

# JUDICIAL RETENTION ELECTIONS AFTER 2010

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In November 2010, three justices of the Iowa Supreme Court, Chief Justice Marsha K. Ternus, Justice Michael J. Streit, and Justice David L. Baker, lost their seats after receiving less than 50% of the vote in their retention elections.<sup>1</sup> Their removal from the bench, which was based on a single decision by their court in 2009, sent shock waves through state court systems all over our country. As part of our attempt to make sense of this historical anomaly, this Article will address the following topics: first, judicial retention elections prior to 2010; second, retention challenges in the 2010 election cycle; and third, actions that have been taken by judges, bar associations, and ordinary citizens in response to these challenges, which are likely to continue to occur.

## I. HISTORY OF JUDICIAL RETENTION ELECTIONS

The dramatic removal of Chief Justice Ternus and Justices Streit and Baker made headlines all over the nation,<sup>2</sup> but it was not the first time voters ousted an appointed judicial officer as a result of negative campaigning based on an isolated issue.

In 1986, Californians voted out of office three state supreme court justices, most notably Chief Justice Rose Bird.<sup>3</sup> Her defeat seemed to be based on the fact that she had never, in the sixty-one capital cases that had appeared before her, “voted to uphold a death sentence.”<sup>4</sup> This loss in a retention election represented the first time an electorate voted any justice of a state’s high court out of office.<sup>5</sup> Her opposition was funded primarily by big business,<sup>6</sup> and the morning after the election, the *Los Angeles Times* reported, “After nine years in the job, Bird fell victim to a multimillion-dollar campaign . . . .”<sup>7</sup> Television advertising played a crucial role in her defeat. For example, Chief Justice Bird’s campaign “did not

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1. Annette J. Scieszinski & Neal Ellis, *The Gamble of Judging: The 2010 Iowa Supreme Court Retention Election*, 50 No. 4 JUDGES’ J. 8, 9 (2011).

2. See Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010, 1:13 PM), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html>; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, available at <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

3. Frank Clifford, *Voters Repudiate 3 of Court’s Liberal Justices*, L.A. TIMES, Nov. 5, 1986, [http://articles.latimes.com/1986-11-05/news/mn-15232\\_1\\_court-justices](http://articles.latimes.com/1986-11-05/news/mn-15232_1_court-justices). Justices Cruz Reynoso and Joseph Grodin lost their positions on the California Supreme Court at the same time as Justice Bird based on the perception that they were soft on crime. *Id.*

4. Patrick K. Brown, *The Rise and Fall of Rose Bird: A Career Killed by the Death Penalty* 1 (Cal. Sup. Ct. Hist. Soc’y, 2007 Student Writing Competition), available at [http://cschs.org/02\\_history/images/CSCHS\\_2007-Brown.pdf](http://cschs.org/02_history/images/CSCHS_2007-Brown.pdf).

5. Clifford, *supra* note 3.

6. James J. Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 404 (2011).

7. Clifford, *supra* note 3.

raise half the amount of money collected by her opponents,”<sup>8</sup> and “her low-key commercials, stressing the need for a judiciary that can make unpopular decisions in the face of intense political pressure . . . was no match for the emotional appeals of her opponents.”<sup>9</sup>

Ten years later, Justice Penny White lost her retention election in Tennessee.<sup>10</sup> Unlike the three California justices, whose opposition had been vocal early in the campaign,<sup>11</sup> the opposition against Justice White was described as “a wildfire campaign that used a handful of her rulings to cast her as an enemy of the death penalty and a coddler of criminals.”<sup>12</sup> That campaign strategy was illustrated in a letter from John Davies, who was the president of the Tennessee Conservative Union, which stated: ““Now Justice White is asking for your vote . . . She wants you to vote ‘Yes’ for her in August. ‘Yes’ so she can free more and more criminals and laugh at their victims!””<sup>13</sup> Justice White responded to these attacks, but her response was unsuccessful. She pointed out to the media that her record included ““127-year sentences affirmed and double-life sentences affirmed.””<sup>14</sup> She was defeated in the election by a 55%-45% margin on a yes/no vote.<sup>15</sup>

Thus, prior to 2010, it seems only four justices had ever been removed from the bench as a result of a retention election, and only on a few other occasions had there been any serious attempt to oust a sitting judge.<sup>16</sup> Additionally, research suggests special interest group attacks on appointed judicial officers were extremely rare until recently.

## II. THE DRAMA OF 2010

To get a brief idea of the drama that unfolded in 2010, one can examine the costs associated with judicial retention elections. “From 2000-2009 . . . barely one percent of campaign spending” went toward retention elections of state high courts.<sup>17</sup> However, in 2010, “high-court retention elections in Illinois, Iowa, Colorado and Alaska resulted in about \$4.6 million in total costs—more than

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8. *Id.*

9. *Id.*

10. Sample, *supra* note 6, at 405 (citing Paula Wade, *White First Casualty of Yes-No Option on Judges Soft-on-Crime Charge Costs Seat*, MEMPHIS COM. APPEAL, Aug. 2, 1996, at A1).

11. Clifford, *supra* note 3.

12. Sample, *supra* note 6, at 405 (quoting Wade, *supra* note 10).

13. *Id.* at 406 (quoting Richard Locker, *Conservatives Again Target Justice White*, MEMPHIS COM. APPEAL, July 17, 1996, at B1).

14. *Id.*

15. Jesse Fox Mayshark, *As Tennesseans Clamor for the Death Penalty, Judges Are Caught in a Political Crossfire that Threatens to Upend the Scales of Justice*, METRO PULSE (Oct. 6, 1997), [http://weeklywire.com/ww/10-06-97/knox\\_feat.html](http://weeklywire.com/ww/10-06-97/knox_feat.html).

16. See *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS* 11 (Matthew J. Streb ed., 2007).

17. Sample, *supra* note 6, at 408.

twice the \$2.2 million raised for all retention elections nationally in 2000-2009.”<sup>18</sup> On October 29, 2010, Justice at Stake and the Brennan Center for Justice announced that advertising concerning state supreme courts had exploded nationally—\$3.3 million was spent in the week between October 21 and October 27, 2010.<sup>19</sup> A review of some political and legislative developments in states in which there were retention election contests in 2010 help to provide a better understanding of the reason behind the recent explosion in judicial retention election expenditures.

#### *A. Iowa*

In 1998, Iowa legislators passed an act commonly referred to as the Defense of Marriage Act,<sup>20</sup> which prohibited gay and lesbian couples from lawfully entering into a civil marriage.<sup>21</sup> In 2005, a lawsuit was filed in Polk County, Iowa on behalf of six couples that were denied marriage licenses.<sup>22</sup> Polk County District Judge Robert Hanson ruled in favor of the couples in 2007, and state officials immediately appealed.<sup>23</sup> The issue presented to the Iowa Supreme Court was whether “[Iowa’s] state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution.”<sup>24</sup> On April 3, 2009, the Iowa Supreme Court handed down a unanimous decision:

In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union

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18. Press Release, Justice at Stake Campaign, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/2010\\_judicial\\_elections\\_increase\\_pressure\\_on\\_courts\\_reform\\_groups\\_say?show=news&newsID=9129](http://www.justiceatstake.org/newsroom/press_releases.cfm/2010_judicial_elections_increase_pressure_on_courts_reform_groups_say?show=news&newsID=9129).

19. *TV Spending Surges in State Supreme Court Races*, BRENNAN CTR. FOR JUST. (Oct. 29, 2010), [http://www.brennancenter.org/content/resource/tv\\_spending\\_surges\\_in\\_state\\_supreme\\_court\\_races/](http://www.brennancenter.org/content/resource/tv_spending_surges_in_state_supreme_court_races/).

20. Associated Press, *Iowa Judge Stays Ruling That OK’d Gay Marriage*, LIFE ON NBCNEWS.COM (Aug. 31, 2007), [http://www.msnbc.msn.com/id/20531786/ns/us\\_news-life/t/iowa-judge-stays-ruling-okd-gay-marriage/](http://www.msnbc.msn.com/id/20531786/ns/us_news-life/t/iowa-judge-stays-ruling-okd-gay-marriage/).

21. IOWA CODE ANN. § 595.2 (West 2012), *held unconstitutional* by Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). The Defense of Marriage Act amended a prior statute to read, “A marriage between a male and female each eighteen years of age or older is valid.” MARRIAGES—FOREIGN MARRIAGES—RESTRICTIONS, 1998 Iowa Legis. Serv. Ch. 1099 (West).

22. Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, Varnum v. Brien, No. CV5965, 2005 WL 5715627 (Iowa Dist. Ct. Dec. 13, 2005).

23. Varnum v. Brien, 763 N.W.2d 862, 871, 874 (Iowa 2009).

24. *Id.* at 872.

between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.

... We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.

We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold Iowa's marriage statute, Iowa Code section 595.2, violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded. Iowa Code section 595.2 denies gay and lesbian people the equal protection of the law promised by the Iowa Constitution.<sup>25</sup>

Immediately, there was backlash. U.S. Representative Steve King, who helped write the 1998 Defense of Marriage Act when he was a member of the Iowa Legislature, stated, "Our worst fears have been realized . . . It turns immediately Iowa into the Mecca for same-sex marriages—a destination state . . . There will be weekend packages that are being planned right now. It will be the Las Vegas of same-sex marriage for America if the Legislature doesn't act now."<sup>26</sup>

Bob Vander Plaats, who lost his 2010 Republican primary bid for governor, became a leader in the attack on the justices.<sup>27</sup> He formed "an anti-retention effort called Iowa for Freedom," which "was heavily financed by the Tupelo, Miss[issippi]-based American Family Association and other interest groups."<sup>28</sup> Drawing on his existing political support, he consistently told voters to "vote

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25. *Id.* at 905-06.

26. Rod Boshart, *Iowa Supreme Court Legalizes Gay Marriage in Iowa*, GAZETTE (Apr. 3, 2009, 7:44 AM), <http://thegazette.com/2009/04/03/iowa-supreme-court-legalizes-gay-marriage-in-iowa/>.

27. Scieszinski & Ellis, *supra* note 1, at 9.

28. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 1, 2011, 1:59 AM), [http://www.abajournal.com/magazine/article/landmark\\_iowa\\_elections\\_send\\_tremor\\_through\\_judicial\\_retention\\_system/](http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system/).

