No.____

In The
Supreme Court of the United States

RANDOLPH WOLFSON, *Petitioner,*
v.
COLLEEN CONCANNON, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

This Court in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002) ("*White I*") established that the First Amendment protects judicial campaign speech and subjects regulation of such speech to strict scrutiny. Arizona, like many other states, bans judicial speech based on its content, i.e., endorsing other candidates and assisting with their campaigns, even though this constitutes an announcement of views on a disputed legal and political issue protected in *White I.* The *en banc* Ninth Circuit decision followed this Court's decision in *Yulee v. Florida State Bar*, 135 S. Ct. 1656 (2015), a narrow decision which upheld a ban on personal solicitations from judicial candidates because it served a compelling state interest in preserving public confidence in the integrity of the judiciary.

(1) Whether the endorsement clause is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution or unconstitutional as applied to endorsements of candidates that will not appear in the court for which election is sought;

(2) Whether the campaigning prohibition is facially unconstitutional under the First and Fourteenth Amendments to the United States Constitution or unconstitutional as applied to campaigning in support of ballot measures.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

Randolph Wolfson, *Plaintiff-Appellant*;

Colleen Concannon, Louis Frank Dominguez, Peter J. Eckerstrom, George H. Foster, Gustavo Aragon, Jr., Roger Barton, S' Lee Hinshaw, David Stevens, J. Tyrell taber, Lawrence F. Wintrhop, Anna Mary Glaab, Maret Vessela, *Defendants-Appellees*.

Corporate Disclosure Statement

Petitioner is an individual and so has no parent corporation and is not a publicly held corporation. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioner Randolph Wolfson respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The *en banc* order of the court of appeals affirming the district court is at 811 F.3d 1176. App. 1a. The panel decision reversing the district court is at 750 F.3d 1145. App. 32a. The district court opinion is at 822 F. Supp. 2d 925. App. 79a.

Jurisdiction

The Ninth Circuit court of appeals en banc upheld the district court's decision on January 27, 2016. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I.

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Terminology is at 94a.

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Canon 1.2 is at 95a.

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Canon 4.1 is at 98a.

Statement of the Case

This case presents a constitutional challenge by Randolph Wolfson, a 2006 and 2008 Democratic judicial candidate who believes he will run again in a future judicial election. Mr. Wolfson challenges the constitutionality of the "endorsement clause" of Rule 4.1(A)(2) and (3) of the Arizona Code of Judicial

Conduct, which bans judicial candidates from publicly endorsing or opposing candidates for political office, other than the candidate's opponent. Mr. Wolfson also challenges the "campaigning prohibition" of Rule 4.1(A)(5), which ban judicial candidates from actively participating in another candidates campaign.

I. The Facts

Petitioner Randolph Wolfson, a Democratic judicial candidate for Mohave County Justice of the Peace in 2006 and 2008, brought suit in 2008 challenging on First Amendment grounds Arizona judicial campaign regulations that proscribe endorsing (Canon 5A(1)(b) [revised Rules 4.1(A)(2) and 4.1(A)(3)]), and campaigning for anything but his own campaign (Canon 5A(1)(d) [revised Rule 4.1(A)(5)]). (Complaint, Doc. 1.)[1,2] He wanted to endorse other candidates for office, including, in 2008, Democratic candidate John Thrasher for Congress, but the endorsement clause prohibits it. (Complaint, Doc. 1, ¶¶ 26, 32; Wolfson Decl., Doc. 22-1, ¶ 7.) And he wanted to support the campaigns of other candidates on his party's ticket, but the campaigning prohibition does not permit it. (Complaint, Doc. 1, ¶¶ 26, 27; Wolfson Decl., Doc. 22-1, ¶¶ 5, 6.)

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[1]All "Doc." references refer to the document number assigned to filings on the district court docket.

[2] Mr. Wolfson also challenged Arizona's personal solicitation clauses. (*See* Complaint, Doc. 1, ¶¶ 33-35, 150-64.) But because of this Court's decision in *Yulee v. Florida Bar,* 135 S. Ct. 1656 (2015), Mr. Wolfson believes his challenge to the personal solicitation clauses is foreclosed and so does not seek review here.

The endorsement clause of Rule 4.1 states that a judge or judicial candidate shall not "make speeches on behalf of a political organization or another candidate" or "publicly endorse or oppose another candidate for any public office." Ariz. Stat. Rev. S. Ct. Rule 81, Rule 4.1(A)(2) and (3). App. 98a. Rule 4.1's campaigning prohibition provides that judicial candidates cannot "actively take part in any political campaign" other than their own. Rule 4.1(A)(5). App. 98a. The endorsement clause and campaigning prohibition have been formally interpreted to prohibit judicial candidates from making endorsements by the Arizona Judicial Ethics Advisory Commission ("JEAC").[3] JEAC first interpreted the two provisions in Advisory Opinion 96-08, stating that:

> Judges may not participate in campaigns for or against political candidates, even those who take positions affecting the administration of justice. Canon 5A(1) of the Code of Judicial Conduct prohibits judges from publicly endorsing a candidate, making speeches for a political organization or candidate, or actively taking part in any political campaign other than their own election.

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[3] JEAC is a body empowered by the Arizona Supreme Court to render formal advisory opinions to judges and judicial candidates upon request, and to offer formal interpretations of the Canons. Advisory Opinions issued by JEAC are not binding on Respondents, but may be used as a defense in judicial and lawyer discipline proceedings. *See* Rule 19(h), Arizona Commission on Judicial Conduct Handbook. (Complaint, Doc. 1, Ex. 2.)

(Complaint, Doc. 1, Ex. 5.)

The campaigning prohibition was also interpreted by JEAC in Advisory Opinion 96-09. Advisory Opinion 96-09 involved the question "is it appropriate for a judge to appear in a television advertisement endorsing a ballot proposition the judge was involved in drafting?" After citing several provisions of the Canons, including the endorsement clause, JEAC concluded that this was prohibited, stating: "the code does not permit a judge to act as a spokesperson and advocate for others." (Complaint, Doc. 1, Ex. 6 at 2.)

Mr. Wolfson intends to run again for judicial office in the future. (Complaint, Doc. 1, ¶ 62.) He has no remedy at law. (Complaint, Doc. 1, at 70.)

II. The History of the Litigation.

On May 21, 2008, Mr. Wolfson filed his Complaint in the United States District Court for the District of Arizona. (Doc. 1.) In it, he alleged, as relevant here, that his constitutional rights to free speech and association were violated by Canon 5A(1)(b) and Canon 5A(1)(d) of the Arizona Code of Judicial Conduct.[4] Motions to dismiss were filed by Respondents on July 7, 2008. (Doc. 20, 21.) On January 15, 2009, the district court granted Respondents' motions to dismiss on mootness grounds. (Doc. 47.)

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[4] Mr. Wolfson also challenged Canon 5B(1)(d)(i)'s pledges and promises clause and Canon 3E(1)(e)'s commits clause, but these challenges became moot or were deemed unripe during litigation and so are no longer the subject of this litigation. *See Wolfson v. Brammer,* 616 F.3d 1045, 1053, 1062-63 (9th Cir. 2010).

Mr. Wolfson appealed on February 13, 2009. During the appeal, the Arizona Supreme Court amended the Judicial Code, recodifying the endorsement clause (revised to Rules 4.1(A)(2) and 4.1(A)(3)), and the campaigning prohibition (revised to Rule 4.1(A)(5)). (Doc. 58-1, at 5.) The Ninth Circuit reversed the district court as to the endorsement clause and campaign prohibition, finding that Mr. Wolfson's claims against them were not moot, that his challenge continued to be ripe, and that Mr. Wolfson retained standing. (Doc. 58-1.)

On remand, cross motions for summary judgment were filed. (Doc. 69, 71.) On September 29, 2011, the District Court granted Respondents' motion for summary judgment, finding that the judicial canons challenged were constitutional under the First Amendment. (Doc. 95, 96.) On October 31, 2011, Mr. Wolfson appealed. (Doc. 98.)

On May, 2014, the Ninth Circuit ruled that the endorsement clause and campaigning prohibition were unconstitutional under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). App. 32a. En banc review was sought and granted, App. 5a, and while banc review was pending, this Court decided *Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), which held that Florida's personal solicitation clause was constitutional under the First Amendment. App. 6a. The en banc Ninth Circuit authorized supplemental briefing to address *Yulee*'s impact on the case and on January 27, 2016, ruled that the endorsement clause and campaigning prohibition were constitutional under *Yulee*. App 2a. Mr. Wolfson was granted a 60-day

extension to file this petition for certiorari, which he now timely files.

Reasons for Granting the Petition

The decision below undermines the protection afforded to judicial candidates to announce their views on disputed legal and political issues established in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*White I*") by extending the application of *Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) beyond personal solicitations to ordinary, standard, and essential campaign speech by judicial candidates based on their content, even though the speech constitutes an announcement of views on a disputed legal and political issue protected in *White I*.

Not only does this threaten to eradicate core protections recognized in *White I*, it also creates conflicts both within the Ninth Circuit and with other circuits that have faithfully applied *White I*'s strict scrutiny analysis to strike similar, if not identical, restrictions of judicial candidate speech. This Court should grant a writ of certiorari and decide the merits of this case to restore full protection to judicial candidate speech and to ensure uniformity among the circuits.

I. This Case Involves The Important Question of Law of Whether *Yulee* Is Limited to Personal Solicitation Bans, And So Does Not Apply Here.

Political speech traditionally enjoys the greatest constitutional protection under the First Amendment of the United States Constitution, with restrictions on it subject to strict scrutiny. *See Buckley v. Valeo,* 424

U.S. 1, 15 (1976). The same holds true for judicial campaign speech.

In *White I*, this Court reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues, and applied strict scrutiny because the clause "prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774. As part of its strict scrutiny analysis, the *White I* Court recognized impartiality and the appearance of impartiality, defined as "bias for or against parties in a proceeding," *id.* at 776, as a compelling interest but found the announce clause insufficiently tailored to serve that interest. *Id.* at 776-77. In particular, the Court found the announce clause woefully underinclusive because judicial candidates could announce their views at any time before they announced their candidacy, making partiality concerns not credible, *id.* at 779-80. And it found the clause overinclusive because the clause was not directed at speech about parties but speech about issues, *id.* at 776-77.

Federal circuit courts have largely followed the legal analysis of *White I,* and those that properly applied strict scrutiny also applied its rationale faithfully. For example, on remand from *White I*, the Eighth Circuit reviewed numerous judicial campaign speech bans, including Minnesota's endorsement ban. It found the canons failed strict scrutiny because they did not prevent "bias for or against parties in a proceeding" and thus, served no impartiality interest.

Republican Party of Minnesota v. White, 416 F.3d 738, 754, 765-66 (8th Cir. 2005) ("*White II*"). *See also Carey v. Wolnitzek,* 614 F.3d 189, 201-02 (6th Cir. 2010) (striking down as unconstitutional Kentucky's partisan affiliation clause because it was both under- and overinclusive under *White I*). Likewise, the Ninth circuit in the panel decision below struck down Arizona's endorsement clause and campaigning prohibition, reasoning that under *White I*, they were similarly underinclusive and overinclusive. *Wolfson v. Concannon,* 750 F.3d 1145 (9th Cir. 2014). App. 55a-59a.

In 2015, this Court decided *Yulee*, upholding Florida's personal solicitation ban under strict scrutiny review. In doing so, it recognized another state interest: public confidence in the integrity of the judiciary. *Id.* at 1671. Stating that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition," *id.* at 1667, the Court nonetheless reasoned that "[s]imply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors." *Id.* at 1666.

Conducting strict scrutiny analysis, the Court determined that the personal solicitation clause was not underinclusive because "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Id.* at 1668. The solicitation clause was addressed squarely at the most offensive conduct. The Court concluded that the solicitation clause was not overinclusive because it left "judicial candidates free to discuss any issue with

any person at any time." *Id.* The Court reasoned that "[t]he impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." *Id.* at 1671. And the Court held that recusal "would disable many jurisdictions" and "exacerbate the very appearance problem the State is trying to solve." *Id.* at 1671-72. Litigants would be incentivized to contribute to necessitate recusal. *Id.* at 1672. So the Court upheld the solicitation clause.

In light of *Yulee*, the Ninth Circuit en banc below upheld Arizona's endorsement clause and campaigning prohibition. *Wolfson v. Concannon,* 811 F.3d 1176 (9th Cir. 2016). App. 1a-31a. Reading *Yulee* as a broad decision "which addressed not just a prohibition on personal requests for campaign contributions, but state restrictions on judicial candidate speech generally," App. 8a, the court adopted *Yulee*'s reasoning to conclude without evidence that the clauses are not underinclusive:

> When a judicial candidate actively engages in political campaigns, a judge's impartiality can be put into question, and the public can lose faith in the judiciary's ability to abide by the law and not make decisions along political lines.

App. 15a. *Compare with* App. 56a-57a (panel decision applying *White I* concluding that the clauses are underinclusive because judicial candidates could endorse and otherwise campaign until the day they announced their candidacy). It reasoned that *Yulee* foreclosed overinclusive arguments that the clauses precluded involvement with ballot measures and those

highly unlikely to appear before the judge because the restrictions "need not be 'perfectly tailored.'" App. 17a (quoting *Yulee*, 135 S. Ct. at 1671). *Compare with* App. 57a-58a (panel decision applying *White I* to conclude that the clauses are overinclusive because least restrictive recusal requirements were a sufficient remedy.) The court below rejected recusal as a least restrictive measure that "was flatly dismissed in *Williams-Yulee*" and that "could cause the same erosion of public confidence in the judiciary that Arizona's Endorsement Clauses and Campaign Prohibition are trying to prevent." App. 20a. *Compare with* App. 57a-58a (panel decision applying *White I* to conclude that the State had not borne its burden of demonstrating that recusal was an unworkable solution).

The Ninth Circuit treated *Yulee* as supplanting *White I* for judicial speech restriction analysis. The resulting decision in this case is not only is contrary to *Yulee* and *White I*, it poses a serious threat to judicial candidate speech if left unchecked.

A. *Yulee* Is Limited To Personal Solicitation Regulations and Bans.

Throughout the *Yulee* decision, the Court acknowledged the decision's narrow parameters. Establishing that strict scrutiny is the standard of review for the solicitation clause, the Court began by describing the State's burden to defend the clause as "a demanding task" and emphasized that "it is a rare case" in which such a burden is met. *Id.* at 1665-66 (citations omitted). In concluding that the State has met its burden, the Court stated that the case is "one of the rare cases in which a speech restriction

withstands strict scrutiny." *Id.* at 1666.

As it reviewed the solicitation clause, the Court's analysis shows that the interest it was recognizing was directly tied to obligation-creating speech. The Court recognized a compelling interest in judicial integrity because, "[i]n deciding a case, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors." *Id.* at 1667. The Court stated that "a judge's personal solicitation could result (even unknowingly) in 'a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Id.* at 1667 (quoting *Tumey v. Ohio,* 273 U.S. 510, 532 (1927)). And so "[a] State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money." *Yulee*, 135 S. Ct. at 1662.

The Court drew support for this interest—which it called "public confidence in the integrity of the judiciary"—from *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 889 (2009). In *Caperton*, the Court held that a judge can be constitutionally required to recuse in extreme circumstances where significant campaign spending creates a serious risk of actual bias. *Id.* at 884. The decision is itself "an exceptional case," *id.* at 884, that the Court had resisted applying in other contexts: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010).[5]

[5] James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of*

Nonetheless, the *Yulee* Court drew on *Caperton* to formulate a compelling interest to justify regulating contribution-related speech: personal solicitations.

Applying that interest, the *Yulee* Court proceeded to find that narrow tailoring requirements were met. The Court made clear it was not revisiting other types of constitutionally-protected speech deemed unregulable under *White I*, concluding its analysis with the recognition that its "limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns." *Id.* at 1673.

Judicial candidate speech that does not incur a judicial obligation—such as announcing one's views—cannot create "fear or favor" scenarios, and so such regulations implicate *White I*, with its impartiality analysis, rather than *Yulee*, with its judicial integrity analysis.

B. *Yulee* Must Be Limited to Personal Solicitation Regulations and Bans.

Failing to limit *Yulee* to its context results in decisions like the en banc Ninth Circuit decision issued below, which authorizes unconstitutional regulation of meaningful forms of announced views. The *Yulee* decision is vulnerable to this because its analysis is imprecise.

The *Yulee* decision establishes a compelling interest in "public confidence in the integrity of the judiciary," an interest the Court professes is "not easily reduce[d] to precise definition, nor does it lend itself to proof by

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Caperton v. Massey, 60 Syracuse L. Rev. 305, 310 (2010).

documentary record." *Yulee*, 135 S. Ct. at 1667. Such an amorphous, unprovable interest effectively eradicates the State's burden of demonstrating tailoring of any kind, a hallmark of strict scrutiny. *See White I,* 536 U.S. at 774-75. *Yulee*, 135 S. Ct. at 1678 (Scalia, J., dissenting) ("The State 'bears the risk of uncertainty,' so 'ambiguous proof will not suffice.' . . . Now . . . [t]he Court announces, on the basis of its 'intuition,' . . ."). This is contrary to *White I*, which spent considerable time and attention on defining the impartiality interest at issue and closely scrutinized the State's arguments to justify the announce clause. *See White I,* 536 U.S. at 775-79. *Yulee,* 135 S. Ct. at 1678 (Scalia, J., dissenting) ("In *White*, for example, the Court did not allow a State to invoke hazy concerns about judicial impartiality in justification of an ethics rule against judicial candidates' announcing their position on legal issues . . . . today's concept of judicial integrity turns out to be 'a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.'"). Where underinclusivity sealed the demise of the judicial candidate speech ban in *White I, id.* at 779-80, under *Yulee* it is not even a relevant inquiry so long as the law in question at least addresses the most direct threat to the State's interest. *Yulee*, 135 S. Ct. at 1669; *id.* at 1680 (Scalia, J., dissenting) ("The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way."). Where overinclusivity meant lack of tailoring and unconstitutionality in *White I,* 536 U.S. at 776, it is constitutionally acceptable under *Yulee*

where tailoring becomes "unworkable." *Yulee*, 135 S. Ct. at 1671.

