No. 201,996-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Matter of:

The Hon. David S. Keenan
Superior Court Judge for King County

BRIEF OF *AMICI CURIAE* ACLU OF WASHINGTON FOUNDATION AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

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I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

The identity and interests of *amici curiae* are set forth in the motion for leave to file brief of *amici curiae*, filed contemporaneously with this brief.[1]

II. ISSUES ADDRESSED BY *AMICI CURIAE*

1. The decision of the Commission on Judicial Conduct ("Commission") to sanction Judge David Keenan, is a regulation of judicial speech that raises significant First Amendment concerns. The Court also has an obligation to conduct *de novo* review of the Commission's decision. For both of these reasons, heightened scrutiny of the Commission's asserted rationale is appropriate.

2. The Commission's decision gives too much weight to certain asserted interests, such as the concern that Judge Keenan's statement will be perceived as bias against parties who are not members of marginalized communities, and thus

[1] This brief does not purport to convey the position of NYU School of Law.

signal that he will prejudge those parties when he issues rulings in cases where they appear before him. The Commission's decision also gives insufficient weight to other compelling government interests, such as ending bias in the judicial system and encouraging access to justice.

3. The Commission's decision and interpretation in other matters raises the specter of arbitrary enforcement, presenting vagueness concerns.

4. The Commission's decision also ignores the interest of the public in being informed about its judiciary. Learning more about judges who preside over potentially life-changing matters will increase public confidence in the administration of justice.

III. STATEMENT OF THE CASE

Amici adopt Judge Keenan's Statement of the Case.

IV. ARGUMENT

A. Restrictions on Judicial Speech are Subject to Heightened Scrutiny

"A judge does not surrender First Amendment rights upon becoming a member of the judiciary." *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 188, 955 P.2d 369 (1998). As this Court held in *Sanders*, the Commission must establish a "compelling interest" and "narrow tailoring" when policing judicial speech. *Sanders*, 135 Wn.2d at 188-89; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 774-75, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) (both applying strict scrutiny to restrictions on the speech of judicial candidates).

These principles apply with near equal force for sitting judges as they do judicial candidates, as the Ninth Circuit held in *French v. Jones*, 876 F.3d 1228 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1598 (2018). The Ninth Circuit first addressed the

proper level of scrutiny in *Wolfson v. Concannon*. 811 F.3d 1176, 1180-81 (9th Cir. 2016) (en banc). *Wolfson* involved a challenge to Arizona's code of judicial conduct regulating campaigns. The original panel declined to review the challenge as to sitting judges, and employed strict scrutiny as to judicial candidates. *Wolfson v. Concannon*, 750 F.3d 1145, 1152 (9th Cir. 2014). On rehearing en banc, the court had the benefit of the Supreme Court's ruling in *Williams-Yulee* and applied strict scrutiny, including as to restrictions that were not limited to judicial elections. *Wolfson*, 811 F.3d at 1181, 1183 (en banc). Judge Berzon wrote separately, noting that both *Williams-Yulee* and the main opinion "elide[d]" a distinction between "sitting judges running for re-election and nonjudge candidates aspiring to the office." *Id.* at 1190 (Berzon, J., concurring).

French v. Jones involved a challenge to the Montana Code of Judicial Conduct's prohibition on "engaging in political or campaign activity . . . inconsistent with the independence, integrity, or impartiality of the judiciary." 876

F.3d at 1230 (internal marks omitted). The restriction applied to both judges and judicial candidates. *Jones*, 876 F.3d at 1230. While the Ninth Circuit upheld the code against a First Amendment challenge, the court nevertheless applied heightened scrutiny without distinguishing between sitting judges and candidates. *Id.* at 1231.

The approach taken by the Ninth Circuit is consistent with this Court's approach in *Sanders*, where the Court held that "the same principles [applicable to judicial candidates] should . . . apply to speech by a sitting judge, albeit with somewhat less force." *Sanders*, 135 Wn.2d at 188. In *Sanders*, the Court rejected the Commission's conclusion that then-Justice Sanders's post-election appearance at a pro-life rally violated former Canons 1 (protecting the integrity and independence of the judiciary), 2(B) (lending the prestige of office to benefit others), and 7(A)(5) (prohibition on political activity with certain exceptions). *Id.* at 180. The Court should

apply the standards articulated in *Sanders* in this case.

The Commission does not overtly argue for a lower standard, although it tries to distinguish *Sanders* as involving "campaign speech". Resp. Br. at 30. However, *Sanders* rejected this very distinction, noting that if a person does not surrender their First Amendment rights "upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office." *Id.* at 189.