‘No.’”<sup>29</sup> Vander Plaats had been clear that he supported traditional marriage and saw the three justices as part of the problem in Iowa.<sup>30</sup> He stated, “This election, in my opinion, to remove these judges is one of, if not the most[,] important election[s] in our country.”<sup>31</sup> Vander Plaats conceded that the federal court ruling in California, which struck down Proposition 8,<sup>32</sup> encouraged “him to move against the justices in Iowa.”<sup>33</sup> According to Vander-Plaats, “If the judges can do this to marriage, every one of your freedoms is up for grabs.”<sup>34</sup> He also questioned “whether the decision by the [Iowa] Supreme Court . . . was not a conspiracy in order to ‘protect their seats on the court.’”<sup>35</sup>

The Citizens United Political Action Committee focused its crusade toward “250,000 potential Iowa voters through robo-calls,” urging them to vote against retention.<sup>36</sup> The Committee utilized Fox News host and former Arkansas Governor Mike Huckabee to make these robo-calls. Citizens United teamed with other conservative organizations, such as “the American Family Association, the National Organization for Marriage, the Family Research Council, and Concerned Women of America,” which by October 31, 2010, had already spent in excess of \$711,000 in their campaign against retention of the justices.<sup>37</sup> Between the day *Varnum* was handed down and election day, special interest campaigns poured almost one million dollars into Iowa to unseat the three justices up for retention.<sup>38</sup>

In contrast, the justices declined to campaign<sup>39</sup> and chose not to engage in fundraising because they did “not want to contribute to the politicization of the judiciary.”<sup>40</sup> Chief Justice Marsha Ternus, in public comments at Iowa State University just three weeks before the election, stated that

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29. Brian Tashman, *Iowa for Freedom*, RIGHT WING WATCH (Apr. 22, 2011, 10:13 AM), <http://www.rightwingwatch.org/cpmtemtopwa-gap-tries-impeach-state-supreme-court-over-marriage-equality>.

30. Christina Rivers, *Vander Plaats Announces He Is Ready to Launch a Battle Against Iowa Supreme Court Judges*, EXAMINER.COM (Aug. 6, 2010, 11:30 AM), <http://www.examiner.com/article/vander-plaats-announces-he-is-ready-to-launch-a-battle-against-iowa-supreme-court-judges>.

31. *Id.*

32. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), *aff’d sub nom.* Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012).

33. Rivers, *supra* note 30.

34. *Id.*

35. *Id.*

36. Tyler Kingkade, *Citizens United, Huckabee Target Iowans over Judicial Retention Vote*, IOWA STATE DAILY.COM (Oct. 31, 2010, 4:22 PM), [http://www.iowastatedaily.com/news/article\\_27bfe720-e536-11df-9c40-001cc4c03286.html](http://www.iowastatedaily.com/news/article_27bfe720-e536-11df-9c40-001cc4c03286.html).

37. *Id.*

38. ADAM SKAGGS ET AL., BRENNAN CTR. FOR JUSTICE, JUSTICE AT STAKE CAMPAIGN & NAT’L INS. ON MONEY IN STATE POL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10, at INTRO. (2011), available at [http://brennan.3cdn.net/23b60118bc49d599bd\\_35m6yyon3.pdf](http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf).

39. Curriden, *supra* note 28.

40. Sample, *supra* note 6, at 383 (internal quotation marks omitted).

[t]he American Family Association wants our judges to be servants of this group's ideology, rather than servants of the law . . . . These critics are blinded by their own ideology. They simply refuse to accept that an impartial, legally sound and fair reading of the law can lead to an unpopular decision.<sup>41</sup>

Iowa voters disagreed with Chief Justice Ternus. Turnout was unusually high for the November 2010 election,<sup>42</sup> with 52.98% of Iowan voters casting a ballot;<sup>43</sup> of those voters, 88% participated in the retention election.<sup>44</sup> Chief Justice Ternus and Justices Baker and Streit each received only 46% of votes supporting their retention,<sup>45</sup> which was five percentage points short of the number necessary to be retained.<sup>46</sup>

Interestingly, all of the other judges running for retention in the same Iowa election were retained.<sup>47</sup> Judge Robert Hanson, a district judge in Polk County, received 66% of the vote in support of his retention, despite the fact that he had made the initial ruling to permit same-sex marriage.<sup>48</sup> In addition, five of the judges on the Iowa Court of Appeals were retained with more than 60% support.<sup>49</sup>

#### *B. Other States in 2010*

There were "other hotly contested judicial retention votes in Alaska, Colorado, Florida, Illinois, [Kansas,] and Michigan" where more money was raised than in Iowa.<sup>50</sup> Nevertheless, in each of those states the sitting supreme court justices campaigned and won retention.<sup>51</sup>

1. *Alaska*.—Prior to the election, the Alaska Judicial Council unanimously recommended that Justice Dana Fabe be retained, citing an overall attorney-rated

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41. Curriden, *supra* note 28.

42. Jason Clayworth, *Nov. 2 Was the Highest Total Midterm Election Turnout in Iowa History*, DES MOINES REGISTER (Nov. 29, 2010, 12:10 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2010/11/29/nov-2nd-was-the-highest-midterm-election-turnout-in-iowa-history/>.

43. IOWA SECRETARY OF STATE, REPORT NO. E-030, VOTERS REGISTERED AND VOTING: 2010 GENERAL ELECTION STATEWIDE VOTERS, available at <http://sos.iowa.gov/elections/pdf/2010/genstatestats.pdf>.

44. Curriden, *supra* note 28.

45. *Id.*

46. See IOWA CODE ANN. § 46.24 (West 2012) ("A judge of the supreme court, court of appeals, or district court including a district associate judge, full-time associate juvenile judge, or full-time associate probate judge, or a clerk of the district court must receive more affirmative than negative votes to be retained in office.").

47. Curriden, *supra* note 28.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

performance of a 4.3 out of 5 and a court employee overall performance rating of 4.6 out of 5.<sup>52</sup> Alaska's ethical rules prohibit judges from campaigning for retention absent "active opposition,"<sup>53</sup> and the opposition to Justice Fabe's retention began very late in the campaign season.<sup>54</sup> Her opposition included CitizenLink, headed by Tom Minnery, the public policy arm of the national Christian group Focus on the Family.<sup>55</sup> As leader of a conservative group known as Alaska Family Action, Jim Minnery, Tom Minnery's cousin, opposed Justice Fabe's retention.<sup>56</sup> Another group, Alaskans for Judicial Reform, targeted Justice Fabe by airing a television ad depicting "a black-robed figure feeding papers, including an apparent ballot, into a paper shredder."<sup>57</sup> At the center of the debate was the Alaska Supreme Court's 2007 rejection of a state law that required girls seeking an abortion to get a parent's consent.<sup>58</sup> Alaska Family Action stated that Justice Fabe "Torpedoed Parental Rights."<sup>59</sup> In addition, Justice Fabe's opposition stated she was generally too liberal and was an "activist judge," as reflected by her "rulings on abortion, gay marriage, benefits for same-sex partners of state workers, and prisoner rights."<sup>60</sup>

Justice Fabe was unable to form a campaign committee, so she spent her own money on advertisements.<sup>61</sup> A group of her supporters, mostly friends and former law clerks, formed Alaskans for Justice Dana Fabe<sup>62</sup> and created a website containing endorsements from prominent organizations and people including, among others, former Governor Bill Sheffield, U.S. Senator Mark Begich, and the Alaska Federation of Natives.<sup>63</sup> She was retained with 53.33% of the vote.<sup>64</sup>

2. *Colorado*.—In 2010, three Colorado Supreme Court justices were up for

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52. 2010 JUDICIAL RETENTION PERFORMANCE EVALUATION MATERIALS JUSTICE DANA A. FABE, SUPREME COURT JUSTICE, ALASKA JUDICIAL COUNCIL 2 (2010), available at <http://www.ajc.state.ak.us/retent/retent2010/fabe10.pdf>.

53. ALASKA CODE OF JUDICIAL CONDUCT Canon 5(c)(2) (2012).

54. Lisa Demer, *Allies Defend Fabe as Justice Fights Campaign to Oust Her*, ANCHORAGE DAILY NEWS (Oct. 29, 2010, 6:40 PM), <http://www.adn.com/2010/10/28/1524477/allies-rally-around-fabe-as-justice.html>.

55. See Mark Barna, *Citizen Link Sends Plea for \$2.3 Million to Stay Afloat*, COLO. SPRINGS GAZETTE (Sept. 1, 2011, 10:09 PM), <http://www.gazette.com/articles/link-124284-million-plea.html>.

56. *Alaska Supreme Court Justice Faces Retention Vote*, JUNEAU EMPIRE.COM (Oct. 29, 2010), [http://juneauempire.com/stories/102910/sta\\_727786461.shtml](http://juneauempire.com/stories/102910/sta_727786461.shtml).

57. Peter Hardin, *Election 2010: Ugly Attack Ads at Finish Lines*, GAVEL GRAB (Nov. 1, 2010), <http://www.gavelgrab.org/?p=15203>.

58. *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007).