The problematic implications of this dichotomy are underscored and exemplified in what occurred in the Ninth Circuit below. Applying *White I,* the initial panel determined that the endorsement clause and the campaigning prohibition were underinclusive, App. 56a-57a, that they were overinclusive, App. 58a-59a, and that recusal served as a less restrictive alternative. App. 57a-58a. Yet on en banc review, the court adopted *Yulee*'s judical integrity interest,[6] discarded the rationale of *White I,* and concluded that "*Yulee* controls our reasoning," App. 14a, "*Yulee* forecloses Wolfson's arguments," App. 17a, "Wolfson asks us to draw a similarly unworkable and unnecessary line," App. 17a, and "this unworkable alternative was flatly dismissed in *Williams-Yulee*," App. 20a.[7] *White I* has been rendered irrelevant.

Even though the *Yulee* Court repeatedly emphasized that the personal solicitation clause "leaves judicial candidates free to discuss any issue with any person at any time," *id.* at 1670—an effort to

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[6]Unlike Florida, Arizona's Rules define "integrity" not in relation to "fear and favor" but in relation to "probity, fairness, honesty, unprightness, and soundness of character." Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Terminology. App. 94a.

[7] Judge Berzon, who concurred in both the panel and en banc decisions, observed in her en banc concurrence that the endorsement clause and the campaigning prohibition represent a different type of speech that should not even satisfy *Yulee*'s analysis as they do not implicate the bias concerns addressed in both *White I* and *Yulee*. App. 21a.

reinforce *White I*'s continued value—the Ninth Circuit had no difficulty likewise parrot *Yulee* to conclude without analysis (since none is really needed) that its "conclusion is consistent with *White I.* Arizona's prohibitions do not prevent judicial candidates from announcing their views on disputed legal and political subjects," App. 18a—this despite the fact that these types of provisions are simply forms of announcing one's views. *See White II,* 416 F.3d at 754 ("a party label is nothing more than shorthand for the views a judicial candidate holds"); *Wersal v. Sexton,* 674 F.3d 1010, 1051 (8th Cir. 2012) (Beam, J., dissenting) ("Endorsing a well-known candidate is often a highly effective and efficient means of expressing one's own views on issues").

Yulee is the narrow exception to the rule established in *White I* for judicial speech regulations, applicable only in its specific context of contribution-related speech. Unless *Yulee* is properly confined to that context, a legal conflict between *White I* and *Yulee* exists that threatens to eviscerate protected judicial candidate speech by rendering *White I* irrelevant. *See Yulee*, 135 S. Ct. at 1682 (Kennedy, J., dissenting) (dissenting to "underscore the irony in the Court's having concluded that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue."); *see id.* at 1683 ("Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing its goal."); *id.* at 1685 (Alito, J., dissenting) ("If this rule can be characterized as narrowly tailored,

then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.").

II. The Decision Below Is In Conflict With The Other Circuit Decisions On The Same Important Matter.

The conflict between *White I* and *Yulee* exemplified in the court decisions below results in the Ninth Circuit en banc decision conflicting not only with other circuit decisions, but its own circuit decisions, as well.

A. The Endorsement Clause Is Unconstitutional.

Rules 4.1(A)(2) and (3) (collectively the "endorsement clause") provide that a judge or judicial candidate shall not "make speeches on behalf of a political organization or another candidate" or "publicly endorse or oppose another candidate for any public office." App. 98a. Mr. Wolfson, a Democratic judicial candidate, wants to be able to endorse other candidates. At the time this lawsuit was filed, that included U.S. Congressional candidate John Thrasher. (Statement of Facts, Doc. 70, ¶ 68.) Because his endorsement served as a "shorthand for the views a judicial candidate holds," *White II*, 416 F.3d at 754, the endorsement clause prohibits judicial candidates from announcing their views should be subject to review under *White I*.

However, applying *Yulee,* the en banc Ninth Circuit below concluded that "Arizona can properly restrict judges and judicial candidates from taking part in political activities that undermine the public's confidence that judge base rulings on law, and not on

?party[sic] affiliation." App. 14a. Specifically, the court concluded that the endorsement clause is not underinclusive because it is aimed at "preventing conduct that could erode the judiciary's credibility" and that "the public can lose faith in the judiciary's ability to abide by the law and not make decisions along political lines." App. 15a. It rejected overinclusiveness concerns surrounding the endorsement clause as foreclosed under *Yulee*. App. 17a. And it rejected recusal as a less restrictive remedy because it was "flatly dismissed by *Yulee*." App. 20a.

These rationales conflict not only with *White I, see supra* Part I.B, but also with the Eighth Circuit's decision in *White II*.

White II held that, because endorsements are simply a form of announcing one's views, restricting them is unconstitutional under *White I*. 416 F.3d at 754. The *White II* court stated that "'the underlying rationale for [banning the acceptance of endorsements and membership in a political party]—that *associating with a particular group* will destroy a judge's impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality," 416 F.3d at 754 (emphasis in original). A judge or candidate associating with another candidate by means of an endorsement is no more of a threat to judicial impartiality than is that judge or candidate associating with a political party or political interest group, or expressing himself on particular issues. The bare fact of associating with a party cannot credibly create bias or obligation concerns. *Id.* at 755.

Likewise, the Ninth Circuit in *Sanders County Republican Central Committee v. Bullock*, 698 F.3d 741 (9th Cir. 2012) struck down a ban on judicial candidates receiving endorsements from political parties. The *Sanders* court, following *White I* and *White II*, found that Montana's endorsement clause was underinclusive because while it banned endorsements from political parties, it permitted endorsements from equally, if not more engaged, political groups such as the NRA, NAACP, and the AFL-CIO. *Id.* at 747.

Indeed, it is hard to see how, if accepting endorsements cannot be constitutionally regulated, making endorsements can be. In the case of a judge or candidate who receives an endorsement, there is a risk, however slight, that the judge or candidate will be grateful to the endorsing party, as the endorsement has conferred a benefit on the candidate. (Wolfson Decl., Doc. 22-1, ¶ 13.) The same is not true, however, when a judge or candidate makes an endorsement and simply makes public a preference the candidate already has. Insofar as they obligate anyone, endorsements obligate the endorsee, not the endorser, with the endorsee, not the endorser, most likely to feel beholden. *Wersal,* 674 F.3d at 1049 (Beam, J., dissenting). The primary benefit to the endorser is a short hand way to announce her views on a disputed legal issue, (Wolfson Decl., Doc. 22-1, ¶ 8), including who ought to be elected to a particular office, but also announcing one's own positions, as even within political parties, there are political ranges or categories within which candidates fall. *See Wersal,* 674 F.3d at 1051 ("Endorsing a well-known candidate is often a highly effective and efficient means of expressing one's

own views on issues."); *id.* at 1057 (Colloton, J., dissenting) ("The endorsement clause . . . eliminates one useful way for a judicial candidate to associate with other candidates for office and to communicate to the voters his or her outlook on issues of the day."). Since candidates are free to accept such endorsements, they ought to be free to make such endorsements as well. And such endorsements could arise from political associations made well in advance of a candidate's decision to run or even in the course of putting together a campaign committee—none of which are regulated or prohibited.

The endorsement clause bans all endorsements regardless of the remoteness of that party ever appearing before that candidate as judge, while at the same time failing to restrict a host of other endorsements, such as third-party endorsements. This renders the endorsement clause simultaneously overinclusive and underinclusive. *See Siefert v. Alexander,* 608 F.3d 974, 987 (7th Cir. 2010) (upholding Wisconsin's endorsement clause under a lower standard of scrutiny but acknowledging that the fact that the clause allowed other types of endorsements was "underinclusiveness [that] could be fatal to the rule's constitutionality" under strict scrutiny). *See also Yulee,* 135 S. Ct. at 2681 (Scalia, J., dissenting) ("Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages.").

Mr. Wolfson has agreed to recuse himself should an endorsee ever appear before him. (Wolfson Decl., Doc. 22-1,¶ 11), Arizona has offered no evidence why such

recusal is unworkable or inadequate.[9] App. 57a. Because it is underinclusive, overinclusive, and not the least restrictive means of addressing Arizona's interest in impartiality, the endorsement clause is unconstitutional under *White I*. App. 58a. By applying *Yulee,* the decision below directly conflicts with the Eighth Circuit's *White II* ruling and the Ninth Circuit's *Sanders* ruling, warranting this Court's review.

B. The Campaigning Prohibition Is Unconstitutional.

Rule 4.1(5) (the "campaigning prohibition") provides that judicial candidates cannot "actively take part in any political campaign" other than their own. App. 98a. Mr. Wolfson wants to support the election campaigns of other candidates because he believes that "working with . . . other candidates running on his party's ticket is necessary for any candidate hoping to run a successful campaign." (Compl., Doc.1, ¶ 26.)

The Ninth Circuit's en banc decision, which treated the endorsement clause and campaigning prohibition collectively and analyzed them together, *see* App. 14a-20a, results in a conflict with *White II* as to the campaigning prohibition as well.

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[9]Even if a categorical ban on endorsements were constitutional, the Ninth Circuit also failed to consider Mr. Wolfson's as-applied claims. An endorsement of a Congressman by a Justice of the Peace cannot credibly create sufficient judicial integrity and impartiality concerns to warrant proscribing it. The likelihood of a Congressional candidate (present or former) appearing in Mr. Wolfson's court are extremely remote, and in the event either did appear, Mr. Wolfson has already indicated he would recuse. (Wolfson Decl., Doc. 22-1, ¶ 11.)

Like the endorsement clause, the campaigning prohibition prohibits associating with and speaking out in support of other candidates and thereby prohibits announcing views on issues. Just as judicial candidates have the constitutional right to be a member of a political party, *White II,* 416 F.3d at 755, judicial candidates have the constitutional right to express their views through speeches and other support of other candidates. A judge or candidate's associating with another candidate is no more of a threat to judicial impartiality than is that judge or candidate associating with a political party or political interest group, or than is expressing himself on particular issues. Since candidates are free, under *White II*, to associate themselves with other candidates and issues by joining a political party, they must be free to associate with individual candidates as well. *Id.* The campaigning prohibition fails to serve a compelling interest when properly analyzed under *White I.*

A judge's or judicial candidate's support of another candidate for political office does not necessarily mean that he will be biased in favor of that candidate. If that were true, judicial candidates should be required to disassociate with anyone and everyone that might appear before them. In those circumstances were there is such a bias, prohibiting expressing that support only masks a preference that a judge already has. Forcing the judge to remain silent about his preference does not make his preference go away. And any concerns about the appearance of bias are best dealt with through recusal. *White II*, 416 F.3d at 755. As the Eighth Circuit noted in *White II*, "recusal is the least restrictive means of accomplishing the state's interest

in impartiality articulated as a lack of bias for or against a party to the case." *Id.*

The campaigning prohibition is substantially overinclusive. Arizona has no general interest in preventing judges or candidates from associating themselves with like-minded individuals and groups. *White II*, 416 F.3d at 745. And even assuming that Arizona could constitutionally prohibit a judicial candidate from supporting other candidates, it has no interest in prohibiting involvement with and the support of ballot initiatives, which amount to the announcement of views on disputed legal and political issues. *Id.* App. 59a. Yet Arizona concluded that such involvement is prohibited, stating: "the code does not permit a judge to act as a spokesperson and advocate for others." (Complaint, Doc. 1, Ex. 6 at 2.) Lacking such an exception, the campaigning prohibition reaches a substantial amount of protected speech, and thus is facially overbroad.

Aside from being unconstitutional facially, the campaigning prohibition is unconstitutional as applied to Mr. Wolfson. Mr. Wolfson would like to advocate for and express his support on disputed legal and political issues presented through ballot measures. (Wolfson Decl., Doc. 22-1, ¶ 6.) As in *White I*, prohibiting such announcements does not serve a compelling interest in preserving impartiality, as it is directed solely at issues, not parties. *See White I,* 536 U.S. at 776. The campaigning prohibition is unconstitutional under *White I.*

Because the en banc Ninth Circuit decision below conflicts with other decisions in the Ninth Circuit as well as in the Eighth Circuit, this Court should grant

certiorari.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and reverse the decision below.

Respectfully submitted,

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Appendix

Appendix Table of Contents

[***Editing Note:*** *Page numbers from the reported opinion, 811 F.3d 1176, are indicated (*1179).*]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON, *Plaintiff-Appellant*, *v.* COLLEEN CONCANNON, ET AL., IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE ARIZONA COMMISSION ON JUDICIAL CONDUCT; MARET VESSELLA, CHIEF BAR COUNSEL OF THE STATE BAR OF ARIZONA, *Defendants-Appellees*. [a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]	No. 11-17634 D.C. No. Civil No. 3:08-cv-08064-FJM OPINION

Appeal from the United States District Court for the District of Arizona

Frederick J. Martone, District Judge[1]

[1]The Honorable Frederick J. Martone, United States

Argued: September 9, 2015

Decided: January 27, 2016

Attorneys and Law Firms

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District Judge for the District of Arizona.

Robert W. Ferguson, Attorney General, and Alan D. Copsey, Deputy Solicitor General, Olympia, Washington, for Amicus Curiae States of Washington, Hawai'i, and Oregon.

Before: SIDNEY R. THOMAS, Chief Judge, and DIARMUID F. O'SCANNLAIN, SUSAN P. GRABER, WILLIAM A. FLETCHER, RONALD M. GOULD, MARSHA S. BERZON, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, CONSUELO M. CALLAHAN, MORGAN CHRISTEN, and ANDREW D. HURWITZ, Circuit Judges.

Opinion by Judge GOULD; Concurrence by Judge BERZON.

OPINION

GOULD, Circuit Judge:

Plaintiff–Appellant Randolph Wolfson, an Arizona state judicial candidate in 2006 and 2008, challenges several provisions of the Arizona Code of Judicial Conduct regulating judicial campaigns. Specifically, Wolfson challenges: (1) the Personal Solicitation Clause, Rule 4.1(A)(6)[1]; (2) the Endorsement *1179

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[1]"A judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 . . . ." Ariz. Code of Judicial Conduct Rule 4.1(A)(6) (2014), http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf.

Clauses, Rule 4.1(A)(2), (3), (4)[2]; and (3) the Campaign Prohibition, Rule 4.1(A)(5)[3]. Together, the clauses do not allow Wolfson, while running for judicial office, to personally solicit funds for his own campaign or for a campaign for another candidate or political organization, to publicly endorse another candidate for public office, to make speeches on behalf of another candidate or political organization, or to actively take part in any political campaign.

On May 21, 2008, Wolfson filed a complaint against the Commissioners of the Arizona Commission on Judicial Conduct and Chief Bar Counsel Robert B. Van Wyck (collectively "the Commission") in the United States District Court for the District of Arizona, alleging that the campaign regulations violated his First Amendment rights of freedom of speech and freedom of association.[4]

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[2] "A judge or a judicial candidate shall not . . . (2) make speeches on behalf of a political organization or another candidate for public office; (3) publicly endorse or oppose another candidate for any public office; solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law . . . ." *Id.* at 4.1(A)(2), (3), (4).

[3]"A judge or a judicial candidate shall not . . . actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office." *Id.* at 4.1(A)(5).

[4]Wolfson's complaint also named as defendants Com-

The district court disagreed and granted the Commission's motion for summary judgment.[5] *Wolfson v. Brammer*, 822 F. Supp. 2d 925, 931–32 (D. Ariz. 2011). The district court held that strict scrutiny was inappropriate, and instead adopted the Seventh Circuit's approach of applying an intermediate level of scrutiny to assess judicial campaign regulations like Arizona's Rules. *Id.* at 929–30 (*citing Siefert v. Alexander*, 608 F.3d 974, 983–88 (7th Cir. 2010) and *Bauer v. Shepard*, 620 F.3d 704, 713 (7th Cir. 2010)). Applying this level of scrutiny, the district court upheld Arizona's Rules as striking an appropriate "constitutional balance" between judicial candidates' First Amendment rights and the state's compelling interests in protecting litigants' due process rights and in ensuring the impartiality of the judiciary. *See id.* at 931–32.

Wolfson timely appealed. After an original panel hearing, *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014), the case was ordered to be reheard en banc,

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missioners of Arizona Supreme Court Disciplinary Commission, but Wolfson has since voluntarily dismissed all claims against these defendants. *Wolfson v. Brammer*, 822 F. Supp. 2d 925, 926–27 (D. Ariz. 2011).

