No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE, *Petitioner,*
v.
FLORIDA STATE BAR, *Respondent.*

On Writ of Certiorari to the Supreme Court of Florida

Brief of Amici Randolph Wolfson, Marcus Carey, Gregory Wersal; Judges David Certo, John Siefert, Eric Yost; and the James Madison Center for Free Speech; Supporting Petitioner

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Question Presented

1. Whether Florida's personal solicitation clause violates the First Amendment.

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Statement of Interest[1]

Amici are Mr. Randolph Wolfson, Mr. Marcus Carey, Mr. Gregory Wersal, the Honorable David Certo, the Honorable John Siefert, and the Honorable Erik Yost.

Mr. Wolfson is an Arizona attorney that has run for Justice of the Peace (2006) and Superior Court Judge (2008) in Mohave County, Arizona. He successfully challenged that state's endorsement and personal solicitation clauses, *Wolfson v. Concannon,* 750 F.3d 1145 (9th Cir. 2014), but that decision has been vacated pending en banc review. *Wolfson v. Concannon*, 768 F.3d 999 (9th Cir. 2014). That review is stayed pending this Court's decision in this case.

Mr. Carey is a Kentucky attorney who ran twice for judgeship: first, for Kentucky Supreme Court, second, for trial court. He successfully challenged Kentucky's personal solicitation clause. *Carey v. Wolnitzek,* 614 F.3d 189 (6th Cir. 2010).

Mr. Wersal is a Minnesota attorney who has run several judicial campaigns for that state's Supreme Court. He successfully challenged Minnesota's announce clause in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and its party affiliation

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[1]No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of Amici's intent to file this brief pursuant to Rule 37(a) and have consented to its filing.

clause and prior personal solicitation clause in *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), but was unsuccessful in his challenge to Minnesota's revised personal solicitation clause and its endorsement clause. *Wersal v. Sexton,* 674 F.3d 1010 (8th Cir. 2012) (en banc).

Judge Certo serves as a Marion County Superior Court judge in Indianapolis, Indiana. He unsuccessfully challenged numerous judicial candidate speech regulations, including Indiana's personal solicitation clause. *Bauer v. Shepard,* 620 F.3d 704 (7th Cir. 2010).

Judge Siefert currently serves as a Milwaukee County Circuit Court judge in Wisconsin. He unsuccessfully challenged Wisconsin's personal solicitation clause and endorsement clause. *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).

Judge Yost currently serves as a district court judge in Sedgwick County, Kansas. He successfully challenged Kansas' personal solicitation clause. *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379, at *11 (D. Kansas 2008).

Also an amicus is the James Madison Center for Free Speech ("Madison Center"). The Madison Center is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including the challenges to the Bipartisan Campaign Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*

II"). The mission of the Madison Center is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." *New York Times v. Sullivan,* 376 U.S. 254, 275 (1964). The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation.

Summary of Argument

This case turns on the level of scrutiny applicable to the personal solicitation clause and the nature of and its tailoring to the state's compelling interest.

Like the announce clause in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the personal solicitation clause regulates core political speech, so it too is subject to strict scrutiny, regardless of whether it applies to judge nor non-judge candidates. Accordingly, the clause must be narrowly tailored to serve a compelling state interest.

The state's only compelling interest is that of impartiality and its appearance. This Court in *White* defined impartiality as preventing bias for or against a party—that is, ensuring due process is afforded to litigants. Impartiality defined as openmindedness is not a compelling interest because its threshold is too

low to be regulable and because openmindedness is not always desirable. Any judicial campaign speech regulation that seeks to prevent the appearance of bias for or against a party must be tailored to prevent actual partiality or run the risk of undermining due process by masking actual partiality for the sake of appearances.

The government cannot justify judicial campaign speech regulations as efforts to protect judicial independence and public confidence. Such an interest is already served through the judicial system itself, which directs judges to follow existing law, allows them to make new law, and ensures these principles are adhered to through judicial elections.