59. Demer, *supra* note 54.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Voters Retain Fabe, Dismiss Postma*, KTUU.COM (Nov. 3, 2010, 12:34 AM), <http://www.ktuu.com/news/ktuu-2010elect-judicial-retention-votes-110210,0,911916.story>.

retention: Justices Michael Bender, Alex Martinez, and Nancy Rice. The Colorado Office of Judicial Performance Evaluation recommended that all three justices be retained.<sup>65</sup> However, they faced stiff opposition from Clear the Bench, a “grassroots” movement.<sup>66</sup> Matt Arnold, executive director of Clear the Bench, stated, “They have been serial violators of the Colorado Constitution and violated the rights of citizens and refused to follow the law and put their personal and political views above what the constitution says.”<sup>67</sup> The Clear the Bench organization made the following claims:

The current majority [Justices Bender, Martinez and Rice] were guilty of  
Aiding and Abetting:

- Unconstitutional Property Tax Increases (Mill Levy Tax Freeze)
- Unconstitutional elimination of Tax Credits & Exemptions (tobacco tax, “Dirty Dozen” taxes)
- Unconstitutionally re-defining Taxes as Fees (Colorado Car Tax, Ritter Gun Tax)
- Unconstitutional expansion of eminent domain property seizures (Telluride Land Grab)
- Unconstitutional usurpation of legislative power (judicial redistricting, school funding).<sup>68</sup>

Clear the Bench also provides “Evaluations of Judicial Performance” to summarize the decisions made by the justices.<sup>69</sup>

Clear the Bench raised only about \$45,000, which helped fund the website, buttons, yard signs, and bumper stickers.<sup>70</sup> Even with such limited funding, the three justices’ margins of victory were smaller than usual. Approximately 59.3% of voters approved the retention of Justice Martinez; 60.2% of voters supported Justice Bender; and 61.7% voted for the retention of Justice Rice.<sup>71</sup> In the prior election, the two justices running for retention received 72.4% and 74.6% of the vote to support their retention.<sup>72</sup>

Although it does not appear the justices actively campaigned, several groups sponsored a public education campaign. These groups—including the Institute for the Advancement of the American Legal System, the League of Women

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65. *2010 Judicial Performance Reviews*, COLO. OFF. OF JUD. PERFORMANCE EVALUATION (2010), <http://www.coloradojudicialperformance.gov/review.cfm?year=2010>.

66. CLEAR THE BENCH COLO., <http://www.clearthebenchcolorado.org/> (last visited Nov. 3, 2012).

67. Felisa Cardona, *Three Colorado High Court Justices Face Stiff Retention Opposition*, DENVER POST (Oct. 3, 2010, 1:00 AM), [http://www.denverpost.com/election2010/ci\\_16239280](http://www.denverpost.com/election2010/ci_16239280).

68. CLEAR THE BENCH COLO., *supra* note 66.

69. *Id.*

70. Matt Masich, *Colo. Supreme Court Justices Retained*, LAW WEEK COLO. (Nov. 3, 2010), <http://www.lawweekonline.com/2010/11/colo-supreme-court-justices-retained/>.

71. *Id.*

72. *Id.*

Voters of Colorado, the Colorado Judicial Institute, and the Colorado Bar Association—launched the website ‘KnowYourJudge.com.’”<sup>73</sup> This website was designed “to provide voters with impartial, nonpartisan information about the judges appearing on Colorado’s ballot.”<sup>74</sup> Those organizations also produced television and radio public service announcements in order to provide voters with the resources to research their judges.<sup>75</sup>

3. *Florida*.—Opposition to two Florida Supreme Court Justices arose after the court removed three proposed constitutional amendments from the November 2010 ballot.<sup>76</sup> In response to that decision, a Tea Party-affiliated group began a campaign to oust two justices from the bench:

Citizen2Citizen, partnering with the Central Florida Tea Party Council, is launching the “Restore Justice” campaign, advocating for a vote not to retain Florida Supreme Court Justices Jorge Labarga and James Perry this November, after placing politics above the law to deny Floridians of their constitutional right [to] vote on Health Care Freedom (Amendment 9). Labarga and Perry upheld a circuit court ruling by Judge James Sheller to remove Amendment 9 from the November ballot. As such, these justices sided with the liberal political agenda of four Florida citizens having close ties to the Obama administration who filed suit in late June, alleging that three statements (comprising a mere twenty words) in the ballot summary were misleading, to thereby disenfranchise millions of Floridians desiring to exercise their constitutional right to vote on the legislature’s proposed amendment.<sup>77</sup>

Citizen2Citizen was founded by Jesse Phillips, who stated the following:

Such partisan politics . . . is unbecoming of any judge especially on the Supreme Court. Their role is to interpret the law and uphold our constitutional right to vote on legislatively proposed amendments, not to defend Obama’s healthcare plan under the guise of “protecting” the voters. The fact of the matter is that this amendment was voted on by a supermajority of our elected representatives to constitutionally be placed on the ballot. And yet the court arbitrarily decided to ignore the constitution and intent of the legislature, by listening to only four of our

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73. *Buying Time—2010: Colorado*, BRENNAN CTR. FOR JUST. (Sept. 19, 2010), [http://www.brennancenter.org/content/resource/buying\\_time\\_--\\_2010\\_colorado](http://www.brennancenter.org/content/resource/buying_time_--_2010_colorado) [hereinafter *Buying Time—2010*].

74. *Id.*

75. *Id.*

76. Dara Kam, *Supreme Court Tosses Legislature’s Amendments Off Ballot*, POST ON POL. (Aug. 31, 2010), <http://www.postonpolitics.com/2010/08/supreme-court-tosses-legislatures-amendments-off-ballot/>.

77. Ian Millhiser, *Tea Party Nullifiers Seek Revenge Against Florida Supreme Court Justices*, THINK PROGRESS (Sep. 27, 2010, 4:45 PM), <http://thinkprogress.org/politics/2010/09/27/121134/florida-nullification/?mobile=nc>.

neighbors, deciding for and silencing millions of voters who suddenly can't weigh in.<sup>78</sup>

Jason Hoyt, the founding member of the Central Florida Tea Party Council, did weigh in, stating, "This is a tremendous injustice and power grab by the Court, which we have the opportunity to restore this November."<sup>79</sup>

Justices Labarga and Perry were retained by votes of 58.9% and 61.7%, respectively.<sup>80</sup> The two justices who ruled in favor of keeping Amendment 9 on the ballot were retained by votes of 67% and 66%, respectively.<sup>81</sup> Tom Tillison, an activist for the tea party from Orlando, said:

This campaign was totally a grass-roots effort that was completely unfunded, yet it created an 8-10 point swing in the polls. In an election in which nearly 4.5 million people voted, that's fairly substantial . . . . The real success of this campaign is that it began just six weeks prior to the elections. Had we gotten an earlier start and had acquired any source of funding, I believe both judges would have failed to achieve retention. I think we've got their attention, regardless.<sup>82</sup>

4. *Kansas*.—Although four Kansas justices were up for retention in 2010, there was not as much furor there as in the previously mentioned judicial retention elections. Four justices were up for retention: Chief Justice Lawton Nuss and Justices Carol Beier, Dan Biles, and Marla Luckert.<sup>83</sup>

Kansans for Life ("KFL") targeted Justice Beier because she wrote opinions in 2006 and 2008, which heavily criticized the state's former attorney general, Phill Kline, for actions regarding the investigations of abortion clinics.<sup>84</sup> In a 2008 ruling, Justice Beier wrote that Kline "exhibits little, if any, respect" for the court or the rule of law.<sup>85</sup> In her dissent, "[t]hen-Chief Justice Kay McFarland wrote that the comments [by Justice Beier] were designed to threaten and 'heap scorn' upon Kline and were inappropriate."<sup>86</sup>

On January 26, 2010, KFL issued a press release entitled "KFL's 'Fire Beier'

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78. Jesse Phillips, *Restore Justice' Campaign Seeks Removal of Supreme Court Justices Labarga and Perry for Health Care Vote*, FLA. POL. PRESS (Sep. 21, 2010), [www.floridapoliticalpress.com/2010/09/21/restore-justice-campaign-seeks-removal-of-supreme-court-justices-labarga-and-perry-for-healthcare-vote/](http://www.floridapoliticalpress.com/2010/09/21/restore-justice-campaign-seeks-removal-of-supreme-court-justices-labarga-and-perry-for-healthcare-vote/).

79. *Id.*

80. Kenric Ward, *How Justices Jorge Labarga, James Perry Survived Retention Fight*, SUNSHINE STATE NEWS (Nov. 9, 2010, 4:05 AM), <http://www.sunshinestatenews.com/story/how-justices-jorge-labarga-james-perry-survived-retention-fight>.

81. *Id.*

82. *Id.*

83. Fred Mann, *Justices on Ballot Draw Little Noise This Year*, WICHITA EAGLE (Oct. 18, 2010, 5:54 AM), <http://www.kansas.com/2010/10/18/1546834/justices-on-ballot-draw-little.html>.

84. *Id.*

85. *Id.*

86. *Id.*

Campaign Bolstered by Monday Revelation.”<sup>87</sup> KFL’s Director, Mary Kay Culp, stated:

The “Fire Beier” initiative will reveal Kansas Supreme Court Justice Carol Beier’s participation in a dishonorable disinformation campaign to obstruct justice, more reminiscent of an aggressive abortion industry defense attorney, than impartial judge. Her actions and interference have resulted in abortion prosecutions being unjustly stalled and compromised by a state Supreme Court that continues to:

- [K]eep a judge gagged after he began testifying about Planned Parenthood document falsifications;
- [D]elay a ruling that would release abortion forms from KDHE that at no time ever contained patient names;
- [A]ctively inflame the public against abortion prosecutors, charging they violated ethical standards, while concealing that those charges are contradicted repeatedly by judges and the Supreme Court disciplinary administrator’s own investigations.<sup>88</sup>

By October 18, 2010, however, KFL had done little to create opposition to Justice Beier’s retention. Culp refused to discuss her group’s plan, instead stating she wished to “[k]eep ‘em guessing.”<sup>89</sup> Culp did say the group would maintain its customary practice of “mailing postcards to voters with a sample ballot . . . indicating Kansans for Life’s endorsements,” including the judges up for retention.<sup>90</sup>

The Kansas Commission on Judicial Performance conducted a survey, in which all four justices scored well regarding performance of their judicial duties.<sup>91</sup> Justice “Beier received an overall average score of 3.55 on a scale of 4.0 from attorneys, and a 3.58” out of 4.0 from other judges.<sup>92</sup> Justice “Luckert received a 3.56 from attorneys and a 3.68 from judges.”<sup>93</sup> Justice “Biles got a 3.46 from attorneys and a 3.61 from judges.”<sup>94</sup> Justice “Nuss was given a 3.34 overall average by attorneys and a 3.52 by judges.”<sup>95</sup>

Although the four justices were retained, ten out of 105 Kansas counties voted against the retention of at least one of the justices.<sup>96</sup> Five of those counties

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87. Press Release, Kansans for Life, KFL’s “Fire Beier” Campaign Bolstered by Monday Revelation: KFL Campaign to Expose Lies & Vendetta Against Abortion Prosecutors (Jan. 26, 2010), available at <http://www.kfl.org/SiteResources/Data/Templates/templateb.asp?docid=1164> [hereinafter Kansans for Life].