[5]The district court originally dismissed Wolfson's claims as moot because the election had passed and Wolfson was no longer a judicial candidate. *Wolfson v. Brammer*, No. CV–08–8064–PHX–FJM, 2009 WL 102951, at *3 (D. Ariz. Jan. 15, 2009). We disagreed, and reversed and remanded the case. *Wolfson v. Brammer*, 616 F.3d 1045, 1066–67 (9th Cir. 2010). We now review the decision made on remand.

Wolfson v. Concannon, 768 F.3d 999 (9th Cir. 2014). Following this decision but before we reheard the case, the Supreme Court decided *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

I

The First Amendment, applicable to the States through the Due Process Clause of the Fourteenth Amendment, says that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995). Wolfson's appeal requests that we address: (1) the district court's application of intermediate scrutiny to assess Arizona's restrictions on judicial candidate speech; and (2) the impact of *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015), on Arizona's Personal Solicitation Clause, Endorsement Clauses, and Campaign Prohibition.

II

We first address whether the district court was correct in adopting the Seventh Circuit's intermediate level of scrutiny to assess Arizona's judicial speech restrictions. We hold that, in light of *Williams–Yulee*, it was not.

The Supreme Court has repeatedly held that "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339–40, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (*quoting Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103

L. Ed. 2d 271 (1989)) (internal quotation marks omitted). This "requires us to err on the side of protecting political speech rather than suppressing it." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).

In *Williams–Yulee*, a plurality of the Supreme Court applied similar reasoning when addressing the level of scrutiny appropriate for assessing Florida's Code of Judicial Conduct Canon 7C(1), a prohibition on personal solicitation during judicial campaigns. *See* 135 S. Ct. at 1664–65 ("As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection."). Picking up where the Court left off in *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (*White I*) (assuming without deciding that strict scrutiny was appropriate for restrictions on judicial candidates' ability to announce their views on various legal issues), the *Williams–Yulee* plurality held that strict scrutiny was warranted. *Williams–Yulee*, 135 S. Ct. at 1665. "A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Id.*

We agree with the plurality and hold that strict scrutiny is appropriate here. Even before *Williams–Yulee*, other courts had come to similar conclusions. *See Carey v. Wolnitzek*, 614 F.3d 189, 199–200 (6th Cir. 2010); *Republican Party of Minn. v. White*, 416 F.3d 738, 748–49 (8th Cir. 2005) (en banc) (*White II*); *Weaver v. Bonner*, 309 F.3d 1312, 1315, 1322–23 (11th Cir. 2002). Additionally, our holding is

not limited to Arizona's Personal Solicitation Clause, which has no meaningful difference from Florida's Canon 7C(1).[6] We also *1181 hold that strict scrutiny is similarly appropriate for Arizona's Endorsement Clauses and for its Campaign Prohibition. A decision otherwise would be contrary to the Supreme Court's broad reasoning in *Williams–Yulee*, which addressed not just a prohibition on personal requests for campaign contributions, but state restrictions on judicial candidate speech generally. *See Williams–Yulee*, 135 S. Ct. at 1665. A decision otherwise also would put us in conflict with the approach taken by the Sixth, Eighth, and Eleventh Circuits.

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[6]Florida's Canon 7C(1) reads: "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." Code of Judicial Conduct for the State of Florida 38 (2014), http://www.floridasupremecourt.org/decisions/ethics/Code_Judicial_Conduct.pdf. Arizona's Personal Solicitation Clause similarly reads: "A judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . . ." Ariz.Code of Judicial Conduct Rule 4.1(A)(6) (2014), http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf.

III

Federal, state, and local governments have struggled to meet strict scrutiny when defending speech restrictions. *See, e.g., Reed v. Town of Gilbert,* ––*U.S.* ––––, 135 S. Ct. 2218, 2231–32, 192 L. Ed. 2d 236 (2015); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813–14, 816, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *OSU Student All. v. Ray*, 699 F.3d 1053, 1062–64 (9th Cir. 2012); *United States v. Alvarez*, 617 F.3d 1198, 1215–18 (9th Cir. 2010). To overcome such a high standard of review, the government is required to prove that "the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340, 130 S. Ct. 876 (*quoting Wis. Right to Life*, 551 U.S. at 464, 127 S. Ct. 2652). Following *Williams–Yulee*,[7] we hold that Arizona meets that standard for all of the challenged restrictions on judicial candidate speech.

A. The Personal Solicitation Clause

Wolfson contends that Arizona's Personal Solicitation Clause, which prohibits him, while running for judicial office, from personally soliciting funds for his own campaign, fails strict scrutiny. He argues that Arizona's interest is not narrowly tailored, and that Williams–Yulee does not control our decision because Florida and Arizona have different interests in upholding their respective personal solicitation

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[7]With the exception of the level of scrutiny addressed in Part II, above, Chief Justice Roberts' opinion in *Williams–Yulee* garnered a majority. *Williams–Yulee*, 135 S. Ct. at 1662.

prohibitions.

1. Compelling Interest

Wolfson does not contend that Arizona lacks a compelling interest behind this solicitation prohibition. Instead, he argues that Arizona's interest is significantly different than Florida's interest in Canon 7C(1), making the Court's strict scrutiny analysis in Williams–Yulee inapplicable to Arizona's Clause. Attempting to distinguish the two states' interests, Wolfson first points to Florida's Code of Judicial Conduct Canon 1 and its commentary: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor." Code of Judicial Conduct for the State of Florida 6 (2014), http://www.floridasupremecourt.org/decisions/ethics/Code_Judicial_Conduct.pdf. He compares this language to that of Arizona's Code of Judicial Conduct Rule 1.2 and Comment 5, which he contends demonstrate that Arizona's interest is protecting the public's perception of "the judge's honesty, impartiality, temperament, or fitness." Ariz.Code of Judicial Conduct Rule 1.2 (2014), cmt. n.5, http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf. An interest in judicial *1182 "honesty, impartiality, temperament, or fitness," Wolfson argues, is different than a concern for "fear or favors."

This is a distinction without a material difference. Even if we consider the language to which Wolfson points, the Supreme Court did not uphold Florida's prohibition because of an interest in curbing "fear or

favors." Instead, the Court was broad in its language and reasoning. "We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges,'" *Williams–Yulee*, 135 S. Ct. at 1666 (*quoting Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)), because the "judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Id.* Arizona's interest, outlined in Rule 1.2 and its comments, is similar, if not identical.

Moreover, the Supreme Court recognized that the "concept of public confidence in judicial integrity does not easily reduce to precise definition." *Id.* at 1667. Even if Arizona adopted slightly different language for its articulation of its interest,[8] Arizona is similarly interested in upholding the judiciary's credibility. There are no magic words required for a state to invoke an interest in preserving public confidence in the integrity of the state's sitting judges.

Arizona's interest behind its Personal Solicitation Clause is compelling.

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[8]Wolfson's articulation of Arizona's interest stresses selective words and ignores the plain language of Rule 1.2 which is nearly identical to the interests Florida stated in Canon 1. "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Ariz. Code of Judicial Conduct Rule 1.2 (2014), http://www.azcourts.gov/portals/137/rules/Arizona% 20Code% 20of% 20Judicial% 20Conduct.pdf.

2. Narrowly Tailored

Wolfson's arguments that Arizona's Personal Solicitation Clause is not narrowly tailored are precluded by *Williams–Yulee*. First, Wolfson contends that the Personal Solicitation Clause is overbroad because it covers solicitation methods, such as mass mailings and speeches to large groups, that would not result in a quid pro quo. However, the Supreme Court rejected the argument that the state may prohibit only solicitation methods that are the most likely to erode public confidence. *Williams–Yulee*, 135 S. Ct. at 1671. The Court held that the argument "misperceives the breadth of the compelling interest" and that, though that "interest may be implicated to varying degrees in particular contexts, . . . the interest remains whenever the public perceives the judge personally asking for money." *Id.*

Second, Wolfson argues that the Personal Solicitation Clause is not the least restrictive means to effectuate Arizona's interest because Arizona could have adopted contribution limitations or a mandatory recusal rule. Again, the Supreme Court did not consider this argument persuasive. *Id.* at 1671–72. Forced recusals would disable jurisdictions with a small number of judges, erode public confidence in the judiciary, and create an incentive for litigants to make contributions for the sole purpose of forcing the judge to later recuse himself or herself from the litigant's cases. *Id.* Contribution limits would be similarly ineffective. The improper appearance of a judicial candidate soliciting money would still remain and, even though the Court had previously held that contribution limitations advance the interest against

quid pro quo corruption, a state is not restricted to pursuing its interest by a single means. *Id.* at 1672.

*1183 We hold that Arizona's Personal Solicitation Clause is narrowly tailored to achieve the state's compelling interest. The state reasonably wants to uphold the public's perception of publicly elected judges as being fair-minded and unbiased, and may do so by prohibiting judicial candidates from making personal solicitations.

B. The Endorsement Clauses and the Campaign Prohibition

Wolfson also argues that Arizona's Endorsement Clauses and Campaign Prohibition are not narrowly tailored to Arizona's compelling interest in public confidence in the judiciary's integrity.[9] These Clauses prohibit him, while running for judicial office, from personally soliciting funds for a campaign for another candidate or political organization, publicly endorsing or making a speech on behalf of another candidate for public office, or actively taking part in any political campaign. Wolfson contends that the prohibitions are underinclusive, overbroad, and generally not tailored enough to the interest at hand. We disagree. Arizona can properly restrict judges and judicial candidates from taking part in political activities that undermine

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[9]Wolfson again does not contest that Arizona has a compelling interest in upholding the Endorsement Clauses and Campaign Prohibition. Arizona has a compelling interest in upholding the public confidence in the judiciary and furthers this interest through a ban on personal solicitation and curtailment of judicial candidates' ability to engage with the political branches of government.

the public's confidence that judges base rulings on law, and not on ?party [sic] affiliation.

1. Underinclusivity

Wolfson contends that Arizona's Endorsement Clauses and Campaign Prohibition are underinclusive because they allow judicial candidates to receive endorsements, allow judicial candidates to endorse public officials and non-candidates, and allow other candidates to participate in judicial campaigns. "[U]nderinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint,'" *Williams–Yulee*, 135 S. Ct. at 1668 (*quoting Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 131 S. Ct. 2729, 2740, 180 L. Ed. 2d 708 (2011)), and can "reveal that a law does not actually advance a compelling interest." *Id.* However, "[a] State need not address all aspects of a problem in one fell swoop" and can "focus on . . . [the] most pressing concerns." *Id.*

Once again, *Williams–Yulee* controls our reasoning. In assessing whether Florida's solicitation clause was underinclusive, the Court looked at whether Canon 7C(1) was "aim[ed] squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary," "applie[d] evenhandedly to all judges and judicial candidates, regardless of their viewpoint," and was "not riddled with exceptions." *Id.* at 1668–69. We do not believe that the analysis should be any different when assessing a prohibition of endorsements or participation in political campaigns. *Williams–Yulee* may have been about a prohibition on direct candidate solicitations of campaign contributions, but the Supreme Court's reasoning was broad enough to

encompass underinclusivity arguments aimed at other types of judicial candidate speech prohibitions such as Arizona's Endorsement Clauses and its Campaign Prohibition.

And both the Endorsement Clauses and Campaign Prohibition fit easily under the *Williams–Yulee* underinclusivity analysis. First, Arizona squarely aimed at preventing conduct that could erode the judiciary's *1184 credibility. When a judicial candidate actively engages in political campaigns, a judge's impartiality can be put into question, and the public can lose faith in the judiciary's ability to abide by the law and not make decisions along political lines. Arizona's Endorsement Clauses and Campaign Prohibition are aimed at these valid concerns. *See* Arizona Judicial Code of Conduct Rule 4.1, Comment 1 ("Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure."). Further, the Endorsement Clauses and Campaign Prohibition apply to both judges and judicial candidates and have few exceptions.[10]

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[10]Judges and judicial candidates may make limited contributions to another candidate or political organization under Rule 4.1(A)(4) and may engage in political activity that pertains to the legal system or attend dinners or similar functions that do not constitute a public endorsement of candidates under Rule 4.1(C).

We need not question whether Arizona could have, as Wolfson argues, prohibited more types of endorsements or campaign participation. "[P]olicymakers may focus on their most pressing concerns" and the fact that the state could "conceivably could have restricted even greater amounts of speech in service of their stated interests" is not a death blow under strict scrutiny. *Williams–Yulee*, 135 S. Ct. at 1668. Arizona's Endorsement Clauses and Campaign Prohibition are not underinclusive.

2. Overinclusivity

Wolfson next contends that the Endorsement Clauses and Campaign Prohibition are unconstitutionally overbroad because the Campaign Prohibition bans involvement with ballot measures, and the Endorsement Clauses forbid judges from endorsing anyone, even candidates like the President of the United States who are highly unlikely to appear before the judge.[11] A regulation "may be overturned as

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[11]We need not reach whether Arizona could constitutionally forbid judges from discussing ballot measures. Arizona interprets the Clauses to allow candidates to discuss any disputed issue, including those in issue-based initiatives, while cautioning that judicial candidates shall not "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office" and shall "act in a manner consistent with the impartiality, integrity and independence of the judiciary." Ariz. Sup. Ct. Judicial Ethics Advisory Op. 06–05 (2006); *see also* Ariz. Sup. Ct. Judicial Ethics Advisory Op. 0801 (2008).

impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n. 6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

Again, *Williams–Yulee* forecloses Wolfson's arguments. There, the petitioner contended that even though Florida could constitutionally prevent judges from soliciting one-on-one or in person with lawyers and litigants, Canon 7C(1) was overbroad because it included a prohibition of solicitation through mass mailings. *Williams–Yulee*, 135 S. Ct. at 1670–71. The petitioner argued that the latter would have less impact on the public confidence of the judiciary. *Id.* at 1671. But the Supreme Court was not convinced, reasoning that such distinctions became so fine as to be unworkable, and in large part, Florida's *1185 restriction still left judicial candidates "free to discuss any issue with any person at any time." *Id.* at 1670–71. Further, the Court held that though these speech restrictions must be narrowly tailored, they need not be "perfectly tailored." *Id.* at 1671 (*quoting Burson v. Freeman*, 504 U.S. 191, 209, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992)). "[M]ost problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form." *Id.*; *see also O'Toole v. O'Connor*, 802 F.3d 783, at 790–91 (6th Cir.2015).

Wolfson asks us to draw a similarly unworkable and unnecessary line. Although supporting a United States presidential candidate may have less of an effect on the public confidence than endorsing or

campaigning for an Arizona State senator or a local prosecutor, creating a rigid line is as unworkable as it is unhelpful. Judges engaging in political acts may present different levels of impropriety in different situations. It is not our proper role to second—guess Arizona's decisions in this regard. Much as the state drew a line between personal solicitation by candidates and by committees in order to preserve public confidence in the judiciary's integrity, *Williams–Yulee*, 135 S. Ct. at 1671, so too can the state decide that judicial candidates should not engage in legislative or executive campaigns. "These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges.'" *Id.* (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)).

Our conclusion is consistent with *White I*. Arizona's prohibitions do not prevent judicial candidates from announcing their views on disputed legal and political subjects. *See White I*, 536 U.S. at 788, 122 S. Ct. 2528. Instead, Arizona simply makes the distinction that a judicial candidate may do so only in relation to his or her own campaign. This follows the reasoning in *White I*, where the Supreme Court was concerned about restrictions on the ability to express legal views while campaigning, *see id.* at 770–74, 122 S. Ct. 2528, not on the ability to advance the political views and aspirations of another candidate. The latter is not the kind of speech the Court in *White I* sought to protect. *See Wersal v. Sexton*, 674 F.3d 1010, 1026 (8th Cir. 2012) ("[T]he endorsement clause does not regulate speech with regard to any underlying issues, and thus

the candidates are free to state their positions on these issues, in line with *White I*."); *Siefert*, 608 F.3d at 984 ("While an interest in the impartiality and perceived impartiality of the judiciary does not justify forbidding judges from identifying as members of political parties, a public endorsement is not the same type of campaign speech [as that] targeted by the impermissible rule against talking about legal issues the Supreme Court struck down in *White I*."); *Bauer*, 620 F.3d at 711–12 (holding that the reasoning employed in Siefert to uphold a prohibition against judicial candidate endorsements is equally applicable to a prohibition on partisan activities).

The compelling interest in preserving public confidence in the integrity of judiciary warrants a favorable view of Arizona's attempt to foreclose judicial candidates from engaging in political campaigns other than their own. The Endorsement Clauses and Campaign Prohibition are not fatally overbroad.

3. Least Restrictive Means

Finally, Wolfson contends that Arizona's Endorsement Clauses and Campaign *1186 Prohibition are not narrowly tailored because they do not offer the least restrictive means to further the state's interest. He argues that the Clauses do not prevent judges from favoring certain candidates that may appear in court, and even if they did, recusal would be the best way to handle such impartiality or appearance of impartiality. The government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109

S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

But recusal is no answer at all, and this unworkable alternative was flatly dismissed in *Williams–Yulee*. A rule requiring judges to recuse themselves from every case where they endorsed or campaigned for one of the parties could "disable many jurisdictions" and cripple the judiciary. *See Williams–Yulee*, 135 S. Ct. at 1671. Four of Arizona's counties have only one superior court judge and two other counties have only two superior court judges. Arizona Judicial Branch, Fiscal Year 2014 Annual Report 4, http://www.azcourts.gov/Portals/38/2014%20Annual%20Report.pdf. Campaigning for frequent litigants would cause an insurmountable burden that other judges and other counties may not be able to bear. Moreover, an extensive recusal record could cause the same erosion of public confidence in the judiciary that Arizona's Endorsement Clauses and Campaign Prohibition are trying to prevent.