B. The Court's Obligation to Conduct *De Novo* Review Requires Close Scrutiny of the Asserted Government Interests

The First Amendment interests referenced above require heightened scrutiny of the purported government interests. Additionally, heightened scrutiny of the Commission's asserted rationale is also warranted because the State Constitution itself vests this Court with the obligation to conduct *de novo* review. Const. art. 4, § 31. The Court "cannot delegate its fact-finding responsibility and de novo review of disciplinary proceedings." *In re Disciplinary Proceeding Against Kaiser*, 111 Wn.2d 275,

279, 759 P.2d 392 (1988). The "use of the word 'recommend' [in the constitution reflects an] intent to place the ultimate decision to discipline [judges] in the Supreme Court." *In re Hammermaster*, 139 Wn.2d 211, 230, 985 P.2d 924 (1999). In light of this, the standard of proof in reviewing a decision of the Commission is "clear, cogent and convincing evidence." *Kaiser*, 111 Wn. 2d at 279. The Court has required a violation to be based on "direct evidence of misconduct." *In re Disciplinary Proceeding Against Niemi*, 117 Wn. 2d 817, 822, 820 P.2d 41 (1991).

Judicial conduct proceedings are quasi-criminal in nature and carry "potentially severe consequences to a judge." *In re Disciplinary Proceeding Against Deming*, 108 Wn. 2d 82, 102, 736 P.2d 639 (1987); *Sanders*, 135 Wn.2d at 190 (noting that increased scrutiny is warranted because the Commission's decision "can result in disciplinary action to the speaker"). For these reasons, a mere invocation by the Commission of "confidence in the judiciary" is not sufficient. *Niemi*, 117 Wn.

2d at 821. In *Niemi*, this Court recognized the difficulty in drawing the line between nonjudicial activities that "enrich, or at least are harmless to" the judiciary and those that "actually detract from or interfere with the business of judging." *Id.* at 824 (internal citation and marks omitted). In drawing this line, the Court cautioned that judges should be given "every reasonable degree of latitude," with restrictions encompassing only activities that cause "measurable damage" to the reputation of the judiciary. *Id.*

In *In re Disciplinary Proceeding Against Eiler*, when examining whether a judge violated, among others, then-existing Canons 1 (upholding the integrity and independence of the judiciary) and 2 (avoiding the appearance of impropriety) by being "rude and condescending," the Court contrasted the type of conduct that typically suffices to trigger partiality or appearance of propriety concerns:

> Judge Eiler did not cut deals with litigants behind closed doors, accept bribes, or otherwise demonstrate that her

> decisions were governed by anything other than the law and the facts of the cases.

Eiler, 169 Wn. 2d 340, 353, 236 P.3d 873 (2010). Similarly, in evaluating alleged violation of former Canons 1 and 2(A) by a state senator (Niemi) sitting as a judge tempore, the Court noted "[t]here is no allegation or evidence Niemi is trading the dignity and prestige of her case-by-case service . . . in her office as a state senator". *Niemi*, 117 Wn. 2d at 827. Thus, in keeping with the Court's exhortations in *Niemi*, violations of the rules will be found only where the judge's nonjudicial activities "do measurable damage to the court's dignity, available time and energy, or appearance of impartiality". *Id.* at 824 (internal citation and marks omitted). *See also In re Disciplinary Proceeding Against Turco*, 137 Wn. 2d 227, 247, 970 P.2d 731 (1999) (finding that judge "intentionally pushed his wife to the ground" was sufficient to support a violation of Canons 1 and 2(A)); *Deming*, 108 Wn. 2d at 117 (harassment in the workplace "related to the performance of . . . judicial duties [,]

show[ed] a lack of the necessary qualifications to be a judge and were violations of Canons 1, 2 and 3(A)(3)").

C. The Commission's Decision Gives Insufficient Weight to Other Compelling Government Interests

The government has a compelling interest in limiting judicial speech to avoid 'prejudgment' of cases that may come before a judge, but that limitation should be reserved for circumstances where a judge states in advance that they would reach a specific result in cases likely to come before them. Again, *Sanders* is instructive. There, the Court found, in rejecting the Commission's position, that there was nothing in the record that would permit the Court to interpret Justice Sanders' conduct "as an express or implied promise to decide particular issues in a particular way, or as an indication that he would be unwilling or unable to follow the law . . . ." *Sanders*, 135 Wn. 2d at 190. Even the hypothetical cases the Commission offers should not suffice: Judge John Wayne stating that he "got into law in part to protect [Second]

Amendment rights" or Judge Phyllis Schlafly explaining that she "got into law in part to protect [First] Amendment rights and the sanctity of the church." Resp. Br. at 49. Exaggerated examples aside, it is reasonable to limit a judge's First Amendment rights when necessary to avoid the impression that a judge could not impartially rule on a particular legal issue, or a case involving a specific party. The limits on Judge Keenan's speech imposed by the Commission, however, are neither reasonable nor correct.