Nor can the government justify judicial campaign speech regulations by asserting a generalized interest in preventing the appearance of impropriety. No longer tied to due process, such an interest turns simply on abstract public perceptions rather than a legitimate, empirical threats to justice. First Amendment rights cannot be subverted simply to accommodate the ever-changing views of the public.

Last, the government's interest in preventing coercion is already served through statutes that prohibit all public officials from engaging in such conduct. Judicial campaign regulations seeking to do the same are unnecessary.

With a recognized government interest in preventing impartiality, the burden still remains on the government to demonstrate that judicial speech regulations like the personal solicitation clause are narrowly tailored. Simply asking for funds, whether by

letter or in person, cannot, without more, implicate partiality.

This is because the source of potential bias is in knowing the source and amount of contributions, not in the "ask." If the laws governing these sources of bias are inadequate, the solution is not to implement another prophylactic layer of regulation. Instead, contribution limitations and source disclosures should be revisited.

Certain solicitations do implicate impartiality concerns. Solicitations from the bench or anywhere else in a building that houses a judge's chambers creates a strong threat to impartiality or its appearance. So do solicitations of—and indeed, receiving money from—litigants and attorneys with cases pending before judges. Regulations tailored to these concerns would be constitutional. But in those rare circumstances where other threats to impartiality exist, recusal is the best, least restrictive means for addressing those concerns.

Argument

Soliciting contributions is an essential part of any election campaign. As observed in *Republican Party of Minnesota v. White* 536 U.S. 765 (2002), "[u]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising." *Id.* at 789 (O'Connor, J. concurring). This essential campaign function is also core political speech. So regulations affecting it are prohibited unless narrowly tailored to serve a compelling state interest.

I. Strict Scrutiny Applies.

A. The Personal Solicitation Clause Regulates Core Political Speech.

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).[2] In *White,* 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 to it, recognizing that the clause "both 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.[3]

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[2]Indeed, this Court has consistently held that content-based speech regulations—whether political or not—are subject to strict scrutiny. *See, e.g., United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813 (2000); *Rosenberger v. Rector,* 515 U.S. 819, 828-29 (1995).

[3]That differences exist between judicial and legislative office does not mean such speech is entitled to less constitutional protection during election campaigns. Instead, such differences, insofar as they are relevant, are accounted for in the interests this Court recognizes as compelling. In *White*, this Court held that since due process concerns are uniquely applicable in the judicial speech context, a distinctly judicial compelling interest in preserving impartiality exists. *White,* 536 U.S. at 775-76. So it afforded the government an opportunity to specifically demonstrate that the law serves and is narrowly tailored to that interest. *Id.*

The personal solicitation clause, which prohibits judicial candidates from "personally solicit[ing] campaign funds, or solicit[ing] attorneys for publicly stated support," Fla. Canon Jud. Conduct 7C(1), is likewise tied to the content of speech. For example, candidates may not ask for support in some ways (campaign funds) but may in others (a vote, yard signs). *See Carey v. Wolnitzek,* 614 F.3d 189, 199 (6th Cir. 2010). So the clause should be subject to strict scrutiny review.[4]

That personal solicitations can result in a contribution does not change this analysis. In *Buckley,* this Court held that contribution limits are subject to less rigorous scrutiny than spending restrictions. 424 U.S. at 25. Contributions can be limited, provided they are not too low, *Randall v. Sorrell,* 548 U.S. 230, 232 (2006), and are reasonably and narrowly tailored to serve a sufficiently important interest. *McCutcheon v. FEC,* 134 S.Ct. 1434, 1456-57 (2014). However, the personal solicitation clause limits speech, not contributions, based on the topic and the speaker. *Compare* Fla. Canon Jud. Conduct 7C(1) *with* Fla. Stat. 106.08(1)(a) (imposing $3,000 contribution limits on state supreme court candidates and $1,000 contribution limits for all

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at 774-75.