We hold that the Endorsement Clauses and Campaign Prohibition are narrowly tailored to achieve Arizona's compelling interest.

IV

Even though the district court erred when it bypassed strict scrutiny in favor of the intermediate level of scrutiny used by the Seventh Circuit, it arrived at the correct result. The Personal Solicitation Clause, Endorsement Clauses, and Campaign Prohibition all withstand First Amendment analysis under strict scrutiny. Arizona has a compelling interest in upholding public confidence in the judiciary. And in light of *Williams–Yulee*, we hold that Arizona's Rules are narrowly tailored to its compelling interest. The

judgment of the district court is therefore

AFFIRMED.

BERZON, Circuit Judge, concurring:

Given *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015), I am in general agreement with Judge Gould's opinion for the en banc court ("main opinion"). There are two points, however, as to which the main opinion is terse, at best, and which therefore, in my view, deserve further exploration.

First, I concurred in the panel opinion to highlight my concern about articulating the governmental interests at stake in regulating judicial elections, and write separately here, too, to reiterate the same concern. *Wolfson v. Concannon*, 750 F.3d 1145, 1160 (9th Cir. 2014) (Berzon, J., concurring). The main opinion supports all three of Arizona's challenged restrictions on judicial candidates' behavior during judicial election campaigns on the basis of the same governmental interest—judicial impartiality. *See, e.g.*, Maj. Op. at 1183–84. But three different species of speech regulation of judicial candidates are here at issue, not one. And while one of the regulations—the ban on personal solicitation—is closely related to the restriction considered in *Williams–Yulee*, two—the bans on endorsements and campaigning for nonjudicial candidates and causes—are quite different. As to the latter two bans, I am not at all sure that the governmental interest in preventing biased judicial decisionmaking *1187 survives the compelling interest/narrowly tailored standard we are required to apply. I am convinced, however, that there is a societal

interest underlying those two restrictions—maintaining an independent judiciary—that more accurately captures the reasons to limit judicial candidates' endorsements and campaigning activity, and that does meet the compelling interest/narrow tailoring requirements.

Additionally, the main opinion does not distinguish between sitting judges who run for judicial office and judicial candidates who are not yet, and may never be, judges. This distinction turns out not to be dispositive of this case, but it is worth explaining why that is so.

1. As the main opinion and the Supreme Court recognize, "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition." *Williams–Yulee v. Florida Bar*, —— U.S. ——, 135 S. Ct. 1656, 1667, 191 L. Ed. 2d 570 (2015). In my view, this case requires us to disentangle two distinct facets of this compelling interest.

First, society has an interest in judicial impartiality that is "both weighty and narrow." *Wolfson*, 750 F.3d at 1163 (Berzon, J., concurring). This fundamental interest is enshrined in the Due Process Clause's prohibition on a judge trying a case in which she "has an interest in the outcome." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 880, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

It is this impartiality concern that underlay the solicitation restriction in *Williams–Yulee* and also undergirds Arizona's ban on judges' personal solicitation of funds. "[M]ost donors are lawyers and litigants who may appear before the judge they are supporting," *Williams–Yulee*, 135 S. Ct. at 1667, and "personal solicitation by a judicial candidate 'inevitably

places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate,'" *id.* at 1668 (*quoting Simes v. Ark. Judicial Discipline and Disability Com'n*, 368 Ark. 577, 585, 247 S.W.3d 876 (2007)). This impartiality interest is important; its reach is also fairly limited. Impartiality's "root meaning" refers to the lack of "bias for or against either party to the proceeding." *Republican Party of Minn. v. White*, 536 U.S. 765, 775, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (emphasis in original). Restrictions that can be justified by society's interest in impartiality are those that aim at protecting the due process rights of litigants appearing before a judge in court.

There is, however, a separate, broader governmental basis for regulating judicial behavior that goes beyond a concern with biased decisionmaking in individual cases. That interest is society's concern with maintaining both the appearance and the reality of a structurally independent judiciary, engaged in a decisionmaking process informed by legal, not political or broad, nonlegal policy considerations. As I explained in my concurrence to the panel opinion,

> Maintaining public trust in the judiciary as an institution driven by legal principles rather than political concerns is a structural imperative. The rule of law depends upon it.
>
> The fundamental importance of this structural imperative has been recognized from the founding of the nation. As Alexander Hamilton emphasized in The Federalist No. 78, the courts possess "neither FORCE nor WILL, but merely judgment. . . ." *Id.* at 433 (Clinton

Rossiter ed., 1961). Deprived of those alternative sources of power, the authority of the judiciary instead "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the . . . *1188 law means and to declare what it demands." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); see also White, 536 U.S. at 793, 122 S. Ct. 2528 (Kennedy, J., concurring) ("The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments."). It is the courts' perceived legitimacy as institutions grounded in established legal principles, not partisanship, "that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer*, 620 F.3d at 712. Loss of judicial legitimacy thus corrodes the rule of law, "sap[ping] the foundations of public and private confidence, and . . . introduc[ing] in its stead universal distrust and distress." The Federalist No. 78, at 438. In this sense, "[t]he rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *NY State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008) (Kennedy, J., concurring).

This nation's political history demonstrates the disastrous effects of the perceived politicization of the courts. Charges that King George "ha[d]

> obstructed the Administration of Justice" and "ha[d] made judges dependent on his Will alone . . . ." were among the founding generation's justifications for the 1776 revolution. The Declaration of Independence para. 11 (U.S. 1776). Similar concerns apply outside the context of a monarchy: Where the judiciary is drawn into the political intrigues of its coordinate branches, the public might well "fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity." The Federalist No. 81, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And where the politicization of the judiciary brings it into alliance with the politicians who staff the other two branches of government, the public may no longer consider "the courts of justice . . . as the bulwark of a limited Constitution against legislative encroachments," The Federalist No. 78, at 437, or executive excesses. In short, when sitting judges support the campaigns of nonjudicial candidates—via endorsements, speeches, money, or other means—the public may begin to see them not as neutral arbiters of a limited system of governance, but as participants in the larger game of politics.

Wolfson, 750 F.3d at 1164–65 (Berzon, J. concurring) (footnotes omitted).

In short, a deep-seated interest in the structural independence of the judiciary has been recognized as indispensable to our constitutional order since the

founding era. *See id.* at 1164. An independent judge "must above all things put aside his estimate of political and legislative values" when interpreting the law. Benjamin Cardozo, The Nature of the Judicial Process, 90 (1921) (internal quotation mark omitted) (*quoting* Lorenz Brütt, Die Kunst der Rechtsanwendung, 57 (1907)).

When judges swap endorsements with legislative or executive candidates, or make speeches during nonjudicial political campaigns, their political and legislative values are brought to the fore, threatening the public's perception of their independence. To quote again from my panel concurrence:

> The defendants here express precisely this concern—that if sitting judges may support the campaigns of others, the public will perceive them as masters of the political game, powerbrokers "trading on the prestige of their office to *1189 advance other political ends . . . ." *Siefert*, 608 F.3d at 984; *see also* Model Code of Judicial Conduct R. 4.1, cmt.4 (2011) (justifying prohibitions on endorsements and speeches on behalf of other candidates as "prevent[ing sitting judges] from abusing the prestige of judicial office to advance the interests of others"). The opposite fear is equally justified: Today's powerbroker is tomorrow's pawn, as the political winds shift and the next election cycle approaches. The endorsing judge entwines his fate with whomever he endorses and earns the enmity of his favored politician's opponents. "This kind of personal affiliation between a member of the judiciary and a member of the political

> branches raises the specter—readily perceived by the general public—that the judge's future rulings will be influenced by this political dependency." *Wersal v. Sexton*, 674 F.3d 1010, 1034 (8th Cir. 2012) (Loken, J., concurring in the judgment) (emphasis in original).

Wolfson, 750 F.3d at 1165 (Berzon, J., concurring).

I read neither *Williams–Yulee* nor the main opinion to say anything to the contrary. Both impartiality and independence are implicit, for instance, in the majority's reference to "the judiciary's ability to abide by the law and not make decisions along political lines." Maj. Op. at 1184. But because First Amendment doctrine focuses on the breadth and nature of the interests at stake, it is important to be clear that the interests raised by this case are not limited to the due process concerns signaled by the term judicial impartiality.

This dual focus is particularly critical where, as in this case, the two interests affect aspects of the regulations at issue differently. The main opinion takes *Williams–Yulee*'s reasoning regarding the personal solicitation of funds and applies it to uphold a ban on judicial candidates endorsing or campaigning for nonjudicial political candidates and organizations. But the concerns raised by these distinct activities only partially overlap. An in-person solicitation creates a unique risk of a quid pro quo arrangement, or at least the appearance of one, between a judicial candidate and a donor. *See Wersal v. Sexton*, 674 F.3d 1010, 1029 (8th Cir. 2012) (en banc). The risk of such an arrangement is more attenuated, though, when it comes to endorsements and campaigning for

nonjudicial candidates and issues. Candidates can, of course, exchange endorsements in a mutually beneficial arrangement. But there may be many scenarios where "[a] judicial candidate's endorsement of an executive or legislative candidate . . . benefits the endorsee more than the endorser." *Id.* at 1049 (Beam, J., dissenting). The same can be true when a judicial candidate lends their time or credibility to a nonjudicial issue campaign.

Reframing the governmental interest underlying restrictions on judicial candidates' role in campaigns or political organizations other than their own also brings better into focus the requisite "less-restrictive means" analysis. Personal recusal is an ineffective alternative to the solicitation bar because, as *Williams–Yulee* and the majority point out, it would be problematic to have many recusals in smaller jurisdictions, and individuals would have a "perverse incentive" to donate to judges in the hopes of forcing the judge to recuse if elected. *Williams–Yulee*, 135 S. Ct. at 1671–72; Maj. Op. at 1182. In contrast, recusals might be a better alternative to the endorsement and campaign bars, if the only concern were avoiding conflicts of interest. The number of nonjudicial endorsements or campaign speeches a candidate makes is likely to be far lower than the number of individuals donating to his or her campaign. And the concern of hostile donations as "a form of peremptory strike against a judge," *1190 *Williams–Yulee*, 135 S. Ct. at 1672, disappears where the judicial candidate is the one choosing whom to endorse.

It is not clear to me, then, that the compelling interest of judicial impartiality, or the reasons for

concluding that the restrictions are sufficiently narrowly focused, translate well from the solicitation realm to the practice of campaigning for or endorsing other candidates or issues. But these restrictions surely do advance the vital interest in structural judicial independence. The campaign and endorsement restrictions respond to a structural need—they restrict judges from engaging in nonjudicial campaigns, to prevent them from being entangled in the legislative and executive political process. Judges must have the confidence to stand firm against nonjudicial elected officials. That confidence could give way—or appear to give way—if judges behave just like those elected officials, by engaging in the usual, often contentious and fiercely partisan, political processes.

2. I also write to note another distinction that both the main opinion and *Williams–Yulee* elide. Both opinions lump together sitting judges running for re-election and nonjudge candidates aspiring to the office. *See, e.g., Williams–Yulee*, 135 S. Ct. at 1668; Maj. Op. at 1183. The main opinion does so not only with respect to the restriction directly pertinent to the judicial election, the solicitation restriction, but with respect to the two other restrictions as well.

It is worth considering whether that uniform treatment is justified. On reflection, it seems to me that competing considerations pull in various directions with regard to the application to sitting judges and judicial candidates of the nonjudicial endorsement and campaigning restrictions. In the end, I agree with the main opinion's conclusion that all three regulations at issue are valid with respect to both groups.

First, sitting judges are already public employees. The Supreme Court has held in the *Pickering* line of cases that public employee speech may be subject to greater restrictions than the First Amendment would otherwise allow. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). The Seventh Circuit, for instance, has applied *Pickering* to adopt a balancing test when evaluating restrictions on sitting judges' speech. *See Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). But *Pickering* does not appear to apply to the speech of candidates for judicial office who are not yet public employees.

Second, the structural judicial independence interest that to me is central to upholding two of the three judicial campaign restrictions here applicable comes into full force only when the individual elected actually ascends the bench. Before that, the concern is somewhat contingent—the candidate may become a judge. Still, that contingency may be sufficient reason for treating a judicial candidate who is not a sitting judge according to the rules of judicial ethics. The structural independence concerns are largely aspirational, and the public perception of the judicial role may be most at the forefront during judicial elections. So drawing the line on nonjudicial political participation at the point of declaration of judicial candidacy may help to forward both the reality and the appearance of a politically independent judiciary.

Moreover, if sitting judges were subject to greater restrictions on political activity than nonjudge candidates, two individuals may end up running for

the same judicial office on somewhat uneven footing. The Supreme Court has "repeatedly rejected the argument that the government has a *1191 compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech." *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 2825, 180 L. Ed. 2d 664 (2011). But those cases have concerned attempts at government intervention designed to adjust for nongovernmental disparities. Here, stricter restrictions during judicial campaigns on nonjudicial endorsement and campaigning for sitting judges than for nonincumbent candidates for judicial positions would create the disparity, not level it. Such political participation gives judicial candidates more opportunity for exposure to the electorate, and more chance to connect with voters on nonjudicial matters they care about. The inequity of allowing some candidates for judicial office but not others those opportunities, when added to the aspirational and appearance concerns just discussed, seem sufficiently compelling to justify parallel restrictions for sitting judges and nonjudges, when both are running for the same judicial office.

In sum, I concur in the main opinion, in light of the further conclusions I reach in this concurrence.

[***Editing Note:*** *Page numbers from the reported opinion, 750 F.3d 1145, are indicated (*1148).*]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON, *Plaintiff-Appellant*, *v.* COLLEEN CONCANNON, ET AL., *Defendants-Appellees*. [a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]	No. 11-17634

Argued: July 11, 2013

Decided: May 9, 2014

Attorneys and Law Firms

*1148 Anita Y. Woudenberg (argued), The Bopp Law Firm, Terre Haute, IN, for Plaintiff–Appellant.

Charles A. Grube (argued), Assistant Attorney General, Arizona Attorney General's Office, Phoenix, AZ, for Defendants–Appellees Colleen Concannon, Louis Frank Dominguez, Peter J. Eckerstrom, George H. Foster, Sherry L. Geisler, Michael O. Miller, Angela H. Sifuentes, Catherine M. Stewart, Tyrell Taber, and Lawrence F. Winthrop in their official capacities as members of the Arizona Commission on Judicial

Conduct; Kimberly A. Demarchi (argued), Lewis Roca Rothgerber LLP, Phoenix, AR, for Defendant–Appellee Maret Vessella, Chief Bar Counsel of the State Bar of Arizona.

Appeal from the United States District Court for the District of Arizona, Frederick J. Martone, District Judge, Presiding. D.C. No. 3:08–cv–08064–FJM.

Before: RICHARD A. PAEZ, MARSHA S. BERZON, and RICHARD C. TALLMAN, Circuit Judges.

OPINION

PAEZ, Circuit Judge.

A state sets itself on a collision course with the First Amendment when it chooses to popularly elect its judges but restricts a candidate's campaign speech. The conflict arises from the fundamental tension between the ideal of apolitical judicial independence and the critical nature of unfettered speech in the electoral political process. Here we must decide whether several provisions in the Arizona Code of Judicial Conduct restricting judicial candidate speech run afoul of First Amendment protections. Because we are concerned with content-based restrictions on electioneering-related speech, those protections are at their apex. Arizona, like every other state, has a compelling interest in the reality and appearance of an impartial judiciary, but speech restrictions must be narrowly tailored to serve that interest. We hold that several provisions of the Arizona Code of Judicial Conduct unconstitutionally restrict the speech of non judge candidates because the restrictions are not sufficiently narrowly tailored to survive strict scrutiny.

Accordingly, we reverse the district court's grant of summary judgment in favor of Defendants.

I.

Arizona counties with fewer than 250,000 people popularly elect local judicial officers. *See* Ariz. Const. art. VI, §§ 12, 40.[1] The Arizona Code of Judicial Conduct[2] (the "Code") regulates the conduct of judges campaigning for retention and judicial candidates campaigning for office. The Code provides for discipline if a candidate is elected as a judge, but lawyers who are unsuccessful in their candidacy may also be subject to discipline under the Arizona Rules of Professional Conduct.[3] *See* Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 8.2 (2003).

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[1]Arizona Supreme Court and appellate court judges and judicial officers in counties with a population greater than 250,000 (and smaller counties that vote to do so) use a system of merit selection with retention elections. Ariz. Const. art. VI, §§ 37, 38, 40.

[2]Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009). After Wolfson filed his complaint, the Code was revised, effective September 1, 2009. The revision to the Code recodified and renumbered the Rules, but did not alter the substance of the challenged Rules at issue in this appeal. *See Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010) (*Wolfson I*).

[3]"An unsuccessful judicial candidate who is a lawyer and violates this code may be subject to discipline under applicable court rules governing lawyers." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Canon 4, cmt. 2 (2009).