88. *Id.*

89. Mann, *supra* note 83.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Earl Glynn, *10 Counties Voted Not to Retain Kansas Supreme Court Justices*, KAN.

“voted ‘no’ to all four judges.”<sup>97</sup>

5. *Illinois*.—The prime target in Illinois was Chief Justice Thomas Kilbride. The Illinois Civil Justice League, operating as JUST PAC (a political action committee), was the main group opposing Chief Justice Kilbride’s retention.<sup>98</sup> Ed Murnane, the leader of JUST PAC, made a speech in which he stated that Chief Justice “Kilbride not only had the worst record on civil issues, he also had a terrible record on criminal issues . . .”<sup>99</sup> The Illinois Civil Justice League presented itself as a pro-business group and depicted Chief Justice Kilbride as unfriendly to business, especially after *LeBron v. Gottlieb Memorial Hospital*.<sup>100</sup> In *LeBron*, the Illinois Supreme Court overturned a medical malpractice law, which limited damages to \$500,000 for pain and suffering and other non-economic damages in cases against doctors and \$1 million for claims against hospitals.<sup>101</sup>

Groups opposed to Chief Justice Kilbride’s retention raised over \$688,000.<sup>102</sup> Other groups, including unions, trial lawyers and the Illinois Democratic Party, raised \$2.8 million dollars to defend the Chief Justice.<sup>103</sup> In addition, Justice Kilbride openly campaigned with his own advertising and speeches.<sup>104</sup> The full price tag for this retention election was “\$3.5 million, the most ever in a retention race in Illinois,”<sup>105</sup> and “the second most expensive judicial retention race in the country.”<sup>106</sup>

Some of his opponents’ ads were focused not on Justice Kilbride’s perceived

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WATCHDOG.ORG (Nov. 10, 2010), <http://kansas.watchdog.org/5648/10-counties-voted-not-to-retain-kansas-supreme-court-justices/>.

97. *Id.*

98. Carrie Johnson, *No Opponent, but Big Money in Illinois Justice’s Race*, NPR (Oct. 26, 2010), <http://www.npr.org/templates/story/story.php?storyId=130810189>.

99. Judicial Campaign Ads, *Ed Murnane on Justice Kilbride’s Atrocious Record on Crime*, YOUTUBE (Oct. 26, 2010), <http://www.youtube.com/watch?v=QxGK6sIXX4M>.

100. 930 N.E.2d 895 (Ill. 2010), *reh’g denied* (May 24, 2010). Justice Kilbride concurred in, but did not write, the *LeBron* decision. *Id.* at 917. The chief justice at the time, who wrote the decision, was Thomas Fitzgerald. *Id.* at 899. Justice Kilbride became chief a few months later. See *Thomas L. Kilbride, Supreme Court Chief Justice Third District, ILL. COURTS*, [http://www.state.il.us/court/SupremeCourt/Justices/Bio\\_Kilbride.asp](http://www.state.il.us/court/SupremeCourt/Justices/Bio_Kilbride.asp) (last visited Nov. 3, 2012).

101. *LeBron*, 930 N.E.2d at 902, 911.

102. SKAGGS ET AL., *supra* note 38, at 8.

103. *Id.*

104. Editorial, *Judges and Money*, N.Y. TIMES, Oct. 29, 2010, at A22, available at <http://www.nytimes.com/2010/10/30/opinion/30sat2.html> [hereinafter *Judges and Money*].

105. Jim Suhr, *Chief Justice Retention Election Is Nation’s Costliest in 25 Years*, PJSTAR.COM (Oct. 27, 2011, 4:49 PM), <http://www.pjstar.com/free/x671074930/Report-Illinois-Chief-Justice-Kilbrides-retention-election-costliest-in-25-years>.

106. Ann Maher, *Justice Kilbride Prevails in Costly Ill. Retention Election*, LEGALNEWSLINE (Nov. 3, 2010, 1:12 AM), <http://www.legalnewsline.com/news/229640-justice-kilbride-prevails-in-costly-ill.-retention-election>.

anti-business stance, but rather on the belief he was weak on criminals.<sup>107</sup> In television ads, actors portrayed violent felons, “describ[ing] their atrocious crimes in detail,” and stated that Chief Justice Kilbride sided with criminals over law enforcement or victims.<sup>108</sup> One ad stated, “Thomas Kilbride chose criminals’ rights over and over again. Way more than any other justice.”<sup>109</sup>

Chief Justice Kilbride fought back with his own ads, defending his record.<sup>110</sup> He was disgruntled, however, with “being forced to turn into a . . . politician, something he consider[ed] inappropriate for a judge.”<sup>111</sup> He stated, “If we are going to allow the courts to be politicized to this degree, where there’s more and more big-time money coming in, it’s going to ruin the court system . . . . We might as well shut down the third branch.”<sup>112</sup>

In Illinois, unlike most other retention election states, a justice needs to earn 60% of the vote in order to remain on the bench.<sup>113</sup> Chief Justice Kilbride received 65% of the vote after an aggressive campaign.<sup>114</sup>

### III. REPERCUSSIONS OF 2010 RETENTION ELECTIONS

Will this trend continue? The answer is yes, for several reasons. First, judges and justices take an oath to uphold the U.S. Constitution, as well as their state constitutions, and to abide by that oath, they must remain true to the rule of law.<sup>115</sup> As a result, some of their opinions will not be popular with everyone. Second, judges and justices, primarily justices, have to rely on precedent and rule on difficult and controversial issues. These issues are the ones that anger the “losing” side the most. Third, as was quite evident in Iowa in 2010,<sup>116</sup> there are hot-button issues that interest many people. For Chief Justice Bird and Justice

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107. *Judges and Money*, *supra* note 104.

108. *Id.*

109. Judicial Campaign Ads, *Vote No on Justice Kilbride*, YOUTUBE (Oct. 26, 2010), <http://www.youtube.com/watch?v=aPmGtxw2en8>.

110. Fair Courts Page, *Justice Thomas Kilbride Defends Himself from Attack Ads*, YOUTUBE (Oct. 21, 2010), <http://www.youtube.com/watch?v=DonT0iTg4mE>.

111. John Gramlich, *Judge Fights in Iowa, Illinois Signal New Era for Retention Elections*, WASH. POST (Dec. 4, 2010, 9:21 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403857.html>.

112. *Id.*

113. ILL. CONST. art. VI, § 12(d) (“The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term . . . .”).

114. Suhr, *supra* note 105.

115. A.B.A. DIV. FOR PUB. EDUC., DIALOGUE SER., DIALOGUE ON THE RULE OF LAW pt. 1, at 5 (2008), available at [www.americanbar.org/content/dam/aba/migrated/publiced/features/FinalDialogueROLPDF.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/publiced/features/FinalDialogueROLPDF.authcheckdam.pdf).

116. See, e.g., Grant Schulte, *Iowa Ousts 3 Judges After Gay Marriage Ruling*, USA TODAY (Nov. 3, 2010, 10:17 AM), [http://usatoday30.usatoday.com/news/politics/2010-11-03-gay-marriage-iowa-election\\_N.htm](http://usatoday30.usatoday.com/news/politics/2010-11-03-gay-marriage-iowa-election_N.htm) (“Here are three individuals who took a very controversial stand, because it’s what they thought the law required . . . .”).

Penny White, it was crime, death penalty sentences and a perception they were soft on crime.<sup>117</sup> In Iowa, it was gay marriage.<sup>118</sup> In Illinois, the “problem” was being soft on crime and anti-business.<sup>119</sup> In Alaska and Kansas, it was abortion.<sup>120</sup> All of these issues are controversial and likely to raise the blood pressure of people in groups most interested in those issues.

I find it merely coincidental that these high-profile, big-money races occurred in the first judicial election cycle following the United States Supreme Court’s decision in *Citizens United v. Federal Election Commission*.<sup>121</sup> That decision was not directed to state judicial elections; rather, it overturned limits on corporate and union general treasury funds aimed at influencing only federal elections.<sup>122</sup> Nevertheless, some commentators expected *Citizens United* to have an impact on judicial retention elections.<sup>123</sup> One such commentator is Jeffrey Toobin, a staff writer at the *New Yorker* and senior legal analyst for CNN, who stated,

I think judicial elections are really the untold story of [*Citizens United*], the untold implication. Because when the decision happened, a lot of people said, “Okay. This means that Exxon will spend millions of dollars to defeat Barack Obama when he runs for re[-]election.” I don’t think there’s any chance of that at all. That’s too high profile. There’s too much money available from other sources in a presidential race. But judicial elections are really a national scandal that few people really know about. Because corporations in particular, and labor unions to a lesser extent, have such tremendous interest in who’s on state supreme courts and even lower state courts that that’s where they’re going to put their money and their energy because they’ll get better bang for their buck there.<sup>124</sup>

I believe, given what occurred in the states discussed above, Mr. Toobin was correct.

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117. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 313, 316 (1997).

118. Schulte, *supra* note 116.

119. Editorial, *supra* note 104.

120. Demer, *supra* note 54; Kansans for Life, *supra* note 87.

121. 130 S. Ct. 876 (2010).

122. *Id.* at 887, 917.

123. See CARMEN LO ET AL., SPENDING IN JUDICIAL ELECTIONS: STATE TRENDS IN THE WAKE OF *CITIZENS UNITED*, CAL. ASSEMBLY JUDICIARY COMM. 12, 17 (2011), available at <http://www.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf>.

124. Interview by Bill Moyers with Jeffrey Toobin, Staff Writer, the *New Yorker*, and Legal Analyst, CNN (Feb. 19, 2010), available at <http://www.pbs.org/moyers/journal/02192010/transcript2.html>.