[4]Every Circuit to address the constitutionality of speech bans in judicial canons or rules, with the lone exception of the Seventh, agrees. *See Wersal v. Sexton,* 674 F.3d 1010 (8th Cir. 2012) (en banc); *Carey*, 614 F.3d at 199; *Republican Party of Minnesota v. White,* 416 F.3d 738, 775 (8th Cir. 2005) ("*White II*"); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002); *Stretton v. Disciplinary Board of Pennsylvania*, 944 F.2d 137, 141 (3rd Cir. 1991).

other judicial offices). Strict scrutiny review is the proper standard.

B. Strict Scrutiny Applies Regardless of The Speaker.

The Seventh Circuit has subjected regulations of judges' campaign speech to lesser scrutiny review. *See Siefert v. Alexander,* 608 F.3d 974, 984 (7th Cir. 2010) (applying a balancing test); *Bauer v. Shepard,* 620 F.3d 704, 713 (7th Cir. 2010) (same); *see also Wolfson v. Concannon*, 750 F.3d 1145, 1161 (9th Cir. 2014) (Berzon, J., concurring) (vacated for en banc review) (limiting its strict scrutiny analysis to only nonjudge judicial candidates). This is improper.

This Court established a balancing test to review government employee speech regulations, reasoning that, when public employees are engaged in their official duties, they are not acting as citizens and so their speech is not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Instead, their speech rights are balanced against the state's interest in performing its important governmental function. *Id.* at 420. Thus the district attorney in *Garcetti* who, during the exercise of his duties, wrote a disposition memo advising his superior on a course of action could legitimately be disciplined for the content of the memo.

However, the this Court has also held that the state cannot force an employee to relinquish her constitutional rights as a citizen in order to secure public employment. *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). For example, teachers cannot be dismissed because of speech they engaged in outside of

their employment, absent a showing of defamation or other constitutionally-recognized exception. *Id.* at 574.

Indeed, the *Letter Carriers* decision, which addressed the Hatch Act's political speech restriction on government employees, was directed toward "protect[ing] employees' rights, notably their right to free expression," *United States v. National Treasury Employees Union,* 513 U.S. 454, 471 (1976), by preventing ranking officials from making "advancement in the Government service . . . depend on political performance." *CSC v. Letter Carriers,* 413 U.S. 548, 566 (1973); *see also Elrod v. Burns,* 427 U.S. 437, 366-67 (1976).

None of these cases stand for the proposition that elected officials' speech, including judicial candidates' speech, can likewise be restricted. It is one thing to regulate the speech of unelected public employees who only answer to the government as their employer; it is quite another to regulate the campaign speech of public officials, who are required to stand for election and who are beholden to the public at large.

Indeed, the fundamental purpose of the First Amendment's speech clause is to protect political speakers during campaigns: "'The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White*, 536 U.S. at 781 (*quoting Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 222-223 (1989)). So "'[i]f 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 (*quoting Renne v. Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). A regulation prohibiting a sitting judge that is required to run for office from asking for funds implicates the First Amendment with equal force as it would a non-judge judicial candidate asking for funds.

But even if the government employee cases were not exclusively directed at the peculiarities of unelected government employees and even if such cases applied more broadly to a state interest in preserving government function,[5] the personal solicitation clause presents another problem: It's not tailored with that distinction in mind, but applies to all judicial candidates, whether incumbent or challenger. At most, the balancing test could apply only to judges' speech, effectively establishing two speech standards, depending on the speaker. *See Wolfson,* 750 F.3d at 1161 (Berzon, J., concurring) (vacated for en banc review).

But such discriminatory speech standards contravene this Court's holding in *Davis v. FEC,* 554 U.S. 724

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[5]Such a broad interest is problematic, particularly because the *White* Court struck down the announce clause, which could arguably have been crafted to assist the government "perform its functions." Moreover, the recognized "narrow class of speech restrictions" listed in *Citizens United* relate to speaker-discrimination that the Supreme Court has allowed in the context of education, prisons, military, and government employment qualifications. 558 U.S. 310, 341 (2010). The election process is not one of these government functions. Indeed, this Court expressly observed that regulations of speech during the political process and in the context of political speech may *not* impose restrictions on disfavored speakers. *Id.*

(2008), which unequivocally denounced asymmetrical campaign restrictions among competing candidates. *Id.* at 743-44 ("the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."). A balancing test is thus not only inapplicable; it is unconstitutional. All judicial candidates' speech is equal under the First Amendment. Review of the constitutionality of its regulation should be as well. Strict scrutiny applies.