Plaintiff Randolph Wolfson was an unsuccessful candidate for judicial office in Mohave County, Arizona in 2006 and 2008. *Wolfson I*, 616 F.3d at 1052–53. He intends to run in a future election. *Id.* at 1054–55. As a candidate, Wolfson wished to conduct a number of activities he believed to be prohibited by the Code, but refrained from doing so, fearing professional discipline.[4] He brought this action challenging the facial and as-applied constitutionality of certain provisions of the Code, seeking declaratory and injunctive relief. Defending this appeal are the members of the Arizona Commission on Judicial Conduct (the "Commission") and Arizona Chief Bar Counsel ("State Bar *1150 Counsel"), collectively the "Arizona defendants."[5]

Wolfson challenges five clauses of Rule 4.1 of the Code (the "Rules"):

> (A) A judge or judicial candidate shall not do any of the following:
>
> . . . .

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[4]"Wolfson alleges that he wanted personally to solicit campaign contributions at live appearances and speaking engagements, and by making phone calls and signing his name to letters seeking donations. *Wolfson I*, 616 F.3d at 1052. He also alleges that he wanted to endorse other candidates for office and support their election campaigns. *Id.*

[5]Wolfson voluntarily dismissed all claims against a third defendant, the Arizona Supreme Court Disciplinary Commission. *Wolfson v. Brammer*, 822 F. Supp. 2d 925, 926–27 (D. Ariz. 2011) (*Wolfson II*).

> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law . . . .
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 . . . .[6]

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009).

This is the second time that this case is before us. We previously held in *Wolfson I* that Wolfson's challenges to these clauses (hereinafter the "solicitation" clause (6) and "political activities" clauses, (2)-(5)) were justiciable and remanded them to the district court to consider them on the merits. *Wolfson I*, 616 F.3d at 1054–62, 1066–67. With respect to his challenge to a now-defunct "pledges and

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[6]Arizona's Code closely tracks the American Bar Association's Model Code of Judicial Conduct, Rule 4.1 (2011).

promises" clause, we held that Wolfson lacked standing to challenge it insofar as it applied to the speech of judges. *Id.* at 1064. "Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group." *Id.*

On remand, ruling on cross-motions for summary judgment, the district court applied a balancing test articulated by the Seventh Circuit in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), and *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), and upheld the constitutionality of the five challenged Code provisions. *Wolfson II*, 822 F. Supp. 2d at 929–30. The balancing test from *Siefert/Bauer* "derives from the line of Supreme Court cases upholding the limited power of governments to restrict their employees' political speech in order to promote the efficiency and integrity of government services." *Id.* at 929. The district court held that this standard "strikes an appropriate balance between the weaker First Amendment rights at stake and the stronger State interests in regulating the way it chooses its judges," apparently because the speech at issue was not "core speech" deserving of strict scrutiny but "behavior short of true speech." *Id.* at 929–30.

The district court proceeded to balance the interests of the state against the interests of a judicial candidate. With respect to the political activities restrictions (the campaigning and endorsement clauses), the district court held that "[e]ndorsements, making speeches, and soliciting funds on behalf of other candidates is not . . . core political speech." *Id.* at 931. The district court distinguished between announcing one's own political views or qualifications—speech protected by *1151 *Republican*

Party of Minn. v. White, 536 U.S. 765, 788, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (*White I*)—and the type of speech prohibited by the Rules, which only "advance[s] other candidates' political aspirations, or . . . garner[s] votes by way of political coattails." *Wolfson II*, 822 F. Supp. 2d at 931–32. Moreover, although the district court recognized that its review was "limited to the constitutionality of the Rules as applied to judicial candidates who are not also sitting judges," *id.* at 928, it nonetheless

> reject[ed] the suggestion that judicial candidates ought to enjoy greater freedom to engage in partisan politics than sitting judges. An asymmetrical electoral process for judges is unworkable. Fundamental fairness requires a level playing field among judicial contenders. Candidates for judicial office must abide by the same rules imposed on the judges they hope to become.

Id. at 932. The district court assumed the constitutional validity of the Rules restricting political activities as applied to sitting judges, holding that "the Pickering line of cases [upholding the government's power to restrict employees' political speech to promote efficiency and integrity of government services] remains relevant to restrictions on the speech of sitting judges." *Id.* The court concluded that Rules 4.1(A)(2)-(5) appropriately balanced the state's interest in "protecting the due process rights of litigants and ensuring the real and perceived impartiality of the judiciary" against a candidate's interest in "participating in the political campaigns of other candidates" and upheld the political activities clauses

as constitutional. *Id.*

As for the solicitation clause (Rule 4.1(A)(6)) prohibiting a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee," the district court held that it was constitutional as applied to non judge candidates because it struck "a constitutional balance" between the state's interest in the appearance and actuality of an impartial judiciary and a candidate's need for funds. *Id.* at 931. The district court found that all forms of personal solicitation, whether in-person or via signed mass mailings, created "the same risk of coercion and bias." *Id.* Wolfson timely appealed.

II.

A.

We review de novo an order granting summary judgment on the constitutionality of a statute. *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997).

B.

Wolfson seeks to invalidate the challenged Rules on their face, including as to sitting judges campaigning for retention or reelection. In *Wolfson I*, however, we held that "Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group." 616 F.3d at 1064. Nonetheless, although we reject the Arizona defendants' argument, which the district court adopted, that the balancing test applicable to government employee speech cases also applies to sitting judges and thus fairly extends to non judge candidates campaigning for office, we must establish the scope of

our review of the challenged Rules.

We decline to adopt the district court's approach because such reasoning requires a series of unnecessary constitutional decisions.[7] Rather, our analysis of *1152 the challenged Rules is based on Wolfson's status as a non judge candidate. While the Rules apply to judges whether or not a judge is actively campaigning for retention or reelection, they only apply to non judge candidates during an election campaign for judicial office.[8] There is a meaningful

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[7]We find no Supreme Court authority extending the limited First Amendment protection for public employee speech to judicial candidate speech, and we decline to answer the hypothetical question of whether sitting judges are sufficiently similar to rank-and-file government employees to warrant such application. *See, e.g., White I*, 536 U.S at 796, 122 S. Ct. 2528 (Kennedy, J., concurring). We also find no Supreme Court authority extending the limited First Amendment protection for employee speech to a private citizen who is not currently a government employee but merely seeks to become one. *Id.* ("Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner."). Nor do we take a position on a question explicitly unresolved by the Supreme Court in *White I*: whether the First Amendment "requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783, 122 S. Ct. 2528 (majority opinion).

[8]"When a person becomes a judicial candidate, this canon becomes applicable to his or her conduct." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud.

distinction in how the Rules actually apply to judges versus non judge candidates that may warrant distinct levels of scrutiny. Regulated non judge speech only takes place during a campaign. As noted above, political speech is subject to the highest degree of First Amendment protection. Because Wolfson's desired speech would only take place in the context of a political campaign for judicial office, we do not decide whether the restrictions as applied to judges—whether campaigning or not—fit into the "narrow class of speech restrictions" that may be constitutionally permissible if "based on an interest in allowing governmental entities to perform their functions." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

We are not persuaded that "fundamental fairness," *see Wolfson II*, 822 F. Supp. 2d at 929, warrants making an advisory decision about the constitutional speech rights of judges who are not presently before us and whose rights Wolfson cannot assert, *Wolfson I*, 616 F.3d at 1064. Under strict scrutiny, see Part III.A, the proponents of a speech regulation must establish a compelling state interest served by the regulation. Neither the Commission nor the State Bar Counsel has argued that Arizona has a compelling state interest in applying the same election regulations to incumbent sitting judges as to candidates who are not sitting judges—only that such an equal application is principled, logical, and fair.

Our decision to limit our review to non judge candidates is ultimately based on judicial restraint. We

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Conduct, Canon 4, cmt. 2 (2009).

need not decide today what restrictions on judges' speech are constitutionally justified by the interest in allowing the judiciary to function optimally, nor are we squarely presented with that question. We neither "'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (*quoting Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)). The only constitutional question we address is whether the challenged Rules violate the First Amendment rights of non judge candidates.

III.

A.

Strict scrutiny applies to this First Amendment challenge. The regulations in question are content- and speaker-based *1153 restrictions on political speech, which receives the most stringent First Amendment protection. *Republican Party of Minn. v. White*, 416 F.3d 738, 748–49 (8th Cir. 2005) (*White II*); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (internal quotation marks omitted)). We recently applied strict scrutiny to another state statute regulating judicial elections because it was, "on its face, a content-based restriction on political speech and association [which] thereby threaten[ed] to abridge a fundamental right." *Sanders*

Cnty. Republican Cent. Comm. v. Bullock, 698 F.3d 741, 746 (9th Cir. 2012) (holding unconstitutional a ban on political party endorsement of judicial candidates).

Content-based restrictions on speech receive strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). Here, the Rules at issue

> censor speech based on content in the most basic of ways: They prevent candidates from speaking about some subjects [who they endorse or on whose behalf they can speak if that person is running for office or if the entity is a political party] . . . ; and they prevent candidates from asking for support in some ways (campaign funds) but not in others (a vote, yard signs).

Carey v. Wolnitzek, 614 F.3d 189, 198–99 (6th Cir. 2010). The canons do not address any of the "categorical carve-outs" of proscribable speech. *See id.* at 199. Nor are they the types of regulations to which the Supreme Court has applied a less rigorous standard of review, such as time, place and manner restrictions, commercial speech, or expressive conduct. *Id.*

Every sister circuit except the Seventh that has considered similar regulations since *White I* has applied strict scrutiny as the standard of review. *See Wersal v. Sexton*, 674 F.3d 1010, 1019 (8th Cir. 2012) (en banc), cert. denied, —— U.S. ——, 133 S. Ct. 209, 184 L. Ed. 2d 40 (2012); *Carey*, 614 F.3d at 198–99; *White II*, 416 F.3d at 749, 764–65; *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir.2002). We are not

persuaded by the Seventh Circuit's approach, which the Arizona defendants urge us to adopt by asking us to affirm the district court.

The Seventh Circuit treated the solicitation ban in *Siefert* as a "campaign finance regulation" and applied the "closely drawn scrutiny" framework of *Buckley v. Valeo*, 608 F.3d at 988 (*citing* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam)). The court treated the solicitation ban like a restriction on a campaign contribution—though by default, because the solicitation ban was not an expenditure restriction. *Id.* Contrary to the Arizona defendants' argument, the solicitation clause at issue here is not a restriction on a campaign contribution within the meaning of *Buckley*, 424 U.S. at 26–27, 96 S. Ct. 612. Arizona's solicitation ban does nothing at all to limit contributions to a judicial candidate's campaign—either in amount or from certain persons or groups. Contribution restrictions, like those at issue in *Buckley*, restrict the speech of potential contributors. 424 U.S. at 21–22, 96 S. Ct. 612. The Rule at issue here restricts only the solicitation for the contributions—the speech of the candidate.[9] Indeed,

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[9] *See also Carey*, 614 F.3d at 200 ("[T]his argument [that the solicitation clause is akin to a restriction on political donation subject to less rigorous scrutiny] gives analogy a bad name. The solicitation clause does not set a contribution limit, as in McConnell and similar cases. It flatly prohibits speech, not donations, based on the topic (solicitation of a contribution) and speaker (a judge or judicial candidate)—precisely the kind of content-based regulations that traditionally warrant strict scrutiny." (internal citation omitted) (emphasis in original)).

Buckley says *1154 nothing at all about solicitation, other than to note that candidates will ask for contributions. Buckley's framework is inapposite here.[10]

Considering a rule prohibiting a judge or judicial candidate from making endorsements or speaking on behalf of a partisan candidate or platform, the Seventh Circuit applied "a balancing approach" derived from a line of cases determining the speech rights of government employees. *Siefert*, 608 F.3d at 983–87. As noted in Part II.B, here we consider only the speech rights of Wolfson as a private citizen and judicial candidate—not yet, and perhaps never, a government employee. "[Wolfson] [i]s not a sitting judge but a

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[10]Nor are we persuaded by the Commission defendants' argument that the rules prohibiting solicitation "do not involve core political speech," and that "[w]hen a candidate says 'give me money,' he adds nothing to the full and fair expression of ideas that the First Amendment protects." This is a content-based distinction of pure speech that is not excepted from full First Amendment protection. *See, e.g., Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) ("It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment."); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) ("[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (observing that the First Amendment protects speech "in the form of a solicitation to pay or contribute money"). This argument is wholly without merit.

challenger; he ha[s] not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner." *See White I*, 536 U.S at 796, 122 S. Ct. 2528 (Kennedy, J., concurring). For the reasons discussed above, we decline to extend the rationale from the employee-speech cases to apply a lower level of scrutiny to the restrictions on Wolfson's First Amendment rights during a judicial campaign.

The Seventh Circuit also reasoned that a balancing approach was appropriate because endorsements are "a different form of speech" outside of "core" political speech thus having "limited communicative value," and when judges make endorsements they are "speaking as judges, and trading on the prestige of their office to advance other political ends." *Siefert*, 608 F.3d at 983, 984, 986.[11] We do not hold the same view of endorsements by non-judge candidates. In *Sanders County*, we held that endorsements of judicial candidates are no different from other types of political speech: "Thus, political speech—including the endorsement of candidates for office—is at the core of speech protected by the First Amendment." 698 F.3d at 745. Similarly, endorsements by candidates for office is also political speech protected by the First Amendment. Moreover, endorsements made by a non-judge candidate cannot trade on the prestige of an office that candidate does not yet hold.

We share the Seventh Circuit's concerns about

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[11]In this vein, the Commission defendants argue that endorsements have "limited communicative value" other than the desire to be a political powerbroker.

protecting litigants' due process rights, which we recognize as a compelling state interest. That court reasoned that because "restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause," states could regulate even political speech by judges if the regulations served the *1155 state's interest in protecting litigants' constitutional right to due process. *Siefert*, 608 F.3d at 984. We agree that due process concerns are paramount, but this concern does not justify a categorically lower level of constitutional scrutiny for political speech by judicial candidates. Applying strict scrutiny, we can adequately assess whether regulations on a judicial candidate's political speech are narrowly tailored to serve the state's compelling interest in protecting litigants' due process rights. Narrow tailoring is most appropriate. Although we could scarcely imagine a more compelling state interest, we also recognize that "due process" concerns arise not in the ether, but "only . . . in the context of judicial proceedings." *See* Michelle T. Friedland, Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech, 104 Colum. L.Rev. 563, 613 (2004).[12] We are mindful of the fact that we should endeavor to protect litigants from even the "potential for due process violations" or the "probability of unfairness." *See White I*, 536 U.S. at 815–16, 122 S. Ct. 2528 (Ginsburg, J., dissenting) (emphasis added) (internal quotation

[12]"Even if a judicial candidate campaigned solely on the basis of his hatred and vindictiveness toward Joe Smith and the candidate were elected, no due process problem would be presented if Joe Smith were never involved in litigation or other proceedings before that judge." *Id.*

marks omitted). The potential for and probability of a problem that in actuality arises only in real cases does not, however, translate into a generalized concern about the appearance or reality of an impartial judiciary warranting a lower level of scrutiny. Indeed, the Eighth Circuit identified the flaw in this argument.

> It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of being elected.

Weaver, 309 F.3d at 1320; *accord White I*, 536 U.S. at 792, 122 S. Ct. 2528 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").[13] Moreover, there is an equally compelling state interest in the free flow of information during a political campaign.

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[13] *See also Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (en banc) (Reinhardt, J., concurring), *vacated on other grounds*, 501 U.S. 312, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991) ("The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate . . . . Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process.").

"Deciding the relevance of candidate speech is the right of the voters, not the State." *White I*, 536 U.S. at 794, 122 S. Ct. 2528 (Kennedy, J., concurring). Whether and to what extent a judicial candidate chooses to engage in activities such as endorsing and making speeches on behalf of other candidates, fundraising for or taking part in other political campaigns, or asking for contributions is information that the electorate can use to decide whether he or she is qualified to hold judicial office. "The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents. By making this choice, the states, by definition, are turning judges into politicians." Erwin Chemerinsky, *Restrictions on the Speech* *1156 *of Judicial Candidates Are Unconstitutional*, 35 Ind. L. Rev. 735, 736 (2002). Along with knowing a candidate's views on legal or political issues, voters have a right to know how political their potential judge might be.[14] To the extent states wish to avoid a politicized judiciary, they can choose to do so by not electing judges.

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[14] *See, e.g.,* Michael R. Dimino, *Pay No Attention To That Man Behind The Robe: Elections, The First Amendment, and Judges As Politicians*, 21 Yale L. & Pol'y Rev. 301, 356 (2003) ("[S]tates that have rejected the federal model of judicial independence have necessarily accepted (if not celebrated) that some level of electoral accountability will play a part in their judges' decisions. Accordingly, because there is nothing 'corrupt' about the functioning of democracy, limiting speech so as to conceal the part that electoral politics does play in judicial decisions cannot be constitutionally justified.").

B.

Under strict scrutiny, the Arizona defendants have the burden to prove that the challenged Rules further a compelling interest and are narrowly tailored to achieve that interest. *Citizens United*, 558 U.S. at 340, 130 S. Ct. 876. First we consider Arizona's state interests. Then, we analyze whether the solicitation clause (Rule 4.1(A)(6)) and the political activities clauses (Rules 4.1(A)(2)-(5)) are narrowly tailored to serve those interests.

1.