#### *A. Challenges Continue in 2012*

*1. Florida.*—Although the two Florida justices up for retention in 2010 won their elections,<sup>125</sup> the three justices up for retention in 2012 are now targets.<sup>126</sup> Jesse Phillips, the president of a non-profit group designed “to educate voters about the retention election,” known as Restore Justice 2012,<sup>127</sup> stated, “We believe that judicial activism is a serious problem in Florida. Judges play politics and cater to special interests in ways that disrespect the Constitution and threaten our protection under the law . . . . Fortunately, our state provides a way to remove judges when necessary through the merit retention vote.”<sup>128</sup>

Restore Justice 2012, a website Phillips created<sup>129</sup> to target Justices Fred Lewis, Barbara Pariente, and Peggy Quince, along with other members of the judiciary, is up and running.<sup>130</sup> Restore Justice released a voter guide to help its readers find information about each justice’s record.<sup>131</sup> On October 1, 2012, Restore Justice 2012 announced it was releasing a new web advertisement against Justices Pariente, Quince and Lewis.<sup>132</sup> It highlights a 2003 murder case where Justices Quince and Pariente voted to order a new trial for Joe Elton Nixon, who had been sentenced to death for a 1984 murder because of unfair legal representation.<sup>133</sup> Nixon had been convicted of tying his victim to a tree with jumper cables and setting her on fire. He argued he did not have a fair trial because he never gave his attorney the authority to admit his guilt to the jury.<sup>134</sup>

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125. Associated Press, *Supreme Court Justices All Retained*, FLA. TIMES-UNION (Nov. 2, 2010, 10:58 PM), <http://jacksonville.com/news/florida/2010-11-02/story/supreme-court-justices-all-retained>.

126. Yaël Ossowski, *FL: ‘Activist Judges’ Set to Face the Music in Merit Retention Fight*, FL WATCHDOG.ORG (Aug. 16, 2012), <http://watchdog.org/50001/flactivist-judges-set-to-face-the-jusic-in-merit-retention-fight/>.

127. *Id.*

128. Kenric Ward, *Conservative Groups Gunning for Florida Judges Who ‘Play Politics’ on Bench*, SUNSHINE STATE NEWS (June 12, 2011, 5:49 PM), <http://www.sunshinestatenews.com/blog/conservative-groups-gunning-florida-judges-who-play-politics-bench>.

129. Brady Dennis, *Super PACs, Donors Turn Sights on Judicial Branch*, WASH. POST (Mar. 9, 2012), [http://www.washingtonpost.com/business/economy/super-pacs-donors-turn-sights-on-judicial-branch/2012/03/29/gIQAAIsnjS\\_story.html](http://www.washingtonpost.com/business/economy/super-pacs-donors-turn-sights-on-judicial-branch/2012/03/29/gIQAAIsnjS_story.html).

130. RESTORE JUSTICE 2012, <http://www.restorejustice2012.com/> (last visited Nov. 3, 2012).

131. Press Release, Fla. Political Press, Restore Justice Releases Supreme Court Report Card to Grassroots Supporters Statewide (Sept. 4, 2012), <http://www.floridapoliticalpress.com/2012/09/04/restore-justice-releases-supreme-court-report-card-to-grassroots-supporters-statewide/>.

132. Mary Ellen Klas, *Restore Justice 2012 Says It’s Launching TV Ad Aimed at Opposing Justices*, TAMPA BAY TIMES, Oct. 1 2012, <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/restore-justice-2012-says-its-launching-tv-ad-aimed-opposing-justices>.

133. Mary Ellen Klas, *RPOF Wades into Hornets Nest to Oppose Retention of Three Justices*, MIAMI HERALD (Sept. 21, 2012, 4:22 PM), <http://miamiherald.typepad.com/nakedpolitics/2012/09/rpof-wades-into-hornets-nest-to-oppose-retention-of-three-justices-.html> [hereinafter *RPOF*].

134. *Id.*

The Florida Supreme Court agreed with him. But in 2004 the United States Supreme Court voted unanimously to overturn that decision, noting Nixon had several opportunities to object to his lawyer's strategy, but never did.<sup>135</sup>

The Republican Party of Florida released a statement that its executive board voted unanimously to oppose the three justices in their retention election:<sup>136</sup>

While the collective evidence of judicial activism amassed by these three individuals is extensive, there is one egregious example that all Florida voters should bear in mind when they go to the polls on election day. These three justices voted to set aside the death penalty for a man convicted of tying a woman to a tree with jumper cables and setting her on fire. The fact that the United States Supreme Court voted, unanimously, to throw out their legal opinion, raises serious questions as to their competence to understand the law and serve on the bench, and demonstrates that all three justices are too extreme not just for Florida, but for America, too.<sup>137</sup>

This move by the Republican Party of Florida did not go unanswered. Dick Batchelor, a former Democratic lawmaker now working with Defend Justice from Politics, an advocacy group, stated,

The Republican Party has demonstrated with this decision that there are special interests in this state that not only want to control all three branches of government, they want to own all three branches of government. . . . The question for the public now is, do we want an independent judiciary or do we want to surrender the sovereignty of the court to a political Legislature?<sup>138</sup>

This is not the only ruling by the court that has drawn an attack. Americans for Prosperity, a conservative group financed by billionaires Charles and David Koch, released an ad criticizing the entire Florida Supreme Court just days after the Republican Party of Florida announced its campaign.<sup>139</sup> This ad addresses an opinion in 2010 where Justices Pariente, Quince and Lewis joined the majority in a 5-2 decision to reject a state effort to invalidate President Barack Obama's healthcare law.<sup>140</sup>

In addition, the Southeastern Legal Foundation is raising questions whether

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135. *Id.*

136. Mary Ellen Klas, *In Surprise Move, Florida GOP Opposes Supreme Court Justices' Retention in November*, MIAMI HERALD, Sept. 21, 2012, <http://www.miamiherald.com/2012/09/21/3014793/in-surprise-move-florida-gop-opposes.html>.

137. *RPOF*, *supra* note 133.

138. *Id.*

139. Michael Peltier, *Americans For Prosperity Launches Ad Attacking Florida Supreme Court (Video)*, HUFFPOST MIAMI (Sept. 25, 2012, 8:45 PM), [http://www.huffingtonpost.com/2012/09/25/attack-ad-florida-supreme-court\\_n\\_1914741.html](http://www.huffingtonpost.com/2012/09/25/attack-ad-florida-supreme-court_n_1914741.html).

140. *Id.*

the justices may be violating ethics rules.<sup>141</sup> The rules they center on involve raising money and urging voters to keep them on the bench.<sup>142</sup> “No man is above the law, particularly those charged with enforcing the law,” said Shannon Gosseling, executive director of the Southeastern Legal Foundation.<sup>143</sup>

Florida Governor Rick Scott asked the Florida Department of Law Enforcement (FDLE) to independently decide if an investigation was warranted into the three justices’ actions when they filed to run on the ballot in April of 2012.<sup>144</sup> Apparently the Florida Supreme Court put a hearing on hold for more than an hour to allow the three justices to complete their paperwork and file it.<sup>145</sup> The justices used court employees to notarize the paperwork, despite a state law that prohibits candidates for office from using state employees during working hours.<sup>146</sup> Although the FDLE found no wrongdoing, the Southeastern Legal Foundation has filed a lawsuit on behalf of two state residents, arguing that the three justices would not have made the ballot without the use of state employees. The lawsuit asks for their removal from the ballot.<sup>147</sup>

Aubrey Jewett, a political scientist at the University of Central Florida stated, “The three justices have raised a great deal of money to run ads to defend themselves and have spoken publicly and to the press that they think the impartiality of the court is under partisan and ideological attack.”<sup>148</sup> For the first time ever, a tax-exempt political organization known as a 527 group has been formed to run television ads in the justices’ defense.<sup>149</sup> The Fraternal Order of Police and the Florida Professional Fire Fighters have said they too would provide support for the justices’ retention bids.<sup>150</sup> Approximately \$1 million dollars has been raised for the justices’ retention bids.<sup>151</sup>

2. *Iowa*.—After the 2010 election, the Southern Poverty Law Center of Montgomery, Alabama named the National Organization for Marriage (NOM) and the American Family Association (AFA) as groups it was investigating

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141. See Gary Fineout, *Gov. Scott Requests Review of 3 Justices’ Actions*, ORLANDO SENTINEL (June 5, 2012, 10:21 PM) [http://articles.orlandosentinel.com/2012-06-05/news/os-supreme-court-justices-rick-scott-20120605\\_1\\_justices-fred-lewis-florida-supreme-court-justices-rick-scott](http://articles.orlandosentinel.com/2012-06-05/news/os-supreme-court-justices-rick-scott-20120605_1_justices-fred-lewis-florida-supreme-court-justices-rick-scott).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See Brandon Larrabee, *FDLE Investigation Into Justices Over, Fight Not*, WCTV.TV (July 6, 2012, 11:04 PM), [http://www.wctv.tv/home/headlines/FDLE\\_Investigation\\_Into\\_Justices\\_Over\\_Fight\\_Not\\_161565115.html](http://www.wctv.tv/home/headlines/FDLE_Investigation_Into_Justices_Over_Fight_Not_161565115.html).

148. Louis Jacobson, *Judicial Races in 4 States Draw Big Money, Partisanship*, GOVERNING THE STATES AND LOCALITIES (Oct. 16, 2012), <http://www.governing.com/blogs/politics/Four-Judicial-Races-Draw-Big-Money-Partisanship.html>.