II. The Only Compelling Interest Is Preserving Impartiality or Its Appearance.

A. Impartiality Means Unbiased Toward A Party.

The *White* court recognized impartiality as a compelling interest. *White*, 536 U.S. at 776. In doing so, it considered three possible definitions of impartiality: impartiality as a lack of bias toward the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as open-mindedness. *Id.* at 775-80.The Court held that preventing bias for or against a party was compelling because due process requires trial before an unbiased judge. *Id.* at 776. *See Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). The Court discarded a definition of "lack of preconceptions" because having a judge with no preconceptions on any legal issue is neither possible nor desirable. *Id.* at 777. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias"). But it left open the possibility of openmindedness as a compelling interest. *White*,

536 U.S. at 778.

This last proposed definition of impartiality requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *Id.* at 778. Judicial openmindedness "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *Id.* (emphasis in original).

Openmindedness is not a meaningful threshold for regulating protected political speech. Preliminarily, the threshold for establishing openmindedness as set forth in *White* is so low that the circumstance is rare where the interest would be implicated. Contrary to the Arkansas Supreme Court's reasoning in *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 811 (2007), openmindedness does not preclude being predisposed toward an outcome, whether because the judge firmly believes it is the right one or because the party or party's counsel making the argument responded positively or negatively to a personal solicitation. A judge can be more inclined toward one outcome or skeptical of another for a host of reasons, but as long as she is willing to hear and consider the arguments offered—there is *some* chance of success—she will meet the *White* standard for openmindedness.

But more crucially, contexts exist in which openmindness is not desirable. It is not desirable for judges to entertain serious doubts as to whether conviction in a criminal case requires proof beyond a reasonable doubt, whether truth is a defense against a

claim for libel, or whether lower courts are bound to follow higher court precedent. At most, judges cannot be expected to do more than respectfully listen to parties arguments on these questions before ruling against them. *See* James Bopp, Jr. and Anita Y. Woudenberg, *An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves For Exercising Their Freedom to Speak,* 55 Drake. L. Rev. 723, 745-50 (2007). Bias toward parties is the sole impartiality interest of the government.

B. Preventing The Appearance of Bias Toward A Party Can Be Compelling.

The *White* decision found both impartiality and the appearance of impartiality to be compelling interests within the strict scrutiny analysis. *Id.* at 776, 778; *see Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 888 (2009). This "appearance of partiality" concern, however, must be demonstrably tied to actual impartiality concerns to be compelling.

Strict scrutiny requires evidence of a "direct casual link" between the interest and the crafting of the law, and that there be an actual "problem that needs solving." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). As was the case in *Caperton*, the prevention of bias—whether actual or apparent—must always be tied to the facts surrounding the conduct and proceedings in question. *See Caperton,* 556 U.S. at 886 (assessing "the contribution's relative size," "the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election" to conclude a substantial risk of bias was present). States adopting a judicial election system do so know-

ing that such a system necessitates that judicial candidates behave as any other candidate would in running a campaign. So activities like personally asking for funds, which are standard operating procedures for campaigns, cannot, without more, be regulated simply because bias appears to be occurring in the abstract.[6]

Blanket regulation of judicial campaign speech without such factual support also creates the very real risk that actual partiality will be masked in the name of appearances, an outcome contrary to the government's interest in ensuring due process for litigants. For example, most states prohibit judicial candidates from themselves soliciting money but allow a committee to be established to do it for them. *See* Florida Canon Jud. Cond. 7C(1); ABA Model Code Jud. Cond. 4.4. Nothing in the rules governing such committees prohibits them from discussing with the judicial candidate who was asked, who said "yes" or "no," and thanking them for their support. *See Carey,* 614 F.3d at 205. So the committee, while giving the appearance of impartiality because technically the judicial candidate is not herself asking for money, actual serves simply to mask any actual bias that might—though not