Every court to consider the issue has affirmed that states have a compelling interest in the appearance and actuality of an impartial judiciary. *See, e.g., White I*, 536 U.S. at 775–76, 122 S. Ct. 2528. The meaning of "impartiality" is lack of bias for or against either party to a case. *Id.* at 775, 122 S. Ct. 2528. This definition accords with the idea that due process violations arise only in case-specific contexts. The Supreme Court has also recognized that states have a compelling interest in preventing corruption or the appearance of corruption through campaign finance regulations. *Buckley*, 424 U.S. at 26–27, 96 S. Ct. 612; *see also Citizens United*, 558 U.S. at 357, 130 S. Ct. 876. Thus, we recognize that Arizona has a compelling interest in an uncorrupt judiciary that appears to be and is impartial to the parties who appear before its judges.

The Arizona defendants also argue for two other compelling interests that we do not find persuasive. First, the Commission defendants argue that "the State has a compelling interest in preventing candidates (who will after all be the next judges if and when elected) from trampling on the interests of

impartiality and public confidence." This argument is, essentially, that states have a compelling interest in regulating candidates' speech; we do not find an interest in regulating speech per se to be compelling. We do agree, however, that states have a compelling interest in maintaining public confidence in the judiciary. In a similar vein, State Bar Counsel argues that Arizona has a compelling interest in avoiding "judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." But, as explained above, any imperilment of public confidence has its roots in the very nature of judicial elections, and not in the speech of candidates who must participate in those elections to become judges. *See White I*, 536 U.S. at 792, 122 S. Ct. 2528 (O'Connor, J., concurring).[15] If a judicial candidate wishes to engage in politicking to achieve a seat on the bench, keeping the public ignorant *1157 of that fact may conceal valuable information about how well that candidate may uphold the office of an ideally impartial, apolitical adjudicator.

Second, the Commission defendants argue that Arizona has a compelling interest in "preventing judges and judicial candidates from using the prestige of their office or potential office for purposes not related to their judicial duties." We are not persuaded by this argument as applied to non judge candidates, who

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[15]The reality is that the Rules do not "change the circumstances or pressures that cause the candidates to want to make [prohibited] statements," and that "[j]udicial campaign speech codes are therefore much more about maintaining appearances by hiding reality than about changing reality." *Friedland*, 104 Colum. L. Rev. at 612.

cannot abuse the prestige of an office they do not yet and may never hold.

2.

The solicitation clause prohibits a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4." Rule 4.1(A)(6).[16] The Code defines "personally solicit" as "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, "Terminology" (2009). We hold that Rule 4.1(A)(6) is unconstitutional as applied to non judge judicial candidates because it restricts speech that presents little to no risk of corruption or bias towards future litigants and is not narrowly tailored to serve those state interests.

Arizona's sweeping definition of "personally solicit" encompasses methods not likely to impinge on even the appearance of impartiality. The Sixth Circuit recently

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[16]Wolfson argues that Rule 4.1(A)(4) is also a restriction on solicitation, because he wishes to solicit contributions to his own campaign committee, which he considers to be a "political organization." But the Code explicitly carves out a judicial candidate's campaign committee from the definition of "political organization." See Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, "Terminology" (2009). Therefore, we analyze Rule 4.1(A)(4) alongside (A)(2)-(3) and (5), because it prohibits a judicial candidate from soliciting funds on behalf of or donating to a specific political organization or candidate—classic political campaigning activities.

invalidated a similar clause in Kentucky that also extended beyond one-on-one, in-person solicitations to group solicitations, telephone calls, and letters. Carey, 614 F.3d at 204. We agree with our sister court's cogent analysis of this issue. "[I]ndirect methods of solicitation [such as speeches to large groups and signed mass mailings] present little or no risk of undue pressure or the appearance of a quid pro quo." *Id.* at 205. The clauses are also underinclusive: a personal solicitation by a campaign committee member who may be the candidate's best friend or close professional associate (such as a law practice partner) is likely to have a greater risk for "coercion and undue appearance" than a signed mass mailing or request during a speech to a large group. *Id.* Moreover, the Code does not prohibit a candidate's campaign committee from disclosing to the candidate the names of contributors and solicited non-contributors.

> That omission suggests that the only interest at play is the impolitic interpersonal dynamics of the candidate's request for money, not the more corrosive reality of who gives and how much. If the purported risk addressed by the clause is that the judge or candidate will treat donors and non-donors differently, it is knowing who contributed and who balked that makes the difference, not who asked for the contribution.

Id.[17] The lack of narrow tailoring is obvious here: if

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[17]The lack of a non-disclosure-to-the-candidate requirement in Arizona's Code presents the opposite situation of that in *White II*, where appellants challenged the fact that

impartiality or absence of corruption is the concern, what is the point *1158 of prohibiting judges from personally asking for solicitations or signing letters, if they are free to know who contributes and who balks at their committee's request? *Wersal* teaches that the in-person "'ask' is precisely the speech [a state] must regulate to maintain its interest in impartiality and the appearance of impartiality" because of the greater risk of a quid pro quo. 674 F.3d at 1029–31. Indeed, we agree with State Bar Counsel's argument that "the very act of asking for money, personally, creates the impression that judge (and justice) may be for sale." But the clause here sweeps more broadly. It is not necessary "to decide today whether a State could enact a narrowly tailored solicitation clause—say, one focused on one-on-one solicitations or solicitations from individuals with cases pending before the court—only that this clause does not do so narrowly." *Carey*, 614 F.3d at 206 (emphasis in original).[18] The solicitation

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they could not solicit from large groups or via signed appeal letters. The Eighth Circuit found that the prohibition on disclosing to a candidate who contributed and who rebuffed meant the clause was "barely tailored at all to serve [the end of impartiality as to parties in a particular case]" or an interest in "open-mindedness." 416 F.3d at 765–66.

[18]Indeed, the Eighth Circuit upheld the Minnesota solicitation clause even under strict scrutiny precisely because the challenged clause only prohibited direct, in-person solicitation, while the rest of Minnesota's Code of Judicial Conduct permitted solicitation of groups and of a judge's intimates. *Wersal*, 674 F.3d at 1028–29. That court distinguished the outcome from that in *White II*, where an earlier version of the state's Code of Judicial Conduct

clause is invalid as applied to non judge candidates.

3.

We analyze Rules 4.1(A)(2)-(5) as the "political activities" clauses. Judicial candidates are prohibited from speechifying for another candidate or organization, endorsing or opposing another candidate, fundraising for another candidate or organization, or actively taking part in any political campaign other than his or her own. These clauses are also not sufficiently narrowly tailored to serve the state's interest in an impartial judiciary, and are thus unconstitutional restrictions on political speech of non judge candidates for judicial office.

Rules 4.1(A)(2)-(4)—prohibiting speechifying, endorsements, and fundraising—present the closest question. There is an argument that these rules are sufficiently narrowly tailored to be constitutional because they curtail speech that evidences bias towards a particular (potential) party within the scope of *White I*: the candidate or political organization endorsed or spoken of favorably by the judicial candidate. A plurality of the Eighth Circuit, sitting en banc, upheld a nearly identical Minnesota prohibition on a judge or judicial candidate endorsing "another candidate for public office" because such an endorsement "creates a risk of partiality towards the

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prohibited group solicitation and banned judges and candidates from signing fund appeal letters. *Id.* at 1029. Direct personal solicitation "gives rise to a greater risk of quid pro quo," *id.*, but the scope of Arizona's solicitation clause is broader than Minnesota's and we must consider all of the affected speech.

endorsed party and his or her supporters." *Wersal*, 674 F.3d at 1024, 1025. The plurality concluded that the clause was narrowly tailored to serve the state's compelling interest in the appearance and reality of an impartial judiciary. *Id.* at 1028.[19]

*1159 Nonetheless, we hold that these regulations are underinclusive because they only address speech that occurs beginning the day after a non judge candidate has filed his intention to run for judicial office.[20] The day before a private citizen becomes a

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[19]Judge Loken, joined by Judge Wollman, concurred in the result but agreed with the plurality's judgment on the separate ground that the endorsement clause served the distinct compelling state interest in "protecting the political independence of its judiciary." *Id.* at 1033 ("An endorsement links the judicial candidate's political fortunes to a particular person, who may then come to hold office in a coordinate branch of government. This is antithetical to any well considered notion of judicial independence—that we are a 'government of laws, not of men.'") (Loken, J., concurring.).

[20]The Wersal plurality concluded that the Minnesota endorsement clause was not underinclusive but only by reference to what it restricted: "endorsements for other candidate[s] for public office." *Id.* at 1027 (internal quotation marks omitted) (emphasis added). That plurality noted that a separate clause in Minnesota's Code of Judicial Conduct prevented a judge or judicial candidate from making any statement that would "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," and reasoned that the two clauses read together meant that a judicial candidate was prevented from making any biased statement about a party or potential party, whether or not the target of the

judicial candidate, he or she could have been a major fundraiser or campaign manager for another elected official, or may have donated large sums of money to another's political campaign, or may have himself been an elected politician. The Supreme Court confronted a similar underinclusive issue in *White I*. There, in explaining why the "announce clause" was underinclusive, the Court said

> In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

White I, 536 U.S. at 779–80, 122 S. Ct. 2528. Here too, Rules 4.1(A)(2)-(4) are "woefully underinclusive" because they only address speech made after a candidate has filed his intention to enter the race. *Id.* at 780, 122 S. Ct. 2528. Contrary to the dissent, we fail to see why this same concern does not apply here.

Moreover, the Arizona defendants have failed to show why the less restrictive remedy of recusal of a

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speech had become a candidate for public office at the time of the statement. *Id.* We are concerned about the temporal dimension of a non-judge candidate's speech, rather than the candidate status of its target.

successful candidate from any case in which he or she was involved in a party's political campaign or gave an endorsement is an unworkable alternative. "[B]ecause restricting speech should be the government's tool of last resort, the availability of obvious less-restrictive alternatives renders a speech restriction overinclusive." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013). Here, it seems that if a candidate indeed becomes a judge, a less restrictive means of addressing the state's concerns would be to require recusal in cases where the new judge's bias against or in favor of a party is clear.[21] Unlike the dissent and the plurality of the Eighth Circuit in *Wersal*, we decline to address hypothetical situations involving potential frequent litigants and single-judge counties. *See* Dissent at 1168; *Wersal*, 674 F.3d at 1027–28 (posing the hypothetical that "candidates and judges would be free *1160 to endorse individuals who would become frequent litigants in future cases, such as county sheriffs and prosecutors"). The Arizona defendants have not offered any evidence nor argued that these concerns exist, *cf. Siefert*, 608 F.3d at 987, though they bear the burden of demonstrating that the Rules survive strict scrutiny. We decline to speculate on whether such a problem would exist in the Arizona judicial elections affected by these Rules.

We hold Rule 4.1(A)(5), which prohibits a judicial

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[21] *See, e.g.*, *Friedland*, 104 Colum. L. Rev. at 614 ("[T]he proper response to judicial campaign speech that could threaten Fourteenth Amendment due process rights may be to allow the speech and then, if a case arises in which the judge's former campaign speech poses a problem, to assign that case to another judge.").

candidate from "actively tak[ing] part in any political campaign other than his or her own campaign for election, reelection, or retention in office" to be unconstitutional because it is overbroad. By its terms, it is not limited to restrictions on participation in political campaigns on behalf of persons who may become parties to a suit, but may also include political campaigns on ballot propositions and other issues, including political campaigns for ballot propositions that present no risk of impartiality towards future parties. Thus, Rule 4.1(A)(5) unconstitutionally prohibits protected speech about legal issues. *White I*, 536 U.S. at 776–78, 122 S. Ct. 2528.

IV.

For these reasons, we reverse the district court's grant of summary judgment to the Arizona defendants. We hold that strict scrutiny applies and that the challenged portions of the Arizona Code of Judicial conduct unconstitutionally restrict the speech of non judge judicial candidates. We remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BERZON, Circuit Judge, concurring:

Sitting for judicial election while judging cases, Justice Otto Kaus famously quipped, is like "brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub." Joseph R. Grodin, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* 177 (1989) (quoting Kaus). Kaus would know. He sat on the California Supreme Court from 1981 to 1985, Gerald T. McLaughlin, *Memorial Dedication to Otto*

Kaus, 30 Loy. L.A. L.Rev. 923, 923 (1997), having narrowly won a retention election in 1982 and retiring from the court soon before the 1986 vote that would unseat three of his former colleagues, Stephen R. Barnett, *Otto and the Court*, 30 Loy. L.A. L.Rev. 943, 947 & n.19 (1997).[1]

Kaus' point about the psychology of judging applies outside the context of judicial elections, for the temptation to engage in overt political behavior affects judges generally. And so I write separately to identify, and hopefully to tame, the "crocodile" stalking today's majority opinion: the prospect that the principles we apply now will be used in future litigation to challenge the constitutionality of restrictions on the political behavior of sitting judges. The opinion studiously—and designedly—does not address that issue. But it is worth explaining why, in my view, the considerations pertinent to evaluating the complex of constitutional issues raised by *1161 such restrictions are quite different than those the majority opinion applies today.

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[1]Justices of the California Supreme Court and Judges of the California Court of Appeal are nominated by the Governor, confirmed by the Commission on Judicial Appointments, and then subject to voter approval in a retention election at the time of the next gubernatorial election and, thereafter, at the end of each 12–year term. *See* Cal. Const. art. 6, § 16(d); Cal. Elec. Code § 9083. Judges of the California Superior Court usually sit for general election every six years, Cal. Const. art. 6, § 16(b), unless an incumbent is not unopposed, Cal. Elec. Code § 8203, or a county adopts by majority popular vote the retention-election system applicable to appellate judges, Cal. Elec. Code § 8220.

I.

Today's opinion addresses the constitutionality of certain provisions of the Arizona Code of Judicial Conduct ("Code") only as they apply to judicial candidates who, like Wolfson, have not yet ascended to the bench. It does not decide those provisions' constitutionality as they apply to elected judges who, like Kaus, have already taken their oaths of office. Still less does it decide the constitutionality of restrictions on the political activity of judges who, like us on the federal bench, "hold their Offices during good Behaviour," U.S. Const. art. III, § 1, and never sit for election. In the name of prudence and constitutional avoidance, the majority's opinion rightly reserves judgment on the constitutionality of restricting the speech of sitting judges, an issue neither properly before us nor necessary to the resolution of this case.

I emphasize the limited scope of today's decision for fear that future litigants might otherwise seek to obscure it, despite the repeated admonishments in the opinion. Of the five Code provisions we strike today, only one—the solicitation ban—directly relates to a judicial candidate's own campaign for office.[2] The remainder prohibit a would-be judge's efforts to advance the political fortunes of other candidates or

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[2]The full text of the provision is as follows:

> (A) A judge or judicial candidate shall not . . . .
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 . . . .

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009), Rule 4.1(A)(6).

causes, through speeches, endorsements, fundraising, financial support, or other campaign assistance.[3] As these proscriptions bear little direct relation to judicial candidates' personal political fortunes, a casual reader might be forgiven for assuming that they are just as constitutionally offensive as applied outside the election context, to sitting judges, whether or not they reached the bench via election.

In my view, that is not so, for at least two reasons: The analytic framework applicable to political restrictions on sitting judges may well differ from the one we apply today. And the compelling state interest that could well justify such restrictions differs from the one emphasized in the majority opinion. I address each difference in turn.

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[3]The full text of the provision is as follows:

> (A) A judge or judicial candidate shall not do any of the following:
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> . . . .
>
> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law . . . .
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office . . . .

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009), Rule 4.1(A)(2)-(5).

II.

In applying strict scrutiny to a judicial candidate who is not now a judge, today's majority opinion rightly rejects the Seventh Circuit's approach, which applies to political restrictions on elected sitting judges a balancing test derived from the *1162 Supreme Court's cases on public employee speech. *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). Although such a tempered standard has no application to a candidate who has not yet taken his oath of judicial office, whether it would be appropriately applied to political restrictions governing sitting judges is quite a different manner.

The Constitution permits the government to prohibit its employees from speaking about matters of public concern where the government's interest "in promoting the efficiency of the public services it performs through its employees" outweighs the First Amendment interest in speech. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). The *Pickering* balancing test seeks "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Garcetti v. Ceballos*, 547 U.S. 410, 420, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). And that test recognizes that "there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002), did not decide whether the public employee speech cases would justify restrictions on judges' active support for political causes or the candidacies of others. Justice Kennedy, who was a member of the five justice majority, wrote a separate concurrence, explaining this limitation: "Whether the rationale of *Pickering* [, 391 U.S. 563, 88 S. Ct. 1731], and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here." *White*, 536 U.S. at 796, 122 S. Ct. 2528 (Kennedy, J., concurring).

In *Siefert*, 608 F.3d at 985, the Seventh Circuit extended the public employee speech cases to a provision of the Wisconsin Code of Judicial Conduct prohibiting an elected sitting judge from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms," *id.* at 978–79. It reasoned that the government's authority as an employer, "its duty to promote the efficiency of the public services it performs," and the imperative that "the work of the judiciary conform[ ] with the due process requirements of the Constitution" justified a less rigorous balancing test for restrictions on elected sitting judges' participation in the political campaigns or candidacies of others. *Id.* at 985. In a subsequent decision, the Seventh Circuit extended this balancing test to provisions of the Indiana Code of Judicial Conduct prohibiting elected judges from leading or holding office in political organizations or making

speeches on behalf of such organizations. *Bauer*, 620 F.3d at 710–11.