149. *Id.*

150. *Id.*

151. Op-Ed., *Impartial Justice at Risk*, N.Y. TIMES (Oct. 6, 2012), [http://www.nytimes.com/2012/10/07/opinion/sunday/impartial-justice-at-risk.html?\\_r=0](http://www.nytimes.com/2012/10/07/opinion/sunday/impartial-justice-at-risk.html?_r=0).

regarding their “anti-gay rhetoric.”<sup>152</sup> The Center said those groups not only opposed same-sex marriage but also called for the criminalization of homosexuality and spread “falsehoods about homosexuals being pedophiles and gay men having extremely short lifespans.”<sup>153</sup> In fact, those statements were made by a bus driver named Louis Marinelli who claimed to be affiliated with the NOM.<sup>154</sup> The NOM later denied being associated with Marinelli.<sup>155</sup>

Bob Vander Plaats reported the “Iowans for Freedom” movement had the goal of sending messages to judges it believed acted beyond the scope of their powers.<sup>156</sup> Vander Plaats started a new group, the Family Leader, to pressure “the four remaining [Iowa Supreme Court] justices to resign.”<sup>157</sup>

Only one justice on the Iowa Supreme Court, Justice David Wiggins, is up for retention in 2012. Vander Plaats stated Iowans should focus on the economy and the budget in the upcoming election.<sup>158</sup> When asked about Justice Wiggins around February of 2012, Vander Plaats stated, “He should be held to the same account his peers were in 2010, but we haven’t made a decision yet in regards to that.”<sup>159</sup> However, on August 11, 2012, Vander Plaats unveiled Iowans for Freedom’s campaign to oust Justice Wiggins.<sup>160</sup> Vander Plaats stated, “This is about Freedom, not just about marriage . . . . We see this as a freedom and constitutional issue important to all Iowans. If courts are allowed to redefine the institution of marriage, every one of the liberties we hold dear is in jeopardy.”<sup>161</sup>

The 2012 campaign only targets Justice Wiggins and not the three justices

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152. Richard Cohen, *SPLC’s Anti-Gay Hate List Compiled with Diligence and Clear Standards*, S. POVERTY LAW CTR. (Dec. 23, 2010), <http://www.splcenter.org/get-informed/news/splc-s-anti-gay-hate-list-compiled-with-diligence-and-clear-standards>. The SPLC claims it did not list the NOMAFA as a “hate group” but merely noted it was investigating NOM and AFA’s anti-gay rhetoric. Josh Nelson, *Judge-Ouster Supporters Blast ‘Hate’ Label*, WCFCOURIER.COM (Nov. 29, 2010, 3:00 PM), [http://wcfcourier.com/news/local/article\\_0d224deb-9ca4-5f17-9ae0-cdd5c98e47f5.html](http://wcfcourier.com/news/local/article_0d224deb-9ca4-5f17-9ae0-cdd5c98e47f5.html).

153. Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, S. POVERTY LAW CTR., (2010), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners>.

154. *Id.*

155. *Id.*

156. Josh Nelson, *Chief Justice: Budget Cuts, Politicization Threaten Iowa Court System*, WCFCOURIER.COM (Feb. 11, 2011, 12:30 PM), [http://wcfcourier.com/news/local/article\\_2d60b2ad-1c6f-5ad1-ba87-a859718362f9.html](http://wcfcourier.com/news/local/article_2d60b2ad-1c6f-5ad1-ba87-a859718362f9.html).

157. *Id.*

158. Steve Gravelle, *Same-Sex Iowa Couple Still Faces Hurdles*, GAZETTE (Feb. 5, 2012, 9:10 AM), <http://thegazette.com/2012/02/05/same-sex-iowa-couple-still-faces-hurdles/>.

159. *Id.*

160. Rod Boshart, *Vander Plaats Launches Effort to Oust Another Supreme Court Justice*, WCFCOURIER.COM (Aug. 12, 2012, 7:15 AM), [http://wcfcourier.com/news/local/govt-and-politics/vander-plaats-launches-effort-to-oust-another-supreme-court-justice/article\\_9fdc516e-e46a-11e1-a9de-0019bb2963f4.html](http://wcfcourier.com/news/local/govt-and-politics/vander-plaats-launches-effort-to-oust-another-supreme-court-justice/article_9fdc516e-e46a-11e1-a9de-0019bb2963f4.html).

161. *Id.*

appointed after the 2010 elections.<sup>162</sup> Vander Plaats again called for the four justices still on the bench, but not on the ballot, to resign, but stated he doubted that would happen because they still exhibited “a thread of judicial arrogance.”<sup>163</sup>

Iowans for Freedom instituted a statewide “NO Wiggins” bus tour.<sup>164</sup> Former Pennsylvania Senator Rick Santorum and Louisiana Governor Bobby Jindal joined the bus tour.<sup>165</sup> Senator Santorum said:

The judiciary’s usurpation of authority in recent years is completely unacceptable. It is obviously clear the people’s Constitution gives the judicial branch the least power, and yet these appointed judges continuously legislate from the bench whether it is gay marriage in Iowa, collective bargaining in Wisconsin, or resulting in the death of millions of lives caused by the opinion of *Roe v. Wade*.<sup>166</sup>

The bus tour was scheduled for 17 stops.<sup>167</sup>

The bus tour launched on September 24, 2012, with a rally in Des Moines.<sup>168</sup> Senator Santorum stated:

You have an opportunity here in Iowa to continue what you did two years ago, and you struck a blow . . . . But now you have an opportunity to maybe even tip the balance with a fourth justice. So you have four new judges on the court and an opportunity maybe even to reverse this horrific decision.<sup>169</sup>

He went on to state:

People of faith and no faith, even if you don’t agree with my position on the issue of marriage, understand the danger that allowing judges to determine what the law of the land is . . . . Running roughshod over the constitution, the laws of the state, is as dangerous to people on both sides of the aisle. There is as much a chance of conservative judicial activism as there is for liberal judicial activism.<sup>170</sup>

During that rally, the focus was not so much on same-sex marriage as it was

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162. *Id.*

163. *Id.*

164. *Santorum, Jindal Join Iowans for Freedom on Statewide “NO Wiggins” Bus Tour*, IOWA REPUBLICAN (Sept. 18, 2012), <http://theiowarepublican.com/2012/santorum-jindal-join-iowans-for-freedom-on-statewide-no-wiggins-bus-tour/>.

165. *Id.*

166. *Id.*

167. Kevin Hall, *Vander Plaats, Santorum Launch “No Wiggins” Bus Tour*, IOWA REPUBLICAN (Sept. 25, 2012), <http://theiowarepublican.com/2012/vander-plaats-santorum-launch-no-wiggins-bus-tour/>.

168. *Id.*

169. *Id.*

170. *Id.*

on judges making law, instead of interpreting the law.<sup>171</sup> Tama Scott, co-chair for Iowans for Freedom, stated:

This is not just about marriage. It's not just about morality. This is about the constitutional process that our Founding Fathers set in place so long ago and the Iowa Bar Association worked to put in place this retention vote. . . . And yet, when the people decide to use it, they're criticized as politicizing it.<sup>172</sup>

The Iowa State Bar Association conducted a survey of state bar association members, which showed that an average of 90% of the members approved most Iowa judges.<sup>173</sup> However, Justice Wiggins received a 63% rating, the second-lowest approval rating.<sup>174</sup> Vander Plaats called it “unconscionable” to retain a judge who, essentially, got a D- grade.<sup>175</sup> Vander Plaats went on to state:

What they said in that scoring instrument is Judge Wiggins is arrogant. He's confrontational. He's not all that bright and above all, he's lazy. . . . Now, ladies and gentlemen, take that *Varnum* decision out of there. He does not deserve to be on the bench and we need to vote Wiggins out on November 6.<sup>176</sup>

However, even though Iowans for Freedom and their supporters are vehemently opposed to Justice Wiggins, there is another side to this matter. On September 21, 2012, the “Iowa State Bar Association announced a ‘multipronged effort to support Iowa’s judicial merit selection system’ that involve[d], among other things, [a] bus tour.”<sup>177</sup> The “Yes Iowa Justice Tour” schedule mimicked the “No Wiggins” bus tour and added visits to two-liberal-trending college towns.<sup>178</sup> The bar association planned “to promote the retention of all judges and justices standing for retention this year . . . [T]he plan calls for the association to respond to, and correct, misinformation about Iowa’s judicial system.”<sup>179</sup>

As Iowa approaches election day, a new TIR/Voter/Consumer Research Poll showed 49% of Iowans now favor gay marriage, while 42% oppose allowing gays and lesbians to marry legally in Iowa.<sup>180</sup> The poll found 40% of Iowans

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171. *Id.*

172. *Id.*

173. *Iowa Judges Get “Thumbs Up” From Lawyers*, 6 NEWS (Aug. 9, 2012), <http://www.wowt.com/home/headlines/Iowa-Judges-Get-Thumbs-Up-From-Lawyers-165671156.html>.

174. *Id.*

175. Hall, *supra* note 167.

176. *Id.* (emphasis added).

177. Jeff Eckhoff, *Group to Shadow ‘No Wiggins’ Tour*, DES MOINES REGISTER (Sept. 22, 2012, 12:08 AM), <http://www.desmoinesregister.com/article/20120922/NEWS09/309220042/Group-shadow-No-Wiggins-tour>.

178. *Id.*

179. *Id.*

180. Craig Robinson, *TIR Poll: Iowans Favor Gay Marriage—Retention Election Remains Complicated*, IOWA REPUBLICAN (Oct. 1, 2012), <http://theiowarepublican.com/2012/tir-poll>

planned on voting to retain Justice Wiggins, while 32% planned on voting no.<sup>181</sup> This shift in opinion may be due in part to more than 4,500 same sex marriages in Iowa since 2009.<sup>182</sup> A Des Moines Register poll in February of 2012 found that voters overwhelmingly opposed amending the constitution to ban gay marriage.<sup>183</sup> Those surveyed are split on whether they agreed with the 2009 *Varnum* ruling, and one-third said they “don’t care much” about the issue.<sup>184</sup> Bob Vander Plaats conceded that “[i]t makes it more difficult” to oust Justice Wiggins, and “with limited resources,” it would be harder to get an anti-Wiggins message out as “the election nears and more and more presidential and congressional ads air.”<sup>185</sup>

3. *North Carolina*.—States where members of the judiciary actively campaign in partisan elections are not immune from the effects of outside interest groups. For example, in North Carolina, the North Carolina Judicial Coalition, referred to “as a super PAC,” pledged its support for Justice Paul Newby, a conservative, “who has opposed adoptions by same-sex couples and disallowed a lawsuit challenging alleged predatory lending.”<sup>186</sup> Limitations on independent fundraising by candidates give special interest groups almost complete control over the information disseminated to voters because of the unlimited spending permitted by *Citizens United*.<sup>187</sup>

4. *Indiana*.—On May 12, 2011, Justice Steven David authored *Barnes v. State*.<sup>188</sup> In that case, Justice David wrote the majority opinion: “We hold that there is no right to reasonably resist unlawful entry by police officers.”<sup>189</sup> It also stated that “In sum, we hold that [in] Indiana the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.”<sup>190</sup> This ruling arose out of a Vanderburgh County case in which a man yelled at police and blocked them from entering his apartment to investigate a domestic disturbance.<sup>191</sup> Barnes shoved a police officer who entered anyway.<sup>192</sup> Barnes

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iowans-favor-gay-marriage-retention-election-remains-complicated/.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Ryan J. Foley, *Vote on Iowa Justice Seen as Test for Gay Marriage*, YAHOO! NEWS (Oct. 8, 2012), <http://news.yahoo.com/vote-iowa-justice-seen-test-gay-marriage-182452900--politics.html>.