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[6]As with actual impartiality, the regulation of the "appearance of impartiality" must be limited to preventing "bias for or against parties." *See supra* Part II.A. Otherwise, its scope turns away from due process toward assessing how the public generally perceives a judge's biases based on her speech during her campaign and could justify proscriptions on speech already struck down in *White*. *See Wersal*, 674 F.3d at 1032 (Loken, J., concurring); *id.* at 1044 (Beam, J., dissenting).

presumptively—occur. Due process is not only not served by such illusions of impartiality, it is undermined. The appearance of impartiality can only be a compelling interest in factually justifiable circumstances that do not undermine actual bias concerns.

C. A Generalized Interest In Preventing The Appearance of Impropriety Is Not Compelling.

The Florida Supreme Court's decision reflects renewed efforts to find compelling interests beyond those considered in *White* to justify regulations like the personal solicitation clause. One such interest is the appearance of impropriety. *The Florida Bar v. Williams-Yulee,* 138 So.3d 379, 384 (Fla. 2014) ("*Yulee*"); *see also Wersal*, 674 F.3d at 1025. No longer concerned about party bias in a particular case, the interest becomes about a judge's duty to "'maintain the dignity of judicial offices at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.'" *Wersal*, 674 F.3d at 1023 (*quoting* 52 Minn. Stat. Ann., Code of Judicial Conduct, Preamble); *Yulee,* 138 So.3d at 384.

But with no identifiable judicial officer, no litigant or party, and no proceedings in particular, a "purported compelling interest based upon a public perception of bias is, at best, substantially underinclusive, contrafactual, generalized, speculative, presumptive, abstract and spun from the thinnest of constitutional gossamer." *Wersal*, 674 F.3d at 1048 (Beam, J., dissenting). Indeed, such analysis turns the *White* decision on its head.

White, at its most fundamental level, is a case

about reconciling Fourteenth Amendment due process rights on the one hand with First Amendment rights on the other. To addresses these interests within the strict scrutiny context, the *White* court recognized "bias for or against a party in a proceeding," as a compelling interest—certainly the Fourteenth Amendment's due process protections ought to serve as a compelling source of justification for a law. But it also required that interest be served in as narrow a way as possible—competing First Amendment rights necessitated it be so.

An "appearance of impropriety" interest releases the legal analysis from its due process moorings. It makes the interest a broadly public affair, governed by abstract notions of what the public might think about a judge or the judiciary in general without regard to whether the bias amounts to a credible threat to actual justice in an ongoing proceeding. And it relieves the state of its obligation to offer evidence to support its bias concerns. *See supra* Part II.B. It is not a compelling interest warranting subversion of First Amendment rights.

D. Judicial Independence And Public Confidence Are Not Compelling Interests For Regulating Campaign Speech.

The Eighth Circuit en banc decision also posits a separate and distinct compelling interest in "judicial independence." *Wersal*, 674F.3d at 1033 (Loken, J., concurring). "Although the phrase is hard to define, the term 'judicial independence' embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or

the latest opinion poll." Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes*, Ohio St. L. J. 3, 3 (2003). State supreme courts, including Florida, have asserted a similar interest in ensuring "public trust and confidence in the integrity of the judicial system." *Yulee*, at 384 (citing *Simes*, 247 S.W.3d at 881; *In re Dunleavy,* 838 A.2d 338, 351 (Me.2003); *In re Fadeley,* 802 P.2d 31, 41 (Ore. 1990)). These are necessary components of the American judicial system. But the system itself, not judicial speech bans, ensures these interests are served.

Judges have a dual role. First, they make law. *See White*, 536 U.S. at 784; *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (discussing judges as policymakers); *see also* Benjamin Cardozo, *The Nature of the Judicial Process* 113-15 (1921). In creating the common law and policy, judges are legitimately influenced by their own views on policy in making that law. *See White,* 536 U.S. at 777-78 (discussing as appropriate that judges have preconceptions of what the law ought to be and how it works). Because of this legitimate role, it is also legitimate for the people to elect judges who reflect their values to such policy-making positions.

