, *2012 Supreme Court Contestable Seats* (Oct. 18, 2012), *available at* http://www.brennancenter.org/page/-/2012_contested_retention_seats.pdf. All seven of the partisan states (including Michigan and Ohio) had judicial races with spending on television advertisements this year, as compared with six of the 13 nonpartisan states. In the seven partisan states, total television spending as of November 5, 2012 was approximately $19.3 million, compared with only $5.3 million in the 13 nonpartisan states. Thus, television spending in the seven partisan states was more than three times the television spending in the 13 non-partisan states. *Buying Time 2012—State by State Spending*, Brennan Ctr. for Justice [hereinafter *Buying Time 2012*], http://www.brennancenter.org/content/pages/buying_time_2012--_state_by_state_spending (last visited Nov. 5, 2012).

The role of political parties in these judicial races is particularly striking in Michigan and Ohio, where the ballot is nonpartisan but the parties are heavily

involved in judicial races—a situation Montana sought to avoid through the law at issue in this case. In 2012, spending in the Michigan judicial election campaign as of November 5, 2012 was approximately $8.5 million—the highest level in the country. Of this, $7.4 million came from political parties. Press Release, Brennan Ctr. for Justice, Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize the Judiciary (Nov. 7, 2012), http://www.brennancenter.org/content/resource/judicial_election_tv_spending_sets_new_record_yet_voters_reject_campaigns_t/. From 2000-2009, Michigan was sixth in the nation in candidate fundraising and third in the nation in total television spending, and the Michigan Democratic Party was the fifth highest television spender in the country. *See* Sample et al., *supra*, at 6-7, 27-28. During the 2010 election cycle, the Michigan Republican Party was the top spender in the nation on judicial election television ads; the Michigan Democratic Party ranked third. *See* Press Release, Brennan Ctr. for Justice & Justice at Stake, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 2, 2010), http://www.brennancenter.org/page/-/Democracy/release-november%202010-110310-final.pdf.

Ohio has likewise seen dramatic spending in its judicial races over the past decade. From 2000-2009, Ohio was third in the nation in candidate fundraising and first in the nation in total television spending. *See* Sample et al., *supra*, at 6-7,

27. In 2010, Ohio was second in the nation in total television spending and third in the nation in total spending. Adam Skaggs et al., *The New Politics of Judicial Elections 2009-10*, at 5, 15 (2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf. Through November 5, 2012, total television spending in Ohio was approximately $1.7 million. *See Buying Time 2012*, *supra*. While this spending has been primarily candidate-driven, as explained *infra* p. 13, the Ohio Republican party has aired particularly harsh and misleading attack ads during this election cycle, stating that a candidate expressed "sympathy for rapists" while serving as a judge.

The correlation between high spending and partisan involvement in judicial races is consistent with the analysis of social scientists who have found that political parties are uniquely well situated to facilitate connections between interest groups and decision makers and thus encourage an increased role for money in judicial races:

> Parties are well-organized institutions whose business is electing candidates to public office. They are skilled at directing resources, most prominently money, to candidates most likely to serve their programmatic goals once in office. In short, parties may professionalize both pathways for money's influence on judicial voting by identifying candidates who will predictably serve their contributors' interest once on the bench and by monitoring judicial performance for reward or punishment in subsequent elections. Parties may therefore serve as efficient brokers who strengthen the connection between campaign contributors and judicial candidates.

Kang & Shepherd, *supra*, at 72. As Kang and Shepherd explain, political parties influence elected judges in two ways, through selecting candidates who favor their positions, and by monitoring judicial rulings in order to assist or oppose a judge's reelection. *Id*. at 72, 109-10. This principle is borne out around the country and over time, as the involvement of political parties in judicial races has consistently corresponded with dramatically higher spending, even in states such as Michigan and Ohio where the ballots remain formally nonpartisan.

The impact of money on these states' judicial systems is profound. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). But as the Supreme Court explained in *Caperton*, financial connections between a judge and a contributor litigant present a "serious risk of actual bias—based on objective and reasonable perceptions." *Id.* at 884. With money playing a prominent role in partisan state judicial elections, this risk of bias becomes heightened.