Unlike other cases involving regulation of judicial speech, this case is not about endorsing a particular position on an issue or a party. Rather, Judge Keenan's speech is in fact a permitted expression that advances compelling government interests identified by the Court. Specifically, his statements are squarely in line with actions that this Court has encouraged, and in some cases emphasized as necessary, to prevent the legal system from perpetuating systemic bias and to ensure that "access to justice" is not just a sound bite. *See* Open Letter to

Members of the Judiciary and the Legal Community, Washington Supreme Court (June 4, 2020) ("Open Letter"), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

In its historic Open Letter to the judiciary and legal community, with respect to the "devaluation and degradation of Black lives," the Court explained that "[t]he legal community must recognize that we all bear responsibility for this on-going injustice, and we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all." *Id.* at 1 (emphasis added). Speaking specifically to judges, the Open Letter stated that at "[a]s judges, we must recognize the role we have played in devaluing Black Lives….We can develop a greater awareness of our own conscious and unconscious biases

in order to make just decisions in individual cases, and we can administer justice and support court rules in a way that brings greater racial justice to our system as a whole." *Id.* (emphasis added).

In the 2021 report on the State of the Judiciary, the Chief Justice similarly noted that with respect to "eradicat[ing] racism", "[t]he point is to do more than identify the problems, but instead to make structural changes so we can better provide real equal justice under the law." *See* Administrative Office of the Courts, State of the Judiciary 2021 (2021) at 6 ("State of the Judiciary Report"), https://www.courts.wa.gov/newsinfo/content/StateoftheJudiciary2021.cfm (emphasis added).

The Court itself has taken multiple steps toward this goal, including creation of the Racial Justice Consortium, with a stated goal of "develop[ing] specific plans that will result in structural change." *Id.* at 11. The Court has also reversed, and "repudiated," two prior decisions that perpetuated racism, and

in so doing, has recognized its own role in past injustices. *See State v. Towessnute*, 197 Wn.2d 574, 578, 486 P.3d 111 (2020) ("We take the opportunity... to repudiate this case; its language; its conclusions; and its mischaracterization of the Yakama people…. We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so."); *Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020) (reversing 1960 decision in *Price v. Evergreen Cemetery Co.* that upheld a cemetery's right to refuse burial of a Black child in a "White" cemetery section; explaining that the *Price* case "is harmful because of Justice Mallery's concurrence, which condemns civil rights and integration"; citing Open Letter and noting that "[t]he *Price* concurrence is an example of the unfortunate role we have played").

Access to justice is a compelling governmental interest, and one where courts and individual judicial officers, play an important role. Indeed, the Canons themselves highlight this

interest. *See* Rule 1.2, cmt. 4 (encouraging judges to participate in activities that "promote justice for all"); Rule 2.2 cmt. 4 (explaining that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard").

The Court's establishment (and reauthorization of) the Access to Justice Board further highlights the compelling nature of this interest. *See* Washington Supreme Court, *In Re Reauthorization of the Access to Justice Board*, No. 25700-B-567 (Wash. Sup. Ct. Mar. 4, 2016). The ATJ Board was established as a response to, in part, "the unmet legal needs of low and moderate income people in Washington State and others who suffer disparate access barriers" and "the importance of civil equal justice to the proper functioning of our democracy[.]" *Id.* at 1. This Court has charged the ATJ Board "with responsibility to achieve equal access to the civil justice system for those facing economic and other significant barriers." *Id.* Its mandate includes work to "[p]romote the

responsiveness of the civil justice system to the needs of those who suffer disparate treatment or disproportionate access barriers" and "[a]ddress existing and proposed laws, rules, and regulations that may adversely affect meaningful access to the civil justice system." *Id*. at 3. More recently, in the Open Letter, this Court acknowledged "the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support." Open Letter at 1.