Second, judges are obligated to apply the facts and the law to the case before them. *White*, 536 U.S. at 799 (Breyer, J. dissenting). Judges must be independent of outside influences to allow them to honor this obligation. When they do not honor this obligation and issue rulings despite the facts and the law, it is then that judicial independence is threatened because in that context, they do not deserve the freedom such independence provides.

Because judges are expected to be judicially inde-

pendent, the voters must be sure that elected judges will honor the parameters that justify that independence. Broadly allowing the political speech freedoms the First Amendment envisions—including soliciting support through funding—helps ensure that. Indeed, "an enforced silence . . . would probably engender resentment, suspicion, and contempt [for the judiciary] much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Judicial elections are the means by which the people seek to ensure that judges stay within their proper bounds and to ensure that judges develop the common law in a manner consistent with the values of the people. To regulate judicial campaign speech to preserve judicial independence is antithetical to the very purpose of having judicial elections in the first place. Judicial independence and preserving the public's confidence in that judiciary are not compelling justifications for regulating judicial campaign speech.

E. Preventing Coercion Is Not A Compelling Interest.

The Florida Supreme Court suggests a coercion component to the government's appearance of impropriety concerns. *Yulee*, 138 So.3d at 384-85. It looks for support to the Arkansas Supreme Court, which asserts without evidence that "[a]llowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court . . . inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes,* 247 S.W.3d at 882. *See also Stretton,* 944 F.2d 137, 146 (3rd Cir. 1991)("we cannot say that the state may not draw a line at the

point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate."). The government certainly has a compelling interest in preventing actual coercion. But "[i]t is somewhat peculiar to say that *asking a question* is an evil requiring government intervention, particularly in the context of a campaign that requires such questions to be asked." *Siefert v. Alexander*, 597 F. Supp. 2d 860, 887 (W.D. Wis. 2009), *aff'd in part, rev'd in part*, 608 F.3d 974 (7th Cir. 2010) (emphasis in original). And in any event, other statutes address the problem in all campaign contexts. *See, e.g.,* Fla. Stat. § 112.313(2) ("No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer, employee, local government attorney, or candidate would be influenced thereby."); Fla. Stat. § 104.31 (prohibiting state officers and employees from "(a) Us[ing] his or her official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof" or "(b) Directly or indirectly coerc[ing] or attempt[ing] to coerce, command, or advise any other officer or employee to pay, lend, or contribute any part of his or her salary, or any money, or anything else of value to any party, committee, organization, agency, or person for political purposes.").

Moreover, there is nothing unique to a committee solicitation that avoids coercion in a way personal

solicitation does not:

> It may well be that a solicitee will perceive a solicitation to contribute to a judge's campaign to be a demand for a quid pro quo, especially where the solicitee has a case pending before the judge. However, that perception will not be appreciably diminished where the solicitation is made by the judge's agent instead of the judge.

Carey v. Wolnitzek, No. 3:06-cv-36, 2008 WL 4602786, at *16 (E.D. Ky. Oct. 15, 2008) *aff'd in part, vacated in part*, 614 F.3d 189 (6th Cir. 2010) (*citing* Sara Mathias, Am. Judicature Soc'y, *Electing Justice: A Handbook of Judicial Election Reforms* 47, 54 (1990), which described an "incident in which trial judge's campaign committee called President of Florida Bar Association one day before he was scheduled to appear before judge, thanking him for his endorsement but noting that no check was enclosed with letter.").

Preventing coercion is not a compelling justification for prophylaxis-on-prophylaxis judicial campaign speech bans like the personal solicitation clause.

III. Narrow Tailoring Is Required.

The American judicial system has traditionally granted judges a presumption of impartiality, which can be overcome only by objective evidence of actual bias. *See Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("[W]e accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disre-

gard extraneous matters is one of the requisites of judicial office.") (internal citations and quotations omitted); *see also Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) ("We expect–even demand–that judges rise above their potential biasing influences, and in most cases we presume judges do.") (citation omitted). So it is only proper that the government bears the burden of demonstrating narrow tailoring. *White*, 536 U.S. at 774-75.