Indeed, in a 2001 poll of more than 2400 state judges, 46% agreed that campaign donations influence judicial decisions. *See* Greenberg Quinlan Rosner Research, Inc. et al., Justice at Stake—State Judges Frequency Questionnaire 5 (Nov. 5, 2001-Jan. 2, 2002), *available at* http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504

A5.pdf. Likewise, in their empirical study of judicial decisions involving campaign contributors, Kang and Shepherd found that judges facing election in partisan elections were statistically significantly more likely to rule in favor of their campaign contributors, while with "judges [who] are serving their last term before mandatory retirement, their favoring of business litigants [who contributed to the judges' campaigns] essentially disappears." Kang & Shepherd, *supra*, at 74-75. In the words of Ohio Supreme Court Justice Paul E. Pfeifer, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. . . . Everyone interested in contributing has very specific interests. . . . They mean to be buying a vote." Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

Even if judicial campaign contributions did not actually influence judges' decision-making, runaway spending in judicial races undeniably affects public confidence in a fair and impartial judiciary, itself a core principle of due process. *See Offut v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (For litigants, "the appearance of evenhanded justice . . . is at the core of due process."). For example, in a 2011 national survey, 83% of respondents stated that they worry campaign contributions influenced judges'

decisions. A mere 3% believed contributions had no influence. *See* 20/20 Insight LLC, *National Registered Voter Survey*, Oct. 10-11, 2011, at 2, *available at* http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf. As Justice Sandra Day O'Connor, the last U.S. Supreme Court Justice with experience as an elected official—both as a legislator and a judge—explained, "motivated interest groups are pouring money into judicial elections in record amounts. Whether or not they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions." Sandra Day O'Connor, *Justice for Sale*, Wall St. J., Nov. 15, 2007, at A25, *available at* http://online.wsj.com/article/SB119509262956693711.html.

In sum, the strong correlation between spending and party involvement in judicial elections suggests that requiring Montana to allow parties to endorse and spend money in judicial races would likely have a transformative effect on the character of its elections, leading to dramatically increased spending and threatening the impartiality, and appearance of impartiality, of Montana's judges. Whether the state's undeniably compelling interest in courts that are—and appear—impartial justifies the restrictions on partisan activity that Montana has enacted is a question on which en banc review is appropriate and necessary.

II. Party involvement in judicial elections is characterized by increased partisanship and negativity in campaign advertising, threatening judicial independence and weakening public confidence in the judicial branch.

The experience of states around the country demonstrates, further, that party involvement in judicial elections corresponds with increased partisanship and negativity in campaign advertising, as well as a weakening of judicial independence from the political branches. This politicization of judicial elections risks damage to the integrity of and public confidence in the courts, and further demonstrates Montana's strong interest in avoiding partisan influence in its judicial races. A thorough examination of this issue of significant importance warrants en banc review.

States with party involvement in judicial elections have consistently seen more negative advertisements than states with nonpartisan elections. For example, in the 2012 judicial election campaigns, five of the seven partisan election states (including Michigan and Ohio) had at least one negative television ad, while only three of the 13 nonpartisan states had negative television ads (Kentucky, Mississippi, and North Carolina). TNS Media Intelligence/CMAG, Campaign Summary – 2012 State Supreme Court (updated Nov. 5, 2012) (on file with Brennan Ctr. for Justice). Advertisements by political parties have been particularly negative, with parties largely rejecting informational ads promoting a favored candidate in favor of "attack" or "contrast" ads, which frequently offer

misleading information distorting candidates' records. In 2010, political parties aired less than a quarter—22%—of all judicial election advertisements, but accounted for nearly half—49%—of attack ads. *See* Skaggs et al., *supra*, at 16. In the same cycle, 81% of candidates' ads were "promote" ads making the case for their candidacy, and only 19% even mentioned an opposing candidate. *Id*. at 18. In marked contrast, only 36% of party ads sought to promote a candidate without attacking another candidate. *Id*. Similarly, in the 2008 election parties aired very few ads that did not attack a candidate. Sample et al., *supra*, at 28-31.

Strikingly, in Ohio, a nominally nonpartisan state in which parties are permitted to spend money in support of judicial candidates, the only negative ads in the 2012 judicial campaign season were aired by the state Republican Party, including an ad in support of incumbent Justice Robert Cupp that described candidate Bill O'Neill as having "expressed sympathy for rapists" while serving as a judge. TNS Media Intelligence/CMAG, Campaign Summary – 2012 State Supreme Court (updated Nov. 5, 2012) (on file with Brennan Ctr. for Justice). In a letter to the Republican Party, the Ohio State Bar Association described the ad as misleading and stated that it "impugn[s] the integrity of the judicial system, the integrity of a candidate for the Supreme Court of Ohio, and erode[s] the public trust and confidence in the independence and impartiality of the judiciary." Letter from Maxine Thomas, Chair, Judicial Election Campaign Adver. Monitoring

Comm., Ohio State Bar Ass'n, to Robert Bennett, Ohio Republican Party (Oct. 26, 2012), *available at* https://www.ohiobar.org/General%20Resources/pub/Supreme%20Court%20Campaign%20Ad%20Letters%2010-26-12.pdf. Justice Cupp distanced himself from the ad, stating through his campaign committee that "he has not and would not approve a commercial like this," but the Republican Party refused to pull the ad. *Id.*; Jim Provance, *O'Neill Leading GOP Incumbent Cupp for Ohio Supreme Court Seat*, Toledo Blade, Nov. 6, 2012, http://www.toledoblade.com/Courts/2012/11/06/O-Neill-leading-GOP-incumbent-Cupp-for-Ohio-Supreme-Court-seat.html.