Whether the ad was viewed as encouragement for non-traditional students to explore a pathway to the legal profession, a statement to those in marginalized communities that the judiciary includes someone from their ranks, or, as the Commission claims, an overt statement that Judge Keenan is working to ensure that marginalized communities get fair treatment in his courtroom, all of these are interests identified by the Court as compelling.

Judge Keenan's statement that he was motivated in part

to enter the legal profession "to advocate for marginalized communities" can reasonably read as a statement that as a lawyer, he was committed to working to transform the legal system to ensure that marginalized communities have meaningful access to justice, which in turn is a step towards eradicating bias. It is not uncommon for judges to explain their motivation for entering the legal profession, or aspiring to the bench, as the desire to advocate for a particular community. For example, Justice Madsen was quoted in a Seattle Times story about sexual harassment and women leaders in Washington State as saying that she was motivated to run for an open seat on this Court, in 1992, in part by the confirmation hearing of Clarence Thomas for the United States Supreme Court where Anita Hill testified about sexual harassment and was asked by the all-male Senate Judiciary Committee what she had done to provoke the harassment. *See* Lynn Thompson, "*Sexual harassment, put-downs and progress: Northwest women leaders tell their stories*," Seattle Times (November 4, 2016),

https://www.seattletimes.com/seattle-news/politics/sexual-harassment-put-downs-progress-northwest-women-leaders-tell-their-stories/. As Justice Madsen recalled, "The response was so outrageous. [Ms. Hill] was made into the perpetrator….I thought, 'If this is how people in power treat women, the wrong people are in power.'" *Id. See also* Chief Justice Barbara Madsen, "Testimonial," posted on the National Association of Women Judges website, https://www.nawj.org/testimonials/5/chief-justice-barbara-madsen ("Justice Madsen Testimonial") (stating that "in 1992, I decided to run for a seat on the Supreme Court in response to the testimony of Anita Hill and to my continued commitment to actively address gender bias in the legal system in Washington State"). Like Judge Keenan's statement, Justice Madsen's statements explain one of her motivations for her career trajectory, but do not assert or imply that she would favor women litigants who, like Anita Hill, find themselves in a situation where their allegations are not believed or are

belittled.

Judges also often offer personal opinions about other courts' decisions that, by the Commission's cramped interpretation of the Canons, might be evidence of purported "impartiality." *See, e.g.,* Kim Malcolm & John O'Brien, "A view of the SCOTUS Title VII decision from Justice Mary Yu," KUOW.org (June 17, 2020), https://www.kuow.org/stories/a-view-of-the-scotus-title-vii-decision-from-justice-mary-yu. When asked about her reaction to the United States Supreme Court's ruling that Title VII of the Civil Rights Act protects LGBTQ people from employment discrimination, Justice Yu stated "I would say [I] was surprised, and then second, just absolutely delighted…. We are fortunate enough to not have to worry about losing our job or housing because of who we are." *Id.* (emphasis added).

Moreover, judges' participation in the Access to Justice Board and the many commissions authorized by the Court, including the Minority and Justice Commission and the Gender

and Justice Commission, is an indirect way of asserting viewpoints and taking action, through the collective voice of a commission or board. When a judge engages in individual speech consistent with such collective speech, these individual statements advance the government interests reflected in the board and commission's goals, as does the collective statement. The Commission apparently has no concern about "advocacy" for marginalized communities when the statements are issued by a group including judicial officers. In the Commission's view, these concerns arise only when an individual judge echoes that group's sentiments. There is no basis to conclude that the impartiality of the judiciary will suffer more from allowing Judge Keenan to communicate a similar message on an individual basis. Indeed, the Open Letter encourages judges to consider how decisions in individual cases can help eradicate racism. *See* Open Letter at 1 (explaining that judges "can develop a greater awareness of our own conscious and unconscious biases in order to make <u>just decisions in individual</u>

cases") (emphasis added).

The Commission argues that "[t]he language of the ad intimated that [Judge Keenan] views his judicial status through a lens of advocacy." Resp. Br. at 1. The only reasonable reading of the ad is that Judge Keenan was an advocate prior to being a judge, and this advocacy has some effect on Judge Keenan's judicial philosophy. Even assuming, as the Commission argues, that Judge Keenan views part of his duty as a judge is to advocate for access to justice, this is in keeping with the types of changes the commissions established by the Court have suggested in the last several years, not to mention the call to action in the Court's Open Letter. To be an advocate for changes to a legal system that has historically limited access to parties with privilege is not, as the Commission claims, a "judicial endorsement of causes or organizations" that would result in judicial officers "becom[ing] Nascar-stickered with their causes of choice[.]" Resp. Br. at 5.