A. Most Personal Solicitation Contexts Do Not Implicate Impartiality Concerns.

The personal solicitation clause bans *all* personal solicitations.[7] So although Mr. Wolfson wants to personally solicit campaign contributions at live appearances and speaking engagements, to make phone calls, and to sign his name to fund appeal letters in future campaigns, he is unable to do so. *Wolfson v. Brammer*, 616 F.3d 1045, 1052 (9th Cir. 2010). When Judge Certo wanted to personally solicit funds for his campaign from family members, former out-of-state roommates and classmates—none of whom would affect his ability to be impartial any more than he was already affected—he was unable to do so. *Bauer v. Shepard,* 634 F. Supp.2d 914, 923 (N.D. Ind. 2009). When Judge Siefert wanted to make personal phone calls asking for funds, to make personal invitations to

[7]That a judge can form a committee does not negate this fact. Just as PACs formed by corporations are separate speakers and so have little relevance to regulations that impact a corporation's ability to itself speak, *see Citizens United v. FEC,* 558 U.S. 310, 337 (2010), so too do judicial committees formed by a judicial candidate.

potential donors to his campaign's fundraising events, and to sign letters seeking contributions to his upcoming 2011 election campaign, he was unable to do so. *Siefert v. Alexander*, 608 F.3d 974, 977 (7th Cir. 2010). And when Mr. Wersal wanted to personally solicit funds for his campaign from non-attorneys by going door-to-door and by making personal phone calls asking for financial support, he could not do so.[8] *Wersal v. Sexton,* 674 F.3d 1010, 1017 (8th Cir. 2012) (en banc). Yet without more to rest on factually, these circumstances do not implicate bias or appearance of bias concerns.

This is because the source of potential bias stems not from asking for funds but from the receipt of funds and knowledge of their source. The only way "mass mailings," for example, "raise[ ] an appearance of impropriety and call [ ] into question, in the public's mind, the judge's impartiality," *Yulee*, 138 So.3d at 385, is if a judge is presumed or is required to be monitoring how each and every mailer is responded to and decides to reward or punish those responding (if they ever even appear in court) according to that response (and the size of that response).

In Florida, the receipt of funds is governed by contribution limits. *See* Fla. Stat. 106.08(1)(a). And candidate monitoring of contributors and their contri-

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[8]Judge Yost and Mr. Carey successfully challenged Kansas' and Kentucky's personal solicitation clauses, respectively, and so are able to personal solicit for their campaigns. *See Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379, at *11 (D. Kansas 2008); *Carey v. Wolnitzek,* 614 F.3d 189, 207 (6th Cir. 2010).

butions is required. *See* Fla. Stat. § 16.07(5) (requiring both a candidate and her treasurer to certify the correctness of reports filed with the state and subjecting the knowing certification of false, incorrect, or incomplete information to a criminal misdemeanor charge); Fla. Stat. § 106.07(4)(a)(1) (requiring contribution reports to include the full name, address, occupation of contributors along with the full amount and date of contribution). This is true in other states as well. *See, e.g.,* Ariz. Stat. § 16-913(I) (requiring all candidates, including judicial candidates, to either themselves or their treasurer to certify under penalty of perjury that reports filed with the state are true and complete); Ariz. Stat. § 16-904(E)(requiring a political committee to keep an account of "[t]he identification of any individual or political committee that makes any contribution together with the date and amount of each contribution and the date of deposit into a designated account.").

It is these provisions, not a personal solicitation ban, that properly targets actual bias sources, and so if these are inadequate, they should be revisited. The solution is not to adopt a sweeping prophylaxis-on-prophylaxis regulation. As such a regulation, the personal solicitation clause is subject to especially rigorous scrutiny review. *See McCutcheon v FEC,* 134 S. Ct. 1434, 1458 (2014); *cf. FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 479 (2007) (discussing the Federal Election Commission's unconstitutional use of numerous regulations to get at the same corruption interest associated with political contributions). A complete ban on all personal solicitations inherently fails such scrutiny.