The core rationale of the public employee speech cases, on which *Siefert* and *Bauer* relied, does not apply to the case presently before us. Wolfson has never been an employee of Arizona, let alone a judge. Indeed, he may never become one. While the public employee speech cases do not rest solely on the now-antiquated principle that the government can condition employment on the waiver of First Amendment rights, *see Myers*, 461 U.S. at 143–44, 103 S. Ct. 1684, the nature of government employment is a necessary *1163 component of their reasoning. *Pickering* recognized as much, commenting that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568, 88 S. Ct. 1731. The public employee speech cases thus recognize the "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008) (alteration in original) (*quoting Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)). Critically, the balancing test the *Pickering* line of cases articulates does not apply to governmental restrictions on the speech of those, like judicial candidates, not employed by the government. We could not abandon that determinative distinction without dangerously expanding the scope of

constitutionally permissible regulation of speech.

But our refusal to apply to a judicial candidate not yet a state employee a balancing test derived from the public employee speech cases says nothing whatever about the applicability of such a test to individuals who have already taken their oaths of judicial office and already receive wages from the state. That question remains unanswered. Resolving the First Amendment challenge of a sitting judge to similar restrictions on his speech will require answering it. And, without prejudging whether we should adopt the *Siefert* analysis for restrictions on political activity by sitting judges on behalf of political causes or the candidacies of others, I suggest that the analogy to the *Pickering* line of cases has much to commend it.

III.

Even if we determined that restrictions on the political activity of sitting judges were subject to strict scrutiny, the state interest supporting such a restriction would be far stronger than the one we hold inadequate to justify the restrictions on judicial candidate Wolfson's speech today.

The Supreme Court has recognized as a "vital state interest" the interest in maintaining those "safeguard[s] against judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (emphasis added) (internal quotation marks and citation omitted). Preserving public confidence includes maintaining the perception of judicial propriety. In other words, "'justice must satisfy the appearance of justice.'" *In re*

Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (*quoting Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). "[T]he appearance of evenhanded justice . . . is at the core of due process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Harlan, J., concurring).

The majority opinion, taking its cue from Supreme Court cases on judicial elections, focuses its strict scrutiny analysis on the interest in preserving the actuality and appearance of judicial impartiality. The case law's emphasis on impartiality derives from the obligations imposed by the due process clause, particularly "the proposition that an impartial judge is essential to due process." *White*, 536 U.S. at 776, 122 S. Ct. 2528. This compelling interest in preserving the appearance of impartiality is both weighty and narrow: weighty, because it rises to the level of a constitutional obligation, requiring a judge to recuse himself from a particular case in the name *1164 of due process, *Caperton*, 556 U.S. at 886–87, 129 S. Ct. 2252; and narrow, because it refers only to "lack of bias for or against either party to the proceeding," *White*, 536 U.S. at 775–76, 122 S. Ct. 2528 (emphasis in original). Given this narrow focus on the parties appearing before a judge in an actual proceeding, the less-restrictive remedy of mandatory recusal is available to a state seeking to protect, as it must, the due process rights of litigants appearing in its courts.

But I would define the state's interest in preserving public confidence in its judiciary more broadly, as reaching beyond the process due specific litigants in particular cases. Maintaining public trust in the

judiciary as an institution driven by legal principles rather than political concerns is a structural imperative. The rule of law depends upon it.

The fundamental importance of this structural imperative has been recognized from the founding of the nation. As Alexander Hamilton emphasized in The Federalist No. 78, the courts possess "neither FORCE nor WILL, but merely judgment . . . ." *Id.* at 433 (Clinton Rossiter ed., 1961). Deprived of those alternative sources of power, the authority of the judiciary instead "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the . . . law means and to declare what it demands." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *see also White*, 536 U.S. at 793, 122 S. Ct. 2528 (Kennedy, J., concurring) ("The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments."). It is the courts' perceived legitimacy as institutions grounded in established legal principles, not partisanship, "that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer*, 620 F.3d at 712. Loss of judicial legitimacy thus corrodes the rule of law, "sap [ping] the foundations of public and private confidence, and . . . introduc[ing] in its stead universal distrust and distress." The Federalist No. 78, at 438. In this sense, "[t]he rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *NY State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008) (Kennedy, J.,

concurring).

This nation's political history demonstrates the disastrous effects of the perceived politicization of the courts. Charges that King George "ha[d] obstructed the Administration of Justice" and "ha[d] made judges dependent on his Will alone . . . ." were among the founding generation's justifications for the 1776 revolution. The Declaration of Independence para. 11 (U.S.1776). Similar concerns apply outside the context of a monarchy: Where the judiciary is drawn into the political intrigues of its coordinate branches, the public might well "fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity." The Federalist No. 81, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[4] And where the politicization of the judiciary brings it into alliance with the politicians who staff the other two *1165 branches of government, the public may no longer consider "the courts of justice . . . as the bulwark of a limited Constitution against legislative encroachments," The Federalist No. 78, at 437, or executive excesses. In short, when sitting judges support the campaigns of nonjudicial candidates—via

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[4]This quotation appears in an explanation of why the Supreme Court is "composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain . . . ." *Id.* at 451. But the dangers of perceived partisanship apply at least as much to judges independently chosen but participating publicly in the selection of legislative or executive policies and decisionmakers.

endorsements, speeches, money, or other means—the public may begin to see them not as neutral arbiters of a limited system of governance, but as participants in the larger game of politics.[5]

The defendants here express precisely this concern—that if sitting judges may support the campaigns of others, the public will perceive them as masters of the political game, powerbrokers "trading on the prestige of their office to advance other political ends . . . ." *Siefert*, 608 F.3d at 984; *see also* Model Code of Judicial Conduct R. 4.1, cmt.4 (2011) (justifying prohibitions on endorsements and speeches on behalf of other candidates as "prevent[ing sitting judges] from abusing the prestige of judicial office to advance the interests of others"). The opposite fear is equally justified: Today's powerbroker is tomorrow's pawn, as the political winds shift and the next election cycle approaches. The endorsing judge entwines his fate with whomever he endorses and earns the enmity of his favored politician's opponents. "This kind of personal affiliation between a member of the judiciary and a member of the political branches raises the

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[5]I leave aside whether sitting judges may endorse or support other candidates for judicial office. Such support does not implicate the powerful state interest in the appearance of judicial independence from the political branches I discuss in the text. Moreover, a sitting judge's endorsement of a judicial candidate is a singularly effective mode of voter education. Few observers are as qualified as sitting judges to evaluate the competencies of those who would join their ranks. The concerns and analyses in this concurring opinion are therefore limited to judicial participation in issue, legislative, and executive elections.

specter—readily perceived by the general public—that the judge's future rulings will be influenced by this political dependency." *Wersal v. Sexton*, 674 F.3d 1010, 1034 (8th Cir. 2012) (Loken, J., concurring in the judgment) (emphasis in original).

In his concurrence in *Wersal*, Judge Loken concluded that there is a "compelling state interest . . . in protecting the political independence of its judiciary." *Id.* at 1033. I have no reason at this juncture to come to rest on that question. Instead, I emphasize that, at the very least, there is a powerful state interest in preventing sitting judges from playing the part of political powerbroker and creating the publicly visible interdependence that corrodes confidence in judicial autonomy. Assessing whether that interest qualifies as "compelling," in the lexicon of First Amendment doctrine, awaits a properly presented case—particularly as the issue will never arise if we first determine that the *Pickering* balancing test, rather than strict scrutiny, applies to speech restrictions on sitting judges.

Almost certainly, a state does not forfeit this powerful interest in judicial autonomy by selecting its judges via popular election. It was in the context of a state prohibition against judicial candidates expressing their personal views on disputed legal and political issues during their own campaigns that the Supreme Court has explained that "'the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in

that process . . . the First Amendment rights that attach to their roles.'" *White*, 536 U.S. at 788, 122 S. Ct. 2528 (alteration in original) (*quoting* *1166 *Renne v. Geary*, 501 U.S. 312, 349, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991) (Marshall, J., dissenting)). But that observation does not seem to extend to prohibitions on campaigning on behalf of issue elections or for nonjudicial candidates. The Supreme Court's case law on the political behavior of government employees has "carefully distinguishe[d] between [proscribable] partisan political activities and mere expressions of views," which are constitutionally protected. *Biller v. U.S. Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir.1988) (*citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL–CIO*, 413 U.S. 548, 554–56, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), *and United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 98–99, 67 S. Ct. 556, 91 L. Ed. 754 (1947)); *Siefert*, 608 F.3d at 984; *see also Citizens United*, 558 U.S. at 341, 130 S. Ct. 876 (citing *Letter Carriers* in support of the proposition that the Supreme Court has often "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, . . . based on an interest in allowing governmental entities to perform their functions").[6]

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[6]It is true that an elected judge's support of another candidate or cause signals something about his views, which might be marginally useful to voters assessing their options at the polls. *See Siefert*, 608 F.3d at 994–95 (Rovner, J., dissenting) ("We are, after all, often judged by the company we keep."). But so long as an elected judge may articulate his personal views of legal and political issues in support of his own campaign, attentive voters have a far more direct means with which to form an opinion about

Indeed, prohibitions on supporting the campaigns of others complement, rather than contradict, the decision to select judges via popular election: By adopting such restrictions alongside judicial elections, states harness the "legitimizing power of the democratic process" while avoiding worrisome interdependence between judges and politicians from the remaining two branches.

Nor should we forget that our own federal scheme supplements its structural protections for judicial autonomy with direct prohibitions on politicking. Structurally, our Constitution endows judges with life tenure and prohibits the diminution of their salaries. U.S. Const. art. III, § 1. Such protections seek to encourage "that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty," The Federalist No. 78, at 437, and help "preserve[ ] the independence of the Federal Judiciary," *White*, 536 U.S. at 795, 122 S. Ct. 2528 (Kennedy, J., concurring). In addition to those structural safeguards the federal judiciary has adopted a code of ethics that regulates directly the behavior of federal judges, including restrictions on supporting the political causes and candidacies of others.[7] Our ethical

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competing judicial candidates.

[7]The full text of the relevant canon provides:
(A) A judge should not:
(1) act as a leader or hold any office in a political organization;
(2) make speeches for a political organization or candidate, or publicly endorse a candidate for public office; or

code is independent of the structural safeguards that insulate us from the political branches, and it performs a slightly different function. I see no reason why a state cannot adopt the one without the other, except with regard to a judicial candidate's personal campaign *1167 for judicial office in states where judicial elections are held.

Critically, the state interest in preserving an autonomous judiciary is powerful only insofar as it applies to sitting judges; it has no application to judicial candidates who, like Wolfson, have not yet reached the bench. The spectacle of sitting judges aiding partisan allies in their political struggles corrodes the public repute of the judiciary in a way that the participation of a mere candidate never can. Indeed, the interest in an independent judiciary does not come into existence until a judge assumes office; the politicking of lay people cannot damage the reputation of a body whose ranks they have not yet joined. Individuals who run for judicial office may

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> (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
>
> (B) A judge should resign the judicial office if a judge becomes a candidate in a primary or general election for any office.
>
> (C) A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

Administrative Office of U.S. Courts, Code of Judicial Conduct for United States Judges, Canon 5 (2011).

themselves be officers of political parties or holders of nonjudicial political office when they decide to run for a judgeship. That politicians can become judges is no secret. But that is different from allowing judges to remain or become politicians while still on the bench. Moreover, as the majority opinion explains, a layman who has not yet assumed office has no prestige derived from the office he has not yet attained to lend his political brethren. Essentially, ascending to the bench is like taking the veil, and that veil does not descend until the oath of office is sworn.

Meanwhile, to the extent *White* sought to preserve voters' access to "relevant information" and to prevent "state-imposed voter ignorance" about the candidates sitting for election, 536 U.S. at 782, 788, 122 S. Ct. 2528 (internal quotation marks omitted), such concerns are weaker for already seated judges. Such judges already possess a record of decisions that interested voters can analyze to inform themselves about the desirability of competing judicial candidates; under *White*, they are free to campaign for their own reelection by drawing attention to their records on the bench. By contrast, lay people, like Wolfson, who have not yet sat on the bench lack any such judicial record, making their campaign speech—including endorsements—relatively more valuable for what it reveals about how they might perform in office.

* * *

In sum, the principles applicable to the constitutionality of political restrictions on sitting judges diverge dramatically from those we apply to today's challenge to restrictions on a judicial candidate not now a judge. The standard of review may well

differ. And the powerful interests supporting such restrictions differ, too. I need not address, as the issue is not before us, whether the particular restrictions we review today would be constitutional as applied to sitting judges. But I am quite sure that the analysis required to resolve that question will receive scant support from our decision in this case.

TALLMAN, Circuit Judge, dissenting in part:

I agree with the majority that strict scrutiny—not *Seifert*—is the appropriate standard. I agree that we should limit our decision to non-incumbent judicial candidates. And I agree that Rules 4.1(a)(5) (campaigning for others) and 4.1(a)(6) (personal solicitation) are unconstitutional as applied to those candidates. I concur in the majority opinion only on those points. I part company with my colleagues as to Rules 4.1(a)(2) (giving speeches on behalf of others), (3) (endorsing others), and (4) (soliciting money for others). These three rules are constitutional because they are narrowly tailored to serve the state's compelling interest in maintaining judicial impartiality and its appearance—the hallmark of government's third branch.

My colleagues acknowledge that these three rules "present the closest question," and that the Eighth Circuit upheld similar ones. *Wersal*, 674 F.3d at 1024–25. *1168 Nonetheless, the majority concludes that they are not narrowly tailored for two reasons: timing and recusal. The timing argument is that the rules are underinclusive because "they only address speech that occurs beginning the day after a non judge candidate has filed his intention to run for judicial

office." The recusal argument is that the rules are more restrictive than recusal, i.e., requiring judges who have campaigned for others to recuse themselves when those others show up as litigants. I dissent because I do not find these reasons persuasive.

The majority's timing argument is clever but impractical. Its breadth alone suggests this. The argument would cut down any restriction (a) that is subject to strict scrutiny and (b) that starts to apply to people only after some triggering event. If the restriction's enactment counts as a triggering event, and I don't see why it wouldn't, then strict scrutiny would always be fatal. That cannot be the law.

Moreover, the argument doesn't actually answer the question, which is whether there are less restrictive ways to preserve judicial impartiality and its appearance. Having no rules is, of course, less restrictive. But it isn't an alternative means of furthering the interest at stake here. Any actual alternative will suffer from the timing problem the majority identifies. So the timing argument tells us nothing about which alternative is the least restrictive; it only identifies a problem that all conceivable alternatives share.

The majority's recusal argument, like the timing argument, is too impractical in my view. In Arizona, only very small counties elect judges. And some small counties may well have only one superior court judge. If that one judge campaigns for someone who is then elected sheriff or district attorney, an outside judge would be necessary in every criminal case and in all civil cases involving the county where the district attorney is its lawyer. Constant recusal is no solution.

That's what the Eighth Circuit held in *Wersal*, after it considered this obvious problem. 674 F.3d at 1027–28. The majority, on the other hand, recognizes the problem, but then sidesteps it, claiming that the state failed to raise it and that dealing with it would require us to speculate. I disagree. There's no need to speculate about something so self-evident. And it's hard to fault the state for failing to dwell on the obvious.

In sum, I don't buy the timing or recusal arguments. And without them, there's nothing that prevents us from declaring that these three rules are the least restrictive means at Arizona's disposal for furthering their compelling interest in maintaining judicial impartiality and its appearance. Simply affixing the label of strict scrutiny and then declaring that unspecified less restrictive means are required gives no guidance as to what rules pass constitutional muster. And it encourages an elective free-for-all that undermines respect for the third branch of government. Because my colleagues disagree, I respectfully dissent.

[***Editing Note:*** *Page numbers from the reported opinion, 822 F. Supp. 2d 925, are indicated (*926).*]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RANDOLPH WOLFSON, Plaintiff, vs. J. WILLIAM BRAMMER, *et al.*, Defendants.	Case No. 08-8064-PCT-FJM May 9, 2014 **ORDER**

Attorneys and Law Firms

*926 Byron Jeffords Babione, Benjamin W. Bull, Alliance Defense Fund, Scottsdale, AZ, Anita Y. Woudenberg, James Bopp, Jr., Josiah Simpson Neeley, Bopp Coleson & Bostrom, Terre Haute, IN, for Plaintiff.

Charles Arnold Grube, Office of the Attorney General, Phoenix, AZ, for Defendants.

ORDER

FREDERICK J. MARTONE, District Judge.

The court has before it plaintiff Randolph Wolfson's motion for summary judgment (doc. 69), defendant

Chief Counsel of the State Bar of Arizona's ("Bar Counsel") response (doc. 84), defendant Arizona Commission on Judicial Conduct's (the "Commission Members") response (doc. 86), and Wolfson's reply (doc. 92). We also have before us the Commission Members' motion for summary judgment (doc. 71), Bar Counsel's motion for summary judgment (doc. 75), plaintiffs' combined response to these motions (doc. 79), the Commission Member's reply (doc. 91), and Bar Counsel's reply (doc. 89). Finally, we have a motion for summary judgment by defendant Disciplinary Commission (doc. 73). Plaintiff has since voluntarily dismissed all claims against the Arizona Disciplinary *927 Commission (doc. 88). Therefore, the Disciplinary Commission's motion for summary judgment is denied as moot (doc. 73).