As the Court recently recognized, judges' unique role

positions them to advocate for "structural changes" to address systemic racism and advance access to justice. State of the Judiciary Report at 6. That role should be defined broadly, not narrowly and constrained by "tradition." Indeed, it is "tradition" that often makes judges "feel bound" and constrained from taking action to address past harm. *See* Open Letter at 1. These are compelling interests that require action, not acquiescence in tradition for tradition's sake.

D. The Commission's Ruling Reflects the Lack of Adequate Objective Standards, Raising the Specter of Arbitrary Enforcement

A "statute under which sanctions may be imposed for unprofessional conduct must not be unconstitutionally vague." *Haley v. Med. Disciplinary Bd.*, 117 Wn. 2d 720, 739, 818 P.2d 1062 (1991). The vagueness doctrine serves two important purposes: (1) it provides fair notice to those regulated and (2) guards against arbitrary enforcement. *Seattle v. Rice*, 93 Wn. 2d 728, 731, 612 P.2d 792 (1980), *impliedly overruled on other grounds* , as noted in *State v. Smith*, 111 Wn. 2d 1, 14 n.3,

759 P.2d 372 (1988). Given the quasi-criminal nature of disciplinary proceedings, *see Sanders*, 135 Wn.2d at 190, these concerns are squarely applicable in reviewing the Commission's determination of a violation. Again, in *Sanders*, this Court highlighted the difficulty of line-drawing in this setting. *See id.* at 187 (noting the difficulty in defining the term "political"). The Commission's position as to the ad raises numerous such concerns.

Two examples serve to underscore the arbitrary nature of the Commission's interpretation of the rules.

First, the Commission endorses the view that a judge may promote herself as a graduate of a particular law school without running afoul of the Code. Resp. Br. at 14. But the Commission cannot articulate any credible rationale for why allowing a judge to promote a particular law school should be permitted, while the rules proscribe the same behavior when it comes to another academic institution. The Commission characterizes a judge's promotion of her law school as "quasi-

judicial" under former Canon 4 as somehow offering a principled distinction between the two, but this argument falls short.

Second, judges routinely identify themselves as having engaged in a particular type of legal practice prior to becoming a judge. Indeed, it is almost typical for a judge to say that she was a "former prosecutor" or "corporate lawyer" before entering the judiciary. *See*, *e.g.*, Online Biography of Judge George B. Fearing, https://www.courts.wa.gov/appellate_trial_courts/bios/?fa=atc_bios.display&folderid=div3&fileID=Fearing (noting Judge Fearing "specialized in representing municipal corporations and law enforcement officers in civil litigation ... [and also] served his church in various capacities, including adult and child teacher and board member"); *see also* Justice Madsen Testimonial (discussed *supra*). Judge Keenan's statement that he entered the profession to be an "advocate for marginalized communities" is no different from saying that he was a public

defender, class action lawyer, or worked at a particular public interest organization prior to becoming a judge. Again, as with the Commission's stamp of approval on a judge's participation in the promotion of a law school (as opposed to another educational institution), the distinction sought to be drawn by the Commission does not hold up to scrutiny.

A separate, but related concern is the chilling effect that the Commission's decision would have on judges. *See, e.g., Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 855, 168 P.3d 826 (2007) (noting the chilling effect of the Public Disclosure Commission's then-existing procedures would have on political speech). This effect is likely to fall acutely on judges from diverse communities, who more often follow a "non-traditional" path to the bench. *See, e.g.,* Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 How. L. J. 645, 678-79 (2010) (discussing the non-traditional career path of Justice Quince of the Florida Supreme Court).

E. The Public Has an Interest in Being Informed Regarding Their Judiciary

A system where judges are elected presupposes a public interest in knowing about judicial candidates, their backgrounds, and their guiding principles. *See Am. Civil Liberties Union, Inc. v. The Fla. Bar*, 744 F. Supp. 1094, 1097-98 (N.D. Fla. 1990). Given that Washington has an elected judiciary, the public has a strong interest in being informed about the judiciary. The Commission's decision gives short shrift to the interests of the public to be informed regarding their judges, and at a more basic level, demystifying the judiciary.

While judicial decisions are the largest, and most visible, part of judges' work, their responsibilities also include, as the Code makes clear, acting as stewards over the improvement of the legal system and the administration of justice. *See* Rule 1.2 cmt. 6 (judges "should initiate and participate in" activities that "promote public understanding of and confidence in the

administration of justice"); Rule 1.2 cmt. 4 (judges "should participate" in activities that include activities that "promote access to justice for all").