B. Narrow Circumstances for Prohibiting Personal Solicitation Exist.

1. Courthouse Solicitations Can Be Constitutionally Prohibited.

Soliciting contributions for a judicial candidate anywhere in a courthouse or building where a judge's chambers are located creates a legitimate appearance of bias. The odds of a party or a party's attorney being in the courthouse are substantial, making the threat to impartiality very real. This is true of any solicitations made by anyone of anyone, including by a committee member or of an attorney. And it is especially true of solicitations made by a judge from the bench of any courtroom.

This problem is not unique to the judiciary. Such an appearance of bias, whether for or against a litigant, a constituent, or an organization, can be created in *all* candidate contexts, not just judicial candidates. For this reason, federal law has properly made it "unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States." 18 U.S.C. § 607(a)(1). Notably, this "time, place, or manner" restriction, *see City of Ladue v. Gilleo,* 512 U.S. 43, 56 (1994), applies to *all* solicitations, whether by a candidate or her committee. And it applies to all *receipts* as well—the risk of creating bias is just as great if a litigant of their own volition hands a judge a check as if the judge herself had sought out that contribution. So it exhibits narrow tailoring to

avoid under-and overinclusiveness in a way that the personal solicitation clause does not.

2. Soliciting Participants in Pending Litigation Can Be Constitutionally Prohibited.

Soliciting litigants with cases pending before an incumbent judicial candidate, or those litigants' attorneys, also poses a very real bias problem. Such a bias is not limited to a courthouse but is implicated in *any* context.

The *White* court acknowledged this problem in its review of the announce clause. In assessing the scope of the announce clause, the majority noted that it "covers much more than *promising to decide an issue a particular way*," calling its constitutionality into question. *White*, 536 U.S. at 770 (emphasis added). And in contrast, Justice Ginsberg reasoned in her dissent that the announce clause was constitutional because it prohibited judicial candidates not from "generally stating her view on legal questions," but from "publicly making known how she would *decide* disputed issues." *White*, 536 U.S. at 809 (internal citations omitted) (emphasis in original). Both rationales suggest a compelling interest exists for limiting judicial speech surrounding pending disputes in court. *See Carey,* 614 F.3d at 200.

Many states are aware of this concern and so include in their codes of judicial conduct prohibitions on publicly commenting on pending cases notwithstanding the views a judge may have on those cases. *See, e.g.,* Fla. Code Jud. Conduct 3B(9) ("A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness

or make any nonpublic comment that might substantially interfere with a fair trial or hearing."). *See also* ABA Model Code Rule 2.10(A) (stating that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing").

A corollary concern exists in the context of personal solicitations. As Justice O'Connor observed in her concurrence in *White*, a large proportion of campaign funds often comes from those with pending cases, creating the very real threat of judicial bias or its appearance. *White*, 536 U.S. at 790. So while personal solicitations, like announcing one's views, cannot be broadly proscribed, compelling impartiality concerns justify prohibiting personal solicitations both by a judge or her committee of those involved in pending litigation, so long as it is coupled with a prohibition on the receipt of funds from those same potential donors. *See Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) ("Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support.").

C. Recusal Is The Better Alternative.

In all other cases aside from properly tailored prohibitions in the circumstances described above in Part B, the best, least restrictive means for ensuring due process and addressing impartiality concerns is recusal. As Part A shows, not every personal solicitation presumptively creates an partiality concern, *Caperton v. A.T. Massey Coal Co.,* 129 S.Ct. 2252, 2263 (2009), and so for those rare, factually unique cases

where it can legitimately be called into question, this Court has found recusal to adequately remedy those concerns. *See id.* (determining that recusal was the appropriate remedy to address partiality concerns that arose due to substantial campaign expenditures made to a West Virginia Supreme Court justice during his campaign). Recusal is an alternative that narrowly serves a state's impartiality interest without unnecessarily and excessively trampling upon First Amendment political speech.

Conclusion

Judicial campaign speech regulations must satisfy strict scrutiny. Because Florida's personal solicitation clause does not, it fails First Amendment review and is unconstitutional.

Respectfully submitted,

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