186. Op-Ed., *North Carolina, Meet Citizens United*, N.Y. TIMES, June 6, 2012, at A26, available at <http://www.nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html>.

187. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 908 (2010).

188. 946 N.E.2d 572 (Ind. 2011).

189. *Id.* at 574.

190. *Id.* at 577.

191. *Id.* at 574.

192. *Id.*

was shocked with a stun gun and arrested.<sup>193</sup>

Bloggers immediately started discussing the Court's ruling. “[T]his holding went far beyond [the facts of the case] to intrude, absurdly, into Fourth Amendment jurisprudence.”<sup>194</sup> This blogger went on to state,

Appellate courts generally limit their legal analyses to the facts of the case before them, for good reason. Failure to do so not only results in otherwise unnecessary future litigation, it also changes the law for no valid reason. The creation of new law is the proper function of legislatures, not courts. Here, however, what the court did went well beyond what even the Indiana Legislature could properly have done.<sup>195</sup>

The mainstream media also responded: “Overturning a common law dating back to the English Magna Carta of 1215, the Indiana Supreme Court ruled Thursday that Hoosiers have no right to resist unlawful police entry into their homes.”<sup>196</sup> The Indiana Supreme Court began receiving harassing phone calls and email messages regarding the *Barnes* decision.<sup>197</sup> A rally took place at the Indiana Statehouse on May 25, 2011, with some 300 people expressing opposition to the *Barnes* decision.<sup>198</sup> During the ninety-minute rally, several speakers urged voters to oust Justice David in the November 2012 elections.<sup>199</sup>

At least two Facebook pages have been started in response to the *Barnes* decision—“Over Turn [sic] Indiana Supreme Court’s Ruling Against the 4th Amendment”<sup>200</sup> and “Remove Justice Steven H. David in 2012.”<sup>201</sup> On October 16, 2012, the following post was made to the latter Facebook page: “Ok folks, people are starting to vote early, and we NEED the word to get out about our

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193. *Id.*

194. Dan Miller, *Indiana Supreme Court Issues Death Warrant for Fourth Amendment*, PJ MEDIA (May 13, 2011, 9:38 AM), <http://pjmedia.com/tatler/2011/05/13/indiana-supreme-court-issues-death-warrant-for-fourth-amendment/>.

195. *Id.*

196. Dan Carden, *Court: No Right to Resist Illegal Cop Entry into Home*, NWI TIMES (May 13, 2011, 3:56 PM), [http://www.nwitimes.com/news/local/govt-and-politics/article\\_ec169697-a19e-525f-a532-81b3df229697.html](http://www.nwitimes.com/news/local/govt-and-politics/article_ec169697-a19e-525f-a532-81b3df229697.html).

197. Dan Carden, *Indiana Supreme Court Threatened Following Controversial Ruling*, NWI TIMES (May 16, 2011, 5:30 PM), [http://www.nwitimes.com/news/local/govt-and-politics/article\\_8d416141-5026-51b7-898e-6cd827d878ee.html](http://www.nwitimes.com/news/local/govt-and-politics/article_8d416141-5026-51b7-898e-6cd827d878ee.html).

198. Dan Carden, *Hundreds Rally at Statehouse in Opposition to Recent Ind. Supreme Court Ruling*, MUNSTER COMMUNITY.COM (May 25, 2011, 6:30 PM), [http://www.nwitimes.com/news/local/lake/munster/article\\_55d77b9a-8f0f-5112-ac74-657702f3b7a2.html](http://www.nwitimes.com/news/local/lake/munster/article_55d77b9a-8f0f-5112-ac74-657702f3b7a2.html).

199. *Id.*

200. *Over Turn Indiana Supreme Court’s Ruling Against the 4th Amendment*, FACEBOOK, <http://www.facebook.com/pages/Over-Turn-Indiana-Supreme-Courts-Ruling-Against-the-4th-Amendment/210974625592425> (last visited Nov. 2, 2012).

201. *Remove Justice Steven H. David in 2012*, FACEBOOK, <http://www.facebook.com/NOinNOVEMBER> (last visited Nov. 2, 2012) (obtaining 687 likes as of November 2, 2012).

choice! Remind everyone to vote NO for supreme [c]ourt retention!”<sup>202</sup>

Andy Downs, with the Mike Downs Center for Indiana Politics, said:

Immediately people start[ed] saying this violates the U.S. Constitution, and it violates the Indiana Constitution, and that got a lot of people riled up . . . . We’ll have an opportunity after the election, if we see a huge difference in the result, one of the factors we can point to probably is this decision, as something that played into it.<sup>203</sup>

Rick Barr, who serves on the steering committees for the Indianapolis Tea Party and another conservative group, said the movement to oust Justice David is larger than the tea party,<sup>204</sup> “[i]t’s a broad-based movement all over the state with a variety of folks involved . . . .”<sup>205</sup>

#### *B. Responses from Judges and Legal Systems*

The legal community is not without a plan to counter the attacks of special interest groups that are determined to unseat members of the judiciary based on perceived biases. Voters all over the country can expect to be better informed about the judiciary; specific judges and justices up for retention or running for office; large scale education initiatives; judicial performance evaluations, and bar association participation in response to issues set forth in negative ads.<sup>206</sup>

1. *Campaigning*.—In an article after the 2010 election, the *Des Moines Register* reported Iowa Supreme Court Justice Wiggins declared that he would not “stand quietly” if a campaign is launched to remove him from the bench.<sup>207</sup> “If someone wants to attack me, I’m not going to let them bully me . . . . If asked to, I’ll speak up for myself. The others didn’t do that last time. I will.”<sup>208</sup>

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202. *Id.*

203. Jeff Neumeyer, *Justice Faces Challenge to Position on State’s High Court*, INCNOW (Oct. 3, 2012, 5:52 PM), <http://www.indianasnewscenter.com/news/local/Justice-Faces-Challenge-To-Position-On-States-High-Court-172550481.html>.

204. Charles Wilson, *Indiana Justice Could Lose Seat over ’11 Ruling*, COURIER-JOURNAL.COM (Oct. 13, 2012), <http://www.courier-journal.com/viewart/20121012/NEWS02/310110145/Indiana-justice-could-lose-seat-over-11-ruling?odyssey=nav|head>.

205. *Id.*

206. See Fred N. Six, Op-Ed., *Where to Find Information About the Judges and Justice Who Are Standing for Retention on the November 2012 Ballot*, KAN. COMM’N ON JUDICIAL PERFORMANCE, <http://www.kansasjudicialperformance.org/index.cfm?Page=TheKansasJudicialReport> (last visited Oct. 2, 2012, 12:38 AM); Albert J. Klumpp, *Arizona Judicial Retention: Three Decades of Elections and Candidates*, ARIZ. ATTORNEY 16-18 (2008), available at [http://www.myazbar.org/AZAttorney/PDF\\_Articles/1108election.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/1108election.pdf); Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421, 1431-32 (2012); ISBA Action Plan Designed to Provide Truth About Judicial Retention, STATE BAR ASS’N, <http://iowabar.org/displaycommon.cfm?ari=1&subarticlenbr=761>.

207. Eckhoff, *supra* note 177.

208. Ian Millhiser, *GOP Iowa Governor: Anti-Gay Groups Likely to Try to Oust Another Iowa*

However, less than a month before the election, the Iowa Bar Association and its supporters are actively campaigning for Justice Wiggins, while he apparently is honoring the tradition that Iowa judges do not campaign.<sup>209</sup> He did write recently in the *Des Moines Register*, “I do not want Iowa [t]o end up like states with highly partisan courts. Iowa is better than that.”<sup>210</sup>

In the meantime, the three Florida justices are starting to campaign.<sup>211</sup> Aware that opposition already was mounting against their retention, the three justices decided to campaign early and hard.<sup>212</sup> In March 2012, the justices held a fundraiser; the invitation to which “asked for a ‘suggested contribution’ of \$500 to each of” the three justices.<sup>213</sup> They were not happy, however, to be asking for money. Justice Fred Lewis stated, “It is almost embarrassing to be doing it,” and Justice Barbara Pariente agreed that “[i]t’s an awkward thing.”<sup>214</sup> Justice Peggy Quince also added, “We should not have to go around and have our friends and committees collecting money . . . . We don’t want to get caught up in those kinds of things.”<sup>215</sup>

In Indiana, Justice David responded to opposition by establishing his own website about a month before the retention vote. The official Indiana Courts website includes informational pages designed to provide voters with information about all Supreme Court justices and appellate court judges, including Justice David, who are facing retention votes.<sup>216</sup> But having been singled out for criticism because of his *Barnes* decision, Justice David posted his own separate website,<sup>217</sup> with both informational and campaign-oriented content.<sup>218</sup> In it, the

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209. *Marriage Equality Justice*, THINKPROGRESS JUST. (May 15, 2012, 2:50 PM), <http://thinkprogress.org/justice/2012/05/15/484552/gop-iowa-governor-anti-gay-groups-likely-to-try-to-oust-another-iowa-marriage-equality-justice/?mobile=nc>.

210. Ryan J. Foley, *Vote on Iowa Justice Who Joined Gay Marriage Ruling Seen as Barometer as Views Change*, NEWSER (Oct. 8, 2012), <http://www.newser.com/article/da1pjkt01/vote-on-iowa-justice-who-joined-gay-marriage-ruling-seen-as-barometer-as-views-change.html>.

211. *Id.*

212. *Florida Retention: Targeted Justices Are No ‘Sitting Ducks,’* GAVEL GRAB (Sept. 18, 2012), <http://www.gavelgrab.org/index.php?s=florida+retention+election&sbutt=GO>.

213. *GOP Opposing 3 Florida Justices’ Retention Bids*, GAINESVILLE SUN (Sept. 21, 2012, 4:20 PM), <http://gainesville.com/article/20120921/WIRE/120929896?p=2&tc=pg>.