I

Arizona's Constitution provides for the selection of some state court judges by popular election. See Ariz. Constitution, Art. 6, § 12(A). In an attempt to address the challenges inherent in a system of an elected judiciary, Arizona has adopted a Code of Judicial Conduct (the "Code") that allows judicial candidates to speak to voters about their qualifications and viewpoints on issues, but prohibits them from, among other things, personally soliciting funds for their own campaigns or actively campaigning for others. The Code regulates the conduct of both judges and candidates for judicial office. The defendants contend that the Code attempts to address the areas of greatest possible harm to the appearance and reality of a fair and impartial judicial system.

Defendant Arizona Commission on Judicial

Conduct has authority under Article 6.1 of the Arizona Constitution to investigate complaints involving Code violations, bring formal charges against judges, impose informal sanctions, and make recommendations to the Arizona Supreme Court for formal sanctions. Lawyers who are judicial candidates are also required to comply with the Code of Judicial Conduct. *See* E.R. 8.2(b), Rule 42, Rules of the Ariz. Sup. Ct. Violations of E.R. 8.2(b) are investigated and prosecuted by defendant Bar Counsel.

II

In 2006, plaintiff Randolph Wolfson was a candidate for the office of Kingman Precinct Justice of the Peace in Mohave County, Arizona. Compl. ¶ 14. In 2008, Wolfson was a candidate for the office of Judge of the Superior Court of Arizona in Mohave County. Wolfson contends that during his 2006 and 2008 campaigns, he wanted to personally solicit campaign contributions at live appearances and speaking engagements, by making phone calls, and by signing his name to fund appeal letters, in order to support his own campaign. Compl. ¶ 33. He refrained from soliciting, however, because he believed that he was prohibited by Rule 4.1(A)(6), Rule 81, Rules of the Ariz. Sup. Ct.,[1] which provides that a judicial candidate may not "personally solicit or accept campaign contributions

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[1]After the complaint was filed in this case, the Arizona Supreme Court amended the Code of Judicial Conduct. The current version of the challenged Rules now appears under the Code's Canon 4, and is essentially the same as the former version. We refer to the current Code provisions only.

other than through a campaign committee."

Wolfson also wanted to endorse other candidates for political office and support their election campaigns, but he believed that he was prohibited from these political activities by Rules 4.1(A)(2), (3), (4), and (5), which prohibit a judge or judicial candidate from making speeches or soliciting funds on behalf of a political candidate or organization, or endorsing or otherwise actively participating in any political campaign other than his or her own.

Wolfson brought this action seeking a declaration that these provisions of the Arizona Code of Judicial Conduct violate his rights under the First Amendment, and a permanent injunction against their enforcement. By the time Wolfson's motion for summary judgment was fully briefed, Wolfson had lost the 2008 election. On January 15, 2009, because Wolfson had affirmatively stated that he had no intention of participating in the next election, we concluded that Wolfson's claims were *928 not capable of repetition and granted defendants' motion to dismiss on grounds of mootness (doc. 47).

Article III of the United States Constitution limits federal jurisdiction to "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 1253, 108 L. Ed. 2d 400 (1990). An exception to the actual case or controversy requirement permits prospective relief where the action is "capable of repetition, yet evading review." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462, 127 S. Ct. 2652, 2662, 168 L. Ed. 2d 329 (2007). "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally

only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675 (1983). Wolfson represented to the Ninth Circuit that while he had no intention of participating in the next election, he desired to participate in a "future judicial election." That court concluded that this was sufficient to satisfy the "capable of repetition" jurisdictional test. *Wolfson v. Brammer*, 616 F.3d 1045, 1055 (9th Cir. 2010). We now must consider the merits of Wolfson's First Amendment claims.

III

Canon 4 of the Code of Judicial Conduct broadly provides that "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." Wolfson challenges five provisions under Canon 4: (1) the prohibition on personal solicitation of campaign contributions by judicial candidates, Rule 4.1(A)(6) (the "solicitation clause"); (2) the prohibition on publicly endorsing or opposing other candidates for public office, Rule 4.1(A)(3) (the "endorsement clause"); (3) the prohibition on making speeches, Rule 4.1(A)(2); (4) soliciting funds, Rule 4.1(A) (4); or (5) actively participating in another's campaign, Rule 4.1(A)(5) (collectively, the "political activities clauses"). While each of these Rules applies equally to a sitting judge or a judicial candidate, Wolfson does not have standing to challenge the Rules as applied to sitting judges. "Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group." *Wolfson*, 616 F.3d

at 1064. Therefore, our review is limited to the constitutionality of the Rules as applied to judicial candidates who are not also sitting judges.

The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 1020, 103 L. Ed. 2d 271 (1989) (quotation omitted). Inherent within this restriction is the protection of "political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659 (1976). It is clear, however, that "(n)either the right to associate nor the right to participate in political activities is absolute." *U.S. Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 567, 93 S. Ct. 2880, 2891, 37 L. Ed. 2d 796 (1973). Although "[l]aws that burden political speech are subject to strict scrutiny," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, ——, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010), "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25, 96 S. Ct. at 638 (citations omitted). A judge, of course, holds a judicial office, not a *929 political office. Problems arise when a state chooses to fill judicial offices through the political process.

A. Constitutional Scrutiny

In *Republican Party of Minn. v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528, 2542, 153 L. Ed. 2d 694 (2002) (*White I*), the Supreme Court struck down a

Minnesota canon of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues. Without discussion, presumably because the parties agreed, the Court applied the strict scrutiny test to determine the constitutionality of the restriction. *Id.* at 774, 122 S. Ct. at 2534; *see also Carey v. Wolnitzek*, 614 F.3d 189, 199 (6th Cir. 2010) (applying strict scrutiny to solicitation clause); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (same); *Republican Party of Minn. v. White*, 416 F.3d 738, 775 (8th Cir. 2005) (*White II*) (applying strict scrutiny to solicitation and political activities clauses).

Nevertheless, the Commission Members suggest that an intermediate level of scrutiny is appropriate to assess the Code's restrictions on direct solicitation, political activities, and endorsements. In *Siefert v. Alexander*, 608 F.3d 974, 983–88 (7th Cir. 2010), *cert. denied*, —— U.S. ——, 131 S. Ct. 2872, 179 L. Ed. 2d 1203 (2011), the court held that restrictions on endorsements and partisan speeches should be measured by a "balancing test" that weighs the State's interest in limiting speech against a judge's interest in speaking. Under the balancing test, narrow tailoring is not required. "The fit between state interest and regulation need not be so exact." *Id.* at 985. Instead, the public employee's right to speak as a citizen is weighed against the government's interests as an employer in ensuring an efficient and impartial judiciary.

The balancing test applied in Siefert derives from the line of Supreme Court cases upholding the limited power of governments to restrict their employees'

political speech in order to promote the efficiency and integrity of government services. *See, e.g., Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (balancing interests of school district against teacher's First Amendment rights); *Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (upholding Hatch Act restrictions on political activities of federal employees); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (balancing the government's interest in running an effective workplace against employees' free speech rights); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (holding that the government can restrict a public official's speech if it is necessary to the effective delivery of public services). In adopting the *Pickering* line of cases, which specifically targeted political activity by government workers, *Siefert*'s holding arose from an incumbent judge's political speech. *Siefert*, 608 F.3d at 987. Two months later in *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), cert. denied, —— U.S. ——, 131 S. Ct. 2872, 179 L. Ed. 2d 1187 (2011), the Seventh Circuit appears to have extended the application of the balancing test to restrictions on political speech of judicial candidates.

We agree with the Seventh Circuit. Candidates for judicial office run against sitting judges. Fundamental fairness requires that they abide by the same rules. Candidates for judicial office must behave like the judges they hope to become. While core speech, as in *White I*, warrants the application of strict scrutiny, behavior short of true speech does not. An intermediate level of scrutiny strikes an appropriate balance between the weaker First Amendment rights at stake and the *930 stronger State interests in regulating the

way it chooses its judges.

The parties agree that preserving the appearance and reality of a non-corrupt, and impartial judiciary is a compelling state interest. Litigants have a due process right to a trial before a judge who has no personal or pecuniary interest in the outcome of the case or bias for or against a party. We apply the Siefert/Bauer balancing test to weigh the State's compelling interests against the competing interests of a candidate for judicial office.

B. Solicitation Clause

Arizona's Code of Judicial Conduct restricts candidates for judicial office from personally soliciting contributions, either for their own campaign or the campaigns of others. Rule 4.1(A)(6) prohibits a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4."

Campaigning for elected office necessarily involves the expenditure of funds, which in turn requires fundraising. *See White I*, 536 U.S. at 780, 122 S. Ct. at 2542 ("Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns . . . the cost of campaigning requires judicial candidates to engage in fundraising.") (O'Connor, J., concurring). In choosing to select judges by popular election, Arizona has itself created the dilemma it now seeks to avoid—the state's ability to provide neutral judges free of partisan or pecuniary influence. *See id.* 536 U.S. at 788, 122 S. Ct. at 2528 (O'Connor, J., concurring) (stating that "the very practice of electing judges undermines [an] interest" in an actual and perceived impartial judiciary). If the State chooses to

elect its judges, it cannot deprive the candidates of an effective opportunity to present themselves to the electorate. At the same time, the State's decision to select its judges by popular election does not eliminate the State's compelling interest in preserving the real and perceived integrity of an unbiased judiciary.

The State argues that the solicitation clause is designed to serve its compelling interest in preserving an impartial judiciary by preventing undue influence over judges by those who give them money. Personal solicitations create the risk that judges' decisions in cases will be affected by campaign contributions. Restrictions on personal solicitations are meant to preserve both the appearance and reality of judicial impartiality. Any candidate for judicial office who would ask the lawyers who would appear before that person for money does not know what it means to be a judge.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009), the Court held that a restriction on a judicial candidate's ability to solicit funds for his own campaign is one of many "safeguards against judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." *Id.* at 2266–67 (internal quotations omitted). The Court held that due process required the recusal of a West Virginia Supreme Court justice in a case involving a mining company because the CEO of the company had contributed in excess of three million dollars to the judge's campaign. *Id.* at 2257. When a dispute involving the mining company came before the court, the judge refused to recuse himself and ultimately joined the majority in ruling in favor of the mining

company. The Court held that by refusing to disqualify himself, the judge had unconstitutionally deprived the parties of a fair hearing. The Court recognized that "there is a serious risk of actual bias" when a judge presides over cases involving persons who had a substantial *931 role in the judge's election campaign. *Id.* at 2263–64.

We agree that Arizona has a compelling interest in regulating campaign solicitations by a judicial candidate in order to ensure the actual and perceived independence, impartiality, and fairness of its judiciary, free from political influence and pressure. Rule 4.1(A)(6) prohibits any form of personal solicitation of campaign funds except through a campaign committee. We recognize the risk of bias arising from in-person solicitations. Successful judicial candidates may appear beholden to their campaign contributors, particularly if the contributor is a lawyer or litigant appearing before the judge. Public confidence in the independence and impartiality of the judiciary is eroded if judges or candidates are perceived to be subject to political influence.

Like face-to-face solicitations, methods of indirect solicitations, such as mass mailings signed by the candidate, or presentations to a large audience create the same risk of coercion and bias. By requiring the use of a campaign committee the State has struck a reasonable balance between the need of the candidate for funds and the need of the State for a judiciary not beholden to the lawyers who practice in its courts and their clients who become parties to litigation.

We conclude that Arizona Code of Judicial Conduct, Rule 4.1(A)(6), as applied to judicial

candidates who are not sitting judges strikes a constitutional balance between the candidates' need for funds and the State's interest in judges beholden to the law and not to those who finance their campaigns.

C. Political Activities Clauses

Wolfson also expressed a desire to participate in other candidate's campaigns through endorsements, speeches, and solicitations on their behalf while he is a candidate for judicial office. He argues that the political activities clauses burden political expression because they impair a candidate's ability to advocate the election of other candidates, and to associate with like-minded candidates. He wishes to identify with the political views of candidates for non-judicial office with the hope it would rub off on his own campaign for judicial office.

Arizona's Code of Judicial Conduct limits a judge or judicial candidate's campaign-related activity to that necessary to advance his own campaign, but restricts him from participating in the campaigns of others. Specifically, the Code provides that a judge or judicial candidate shall not (1) make speeches on behalf of a political organization or another candidate for public office, (2) publicly endorse or oppose another candidate for public office, (3) solicit funds for or pay an assessment to a political organization or candidate, or (4) actively take part in any political campaign other than his or her own. Arizona Code of Judicial Conduct, Rules 4.1(A)(2), (A)(3), (A)(4), and (A)(5).

We conclude that the State has a compelling interest in restricting endorsements and political activities in order to prevent judges from misusing the prestige of their office to further political aspirations of

parties or candidates. The State also has a compelling interest in limiting a judge's or judicial candidate's participation in politics in order to avoid the appearance and reality of a biased, partisan judiciary. Preventing actual bias preserves litigants' due process rights. Preventing perceived bias preserves public confidence in a judiciary that is guided by the rule of law, not partisan politics. *White I*, 536 U.S. at 775, 122 S. Ct. at 2535.

Endorsements, making speeches, and soliciting funds on behalf of other candidates is not the same core political speech at issue in *White I*. White I authorized a *932 candidate for judicial office to speak freely in support of his own campaign by announcing his views on disputed legal and political subjects. *Id.* at 788, 122 S. Ct. at 2542. But publicly endorsing or speaking on behalf of other candidates is not the same as expressing one's own political views or qualifications for office. Instead, endorsements, speeches, and solicitations are made to advance other candidates' political aspirations, or to garner votes by way of political coattails. Judges and judicial candidates who publicly endorse, speak on behalf, or otherwise actively participate in the campaign of another candidate undermine the appearance of impartiality and impair the public's confidence in the judiciary.

While this case does not present the question whether the State may restrict a sitting judge's political activities, there is little doubt that a sitting judge's partisan political activities impairs the public's perception of an impartial judiciary and thus the government's ability to promote the fair and efficient administration of justice. Therefore, we recognize the continued validity of the various regulations in both

state and federal codes of judicial conduct that prohibit sitting judges from endorsing political candidates, participating in political fundraising, making speeches on behalf of candidates, or serving in leadership roles in political organizations. *See White I*, 536 U.S. at 796, 122 S. Ct. at 2546 (Kennedy, J., concurring) (noting that the Court did not consider "[w]hether the rationale of *Pickering* and *Connick* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice"). The *Pickering* line of cases remains relevant to restrictions on the speech of sitting judges. *See Siefert*, 608 F.3d at 983.

We reject the suggestion that judicial candidates ought to enjoy greater freedom to engage in partisan politics than sitting judges. An asymmetrical electoral process for judges is unworkable. Fundamental fairness requires a level playing field among judicial contenders. Candidates for judicial office must abide by the same rules imposed upon the judges they hope to become.

Applying the *Siefert/Bauer* balancing test, we conclude that the State's compelling interest in protecting the due process rights of litigants and ensuring the real and perceived impartiality of the judiciary outweighs the candidate's interest in participating in the political campaigns of other candidates. Therefore, we conclude that the restrictions set forth in Arizona Code of Judicial Conduct, Rules 4.1(A)(2), (A)(3), (A)(4), and A(5) are constitutional.

IV

IT IS ORDERED DENYING Wolfson's motion for summary judgment (doc. 69).

IT IS ORDERED GRANTING the Commission Members' motion for summary judgment (doc. 71).

IT IS ORDERED GRANTING Bar Counsel's motion for summary judgment (doc. 75).

IT IS ORDERED DENYING the Disciplinary Commission's motion for summary judgment as moot (doc. 73).

Statutes[2]

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Terminology

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character.

[2]Arizona's complete Code of Judicial Conduct is available at http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf.

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Rule 1.2

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Comment

1. Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

2. A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the code.

3. Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in

the judiciary. Because it is not practicable to list all such conduct, the rule is necessarily cast in general terms.

4. Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

5. Actual improprieties include violations of law, court rules, or provisions of this code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. An appearance of impropriety does not exist merely because a judge has previously rendered a decision on a similar issue, has a general opinion about

a legal matter that relates to the case before him or her, or may have personal views that are not in harmony with the views or objectives of either party. A judge's personal and family circumstances are generally not appropriate considerations on which to presume an appearance of impropriety.

6. A judge should initiate and participate in activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this code.

Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Code of Judicial Conduct, Rule 4.1

(A) A judge or a judicial candidate shall not do any of the following:

. . . .

(2) make speeches on behalf of a political organization or another candidate for public office;

(3) publicly endorse or oppose another candidate for any public office;

(4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law. See, e.g., A.R.S. § 16-905.

(5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;

. . . .

Comment

. . . .

Participation in Political Activities

3. Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations. Examples of such leadership roles include precinct committeemen and delegates or alternates to political conventions. Such positions would be inconsistent with an independent and impartial judiciary.

4. Paragraphs (A)(2) and (A)(3) prohibit judges

and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. Paragraph (A)(3) does not prohibit a judge or judicial candidate from making recommendations in complying with Rule 1.3 and the related comments. These rules do not prohibit candidates from campaigning on their own behalf or opposing candidates for the same judicial office for which they are running.

5. Paragraph (A)(3) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

6. A candidate does not publicly endorse another candidate for public office by having that candidate's

name on the same ticket.

7. Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take and should urge members of their families to take reasonable steps to avoid any implication that the judge or judicial candidate endorses any family member's candidacy or other political activity.

8. Judges and judicial candidates retain the right to participate in the political process as voters in all

elections. For purposes of this canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate and is not prohibited by paragraphs (A)(2) or (A)(3).

. . . .