The prominence of negative and misleading advertisements in states with party involvement in judicial races risks a loss of public confidence in judges' impartiality and commitment to the law, threatening the integrity of the judicial branch. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). For example, a 2011 Wisconsin survey found that 88% of respondents were concerned that high spending and negative and misleading advertisements in Supreme Court races will compromise the fairness and impartiality of the courts. *See* 20/20 Insight LLC, *Wisconsin Registered Voter Survey*, Jul. 18-20, 2011, at 3, *available at*

http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf.

Nor is the harm from partisan involvement in judicial campaigns limited to negative advertisements. As a committee of the ABA that was convened "to study, report and make recommendations to ensure fairness, impartiality and accountability in state judiciaries" found, "The net effect [of partisan elections] is to further blur, if not obliterate, the distinction between judges and other elected officials in the public's mind by conveying the impression that the decision making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law." ABA Comm'n on the 21st Century Judiciary, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, at i, 77 (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf. The committee emphasized that "[e]ven states with ostensibly nonpartisan general elections for judges, such as Michigan and Ohio, have experienced highly politicized races when two-party competition is fierce and the party affiliations of the candidates are widely known." *Id*. at 17.

Indeed, a close relationship between political parties and judicial candidates can threaten the independence of state courts from the political branches of government, one of the motivating factors for the move by most states to elected

judges and away from an appointment system. *See* Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 205 (1993) (positing that reformers believed that popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."). Likewise, the use of nonpartisan elections for judicial selection arose, in part, out of a disillusionment with partisan elections, which "had shown that an elected court, instead of being rendered independent of incumbent politicians, simply became responsive to the same political forces that dominated legislatures." Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. Legal Stud. 431, 450 (2004).

Recognizing this concern, the Michigan Judicial Selection Task Force, a bipartisan blue ribbon panel charged with examining and recommending changes to Michigan's judicial selection system, recently recommended that political parties should not play a role in selecting nominees for the state's nonpartisan ballot, emphasizing that "Justices of the supreme court must offer equal justice under the law without regard for political agendas." Mich. Judicial Selection Task Force, *Report and Recommendations* 1 (2012), *available at* http://jstf.files.wordpress.com/2012/04/jstf_report.pdf.

It is beyond dispute that states have a fundamental interest in preserving a functional separation of powers, including a judiciary that is independent from the

political branches. *See, e.g., Signorelli v. Evans*, 637 F.2d 853, 861 (2d Cir. 1980) (upholding restriction on sitting judges running for political office because "New York's concern for the independence of its judiciary serves interests as fundamental to a constitutional democracy as those served by the Framers' concern for the independence of Congress"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign."). Indeed, the Supreme Court has held that the government may lawfully curtail political activity by even minor government employees in order to preserve the appearance that laws are not being administered in partisan fashion, which is "critical" to public confidence in our system of government. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564-67 (1973) (upholding the Hatch Act's prohibition on partisan activity by employees of the executive branch).[4]

Montana's decision to bar partisan involvement in its races is wholly consistent with this approach. Data from across the country suggest that party involvement in judicial races corresponds with increased negativity and

[4] Such restrictions may be even more appropriate in the context of judicial selection, in light of the unique role of judges in our system of government. As Justice Kennedy has explained, "[t]he differences between the role of the political bodies in formulating and enforcing public policy, on the one hand, and the role of the courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of . . . the legitimate restrictions that may be imposed on them." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (Kennedy, J., concurring).

politicization of judicial campaigns that risk undermining public confidence in the impartiality of judges and the independence of judges from the political branches. These trends reflect both Montana's significant interest in excluding partisan interests in its judicial elections and the importance of en banc review by this Court.

CONCLUSION

Because of the issues of exceptional importance raised by this case, the Brennan Center for Justice urges this Court to grant en banc review.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Cir. R.App. P. 29-2(c), I certify this brief contains 4,116 words. This brief has been prepared using Microsoft XP in Times New Roman 14-point font size. This brief has been scanned and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF systems.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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