214. Dennis, *supra* note 129.

215. *Id.*

216. *Judicial Retention 2012*, COURTS.IN.GOV, <http://www.in.gov/judiciary/admin/2924.htm> (last visited Nov. 3, 2012).

217. JUSTICE STEVEN DAVID, <http://justicestevendavid.com/> (last visited Dec. 27, 2012). It does not appear any of the other judges facing retention have done so.

218. The Indiana Code of Judicial Conduct provides, “A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary.” IND. CODE OF JUD. CONDUCT CANON 4 (2012). However, Rule 4.4 of the Canon permits “a candidate for retention who has met active opposition, [to] establish a campaign committee to manage and conduct a campaign for the

Justice posts “I ask for your support on Election Day by voting YES to retain me, and by voting YES to retain all of the Judges and Justices seeking retention.”<sup>219</sup> Under the subtitle “Punishing judge over 1 decision lowers judicial process,” he provides a link to a newspaper editorial expressing concern over the opposition to his retention.<sup>220</sup>

Judges subject to retention are not alone in their frustration with the politicization of the judiciary.<sup>221</sup> An Ohio Supreme Court Justice, Paul E. Pfeifer, while campaigning in a recent election, stated, “I never felt so much like a hooker down by the bus station in any race I’ve been in as I did in a judicial race.”<sup>222</sup>

In Florida and other states where justices feel compelled to run active retention campaigns, the justices will have to forego, at least in part, their regular workload and actively campaign to keep their seats.

One recent judicial decision that illustrates the possible effect that politicization may have on the judiciary is *Caperton v. A.T. Massey Coal Co.*<sup>223</sup> In *Caperton*, the Supreme Court held that a justice’s failure to recuse himself when a campaign contributor appeared in his court violated the Due Process Clause of the Fourteenth Amendment.<sup>224</sup> *Caperton* has implications for perceptions of “judicial favoritism.”<sup>225</sup> In response to *Caperton*, “Michigan’s Supreme Court issued new rules making it harder for justices to hear cases involving major campaign supporters.”<sup>226</sup>

2. *Educate Voters.*—“A \$300,000 campaign is underway to educate Florida voters” about merit selection.<sup>227</sup> The Florida Bar launched this campaign, and the American Bar Association and the League of Women Voters have become

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candidate.” *Id.* at 4.4.

219. Seven David, *I Would Appreciate Your Vote*, JUSTICE STEVEN DAVID, <http://justicestevendavid.com/i-would-appreciate-your-vote-nov-6/> (last visited Nov. 3, 2012).

220. *Id.* See Steven David, *All Six Judges Have Earned “Yes” Votes for Retention*, JUSTICE STEVEN DAVID (Oct. 15, 2012), <http://justicestevendavid.com/all-six-judges-have-earned-yes-votes-for-retention/>.

221. Brendan H. Chandonnet, *The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts*, 12 WM. & MARY BILL RTS. J. 577, 581-83 (2004).

222. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1, available at <http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all>.

223. 556 U.S. 868 (2009).

224. *Id.* at 872.

225. Mary A. Celeste, AM. JUDGES ASS’N, *The Debate over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 88 (2009-2010), available at <http://aja.ncsc.dni.us/publications/courtrv/cr46-3/CR%2046-3%20Celeste.pdf>.

226. Press Release, Citizens United Called Grave Threat for America’s Courts, JUST. AT STAKE CAMPAIGN (Jan. 22, 2010), <http://www.justiceatstake.org/newsroom/press-releases-16824/?show=news&newsID=6669>.

227. Sascha Cordner, *Florida Supremes Facing Retention Votes in 2012*, WFSU (May 11, 2012, 6:05 PM), <http://news.wfsu.org/post/florida-supremes-facing-retention-votes-2012>.

involved to ensure voters receive “fair and balanced information.”<sup>228</sup>

In 2010, several groups in Colorado, including the Institute for the Advancement of the American Legal System, the League of Women Voters of Colorado, the Colorado Judicial Institute, and the Colorado Bar Association, sponsored a public education campaign.<sup>229</sup> In support thereof, the group launched the website “KnowYourJudge.com.”<sup>230</sup> This website was designed “to provide voters with impartial, nonpartisan information about the judges appearing on Colorado’s ballot.”<sup>231</sup> Those organizations also created a television and radio public service announcement to help equip voters with the resources to research their judges.<sup>232</sup>

*3. Judicial Performance Evaluations.*—At a recent symposium sponsored by the Indiana University McKinney School of Law entitled, “Reflecting on Forty Years of Merit Selection,” former Justice of the Tennessee Supreme Court and distinguished professor Penny White recommended Judicial Performance Evaluations as a way to respond to negative campaigning by special interest groups against judges facing retention.<sup>233</sup> White reasoned that Judicial Performance Evaluations are effective because they are a

means of evaluating judicial performance based upon objective, relevant criteria that are essential to good judging. And that gives the electorate a more meaningful reason to vote for or against a judge than does some “fear” ad, taking one case that the judge has decided that may or may not be consistent with popular opinion.<sup>234</sup>

Prior to the Iowa 2010 retention elections, Alaska, Arizona, Colorado, Kansas, Missouri, New Mexico, Tennessee, and Utah conducted Judicial Performance Evaluations for those judges that were subject to retention.<sup>235</sup> Since then, Justice White indicated, “several other states are looking to use them.”<sup>236</sup>

These Judicial Performance Evaluations are not simply polls taken by state bar associations like the Indiana Bar Association poll, where bar members vote “yes” or “no” to retain judges.<sup>237</sup> Instead, they include “observations, interviews,

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228. *Id.*

229. *Buying Time—2010*, *supra* note 73.

230. *Id.*

231. *Id.*

232. *Id.*

233. See, e.g., Penny J. White, “*The Appeal*” to the Masses, 86 DENV. U.L. REV. 253, 258-59, 264 (2008) (discussing the politicization of state judges and defending their roles from well-funded special interest groups).

234. Audio recording: Symposium on Reflecting on Forty Years of Merit Selection, held by the Indiana Law Review at the Robert H. McKinney School of Law (Apr. 5, 2012), at 32:45 – 33:13 (on file with Robert H. McKinney School of Law).

235. Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 654 n.110 (2009).

236. Audio recording, *supra* note 234, at 32:43.

237. Dan Carden, *State Bar Association Urges Hoosiers Vote ‘Yes’ to Retain Justices, Judges,*

public hearings, and responses to standardized, scaled surveys, provided by relevant individuals who have direct information based on interaction or observation within the evaluation period.”<sup>238</sup> This combination of individual opinions with the knowledge of each particular judge is essential in assuring the evaluation is thorough. “Lawyers provide knowledge about the role of the judge and the judicial process, while lay members add a needed safeguard against an incestuous process,” Justice White said.<sup>239</sup>

In addition to having a diverse sample of the population, Justice White believes it is important for the performance evaluation questions to examine the numerous aspects of the judge’s role.<sup>240</sup> The American Bar Association has established five sections, or “guidelines,” by which judicial performance may be measured: (1) “legal ability” in the form of “reasoning ability” and legal knowledge of precedent and procedure; (2) “integrity and impartiality,” including not only adherence to “judicial ethics,” but also the ability to make “difficult and unpopular decisions;” (3) “written and oral communication skills;” (4) the “judges demeanor,” focusing on “professionalism and temperament” and promotion of “public understanding of and confidence in the courts;” and (5) the judge’s administrative capabilities, measuring “punctuality and preparedness,” as well as “the judge’s ability to foster a productive work environment” in a diverse workplace.<sup>241</sup> Justice White agreed that these guidelines “mirror the qualities that have long been regarded as essential to good judging and are appropriate measures of judicial performance.”<sup>242</sup>

According to Justice White, the use and proper dissemination of Judicial Performance Evaluations helps the general public, most of who are unfamiliar with, and often uninformed about, the role of the judiciary and the judicial process. These evaluations provide a way to become informed about the judge’s tenure as a whole instead of relying on negative attack ads that focus on a specific case or issue of concern to a particular special interest group. This tool not only informs voters but also de-politicizes the judiciary and “promot[es] trust and confidence in the judicial branch.”<sup>243</sup>

4. *“Rapid Response Team.”*<sup>244</sup>—During the same panel discussion at the Robert H. McKinney School of Law in April 2012, a former justice of the Indiana Supreme Court, Theodore Boehm, noted that when he was up for retention in the 2008 election, he had given some thought to how a judge could best deal with a last minute challenge. Justice Boehm suggested that “the bar itself should give

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NWI POLITICS (Oct. 15, 2012, 7:00 PM), [http://www.nwitimes.com/news/local/govt-and-politics/elections/state-bar-association-urges-hoosiers-vote-yes-to-retain-justices/article\\_970cca3d-c741-55aa-b9df-55dba2073131.html](http://www.nwitimes.com/news/local/govt-and-politics/elections/state-bar-association-urges-hoosiers-vote-yes-to-retain-justices/article_970cca3d-c741-55aa-b9df-55dba2073131.html).

238. White, *supra* note 235, at 652.

239. *Id.* at 654.

240. *Id.* at 655.

241. *Id.* at 656.

242. *Id.* at 657.

243. *Id.* at 636.

244. Audio recording, *supra* note 234, at 1:02:44.

serious thought to how to organize a rapid response team that would be positioned to have thought out how best to reach voters, with what message, in the event of an attack on a judge.”<sup>245</sup> He suggested the response could occur in both the news and social media and should occur within twenty-four hours of the first assault on the judge so that the response was not “three weeks behind the public dialogue curve.”<sup>246</sup> Justice Boehm noted the message should have less to do with any particular judge and more to do with the purpose of judicial retention elections and the benefits of an independent judiciary. Justice Boehm and Justice White agreed that such a response team should include both members of the bar and lay persons from all walks of life, all who support the notion of an independent judiciary.<sup>247</sup>

No strategy will fit every situation. However, as a judicial and legal community, we all need to be aware of such threats and be prepared to respond. Indiana’s supreme court justices, appellate court judges, and members of the bar should never forget the effects retention elections had on the judiciary in Iowa and should diligently prepare a plan in anticipation of a similar organized challenge to members of Indiana’s judiciary.

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245. *Id.* at 1:02:39.

246. *Id.* at 1:04:26.

247. *Id.* at 1:08:21.