Engagement with the community, which can include, as noted above, public statements attesting to the judge's commitment to improving the legal system, increasing access to justice, and countering systemic biases, is critical at a time when the public, and in particular, marginalized individuals and communities, lack confidence in the legal system. Indeed, a recent national survey regarding state courts reveals troubling levels of distrust of the legal system, with only 57 percent of respondents who believe that state courts "treat people with dignity and respect." *See* Nat'l Ctr. for State Courts, *State of the State Courts – Survey Analysis* (2020) at 1, 3, https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf at 1, 3 (noting that 2020 public opinion survey regarding state courts "reveals decreased confidence in all levels of the court system" including state

courts, with lower scores on, among other attributes, "equal justice"). The data is similar in Washington: 41 percent of respondents to the most recent civil legal needs survey believed that "they had little chance of protecting their legal rights or those of their families in the court system" and nearly 60 percent do not believe they are consistently treated fairly by the civil legal system. *See* Civil Legal Needs Study Update Committee, Washington State Civil Legal Needs Study Update (October 2015), https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf ("Civil Legal Needs Study") at 17. These figures are higher for people of color. *Id.*

The consequences of this lack of confidence in the legal system are significant, especially with respect to low-income people and people of color, for whom the justice system may be the "last stop" before they potentially lose their home, their parental rights, and benefits to fulfill their basic needs. Members of marginalized communities are more likely to report

experiencing civil legal needs; the Civil Legal Needs Study indicates that more than 70 percent of low-income households in Washington experience at least one civil legal problem each year on matters affecting the most fundamental aspects of their lives - health care, employment, housing, and consumer issues. *See* Civil Legal Needs Study at 5-6.

Lack of confidence in the legal system is not limited to civil proceedings. In criminal cases, where people face the potential loss of their freedom and, even after completing their sentence, the collateral consequences of a conviction record, the lack of trust in the legal system by Black people in particular is well-documented. What is less well-known is that individuals and communities' "negative past experiences with - and perceptions of - the criminal justice system significantly contribute to resistance to seeking out help from the civil justice system." Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263, 1266-67 (May 2016) (emphasis added).

If the Commission's broad restrictions on judicial speech are upheld, in the name of "tradition," the result is silence from the judiciary, which can be as harmful as explicitly racist (or sexist, or anti-immigrant, or homophobic or transphobic) statements.[2] In contrast, statements by judicial officers – like Judge Keenan's statement at issue here – that acknowledge, out loud, in public, the very real barriers and lack of trust that impact marginalized communities' encounters with the legal system, increase confidence and trust in that system by the

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[2] Several commentators have explained the damage done when white people and others with privilege are silent and do not directly confront racism. *See, e.g.*, "Jimmy Carter on George Floyd protests: 'Silence can be as deadly as violence,'" CNN.com (June 3, 2020), https://www.cnn.com/2020/06/03/politics/jimmy-carter-george-floyd/index.html (urging "[p]eople of power, privilege, and moral conscience" to "stand up and say 'no more' to a racially discriminatory police and justice system"); Linda Louden, "White Privilege and the Deadly Effect of Silence," HuffPost (updated May 11, 2016), https://www.huffpost.com/entry/white-privilege-and-the-deadly-effect-of-silence_b_7222776 (noting that "White silence and refusal to closely examine ourselves are two of the most insidious elements that foster the racism that persists in the fabric of our country").

people who most need its protections. This is especially the case for statements that underscore a judge's background and personal commitment as a lawyer to transform the legal system. The Commission's decision, which acts as a barrier to community awareness regarding a Superior Court judge's career path and non-traditional educational background, does nothing to strengthen public confidence in the legal system. It does the opposite.

V. CONCLUSION

For the reasons set forth above, the Court should reverse the Commission's decision and remand for dismissal of the charges against Judge Keenan.

I certify that this brief contains 4,871 words, in compliance with RAP 18.17(b).

RESPECTFULLY SUBMITTED this 24th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the date given below I caused the foregoing document entitled **Brief of *Amici Curiae* ACLU of Washington Foundation and The Brennan Center For Justice at NYU School of Law** to be filed, and served on the following individuals, via the Court's electronic filing system:

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DATED: September 24, 2021.

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Appellate Court Case Title:	In re the Matter of The Honorable David S. Keenan, Superior Court Judge for King County

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