No. 13-1499

In the

SUPREME COURT OF THE UNITED STATES

LANELL WILLIAMS-YULEE,
PETITIONER,

v.

THE FLORIDA BAR,
RESPONDENT.

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF PETITIONER

Thomas E. Hogan
Baker Hostetler LLP
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
The Thomas Jefferson
Center for the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Pages

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

Speech in the context of electoral contests receives the greatest protection under the First Amendment. No restriction can stand unless it is narrowly tailored to serve a compelling state interest. Canon 7(C)(1) does not serve a compelling state interest because the state does not have a compelling interest in preventing the mere appearance of potential for bias as distinct from preventing a high probability of actual bias. Although this case presents a number of additional issues, *amicus curiae* believes it can best serve this Court by focusing solely on whether the government's alleged interest is sufficient to warrant restrictions on a category of speech for which First Amendment protections are at their "zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

[1] This *amicus curiae* brief is filed with the written consent of the parties. Neither party nor party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting this brief.

Recognizing a compelling interest in preventing the mere appearance of potential for bias as distinct from preventing a high probability of actual bias would be inconsistent with this Court's cases regarding core political speech in the context of campaigns. It also would be inconsistent with this Court's rejection of speculative interests as a basis for restricting core political speech. This Court has consistently demanded that a state's interest must be concrete and not speculative to warrant restrictions on core political speech.

Furthermore, the decision to select judges through popular electoral contest demonstrates that the state does not have a compelling interest in preventing the mere appearance of potential for bias because it has voluntarily chosen a process that necessarily entails voters aligning themselves with or against the judicial candidate and with judges and judicial candidates seeking public favor.

Finally, recognizing a compelling interest in preventing the mere appearance of judicial bias as distinct from preventing a high probability of actual bias would invite restrictions on judges' roles in the community.

ARGUMENT

I. An Interest in Preventing the Mere Appearance of Potential for Bias as Distinct From Preventing a High Probability of Actual Bias is Too Speculative to Warrant Restrictions on Core Political Speech

Recognizing a compelling interest in preventing the mere appearance of potential for bias in the absence of a high probability of actual bias would be inconsistent with this Court's cases regarding speech in the context of political campaigns. It would open the door to restrictions on core political speech based on the "general gratitude" candidates for elective office feel toward their supporters, which this Court has rejected as too speculative to warrant restrictions on speech. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

The principle that no restriction on speech may survive strict scrutiny unless the interest it serves is to prevent a concrete as opposed to speculative harm animates this Court's First Amendment jurisprudence in other areas as well. For example, in the defamation context, this Court has curtailed the recovery of presumed damages, holding that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Just as the substantial interest in the public figure defamation context is limited to preventing actual injury as opposed to presumed damages, so too is the substantial interest in the judicial campaign context limited to preventing a high probability of bias as opposed to the mere appearance of the potential for bias. In both contexts, the First Amendment requires us to "err on the side of protecting political speech rather than suppressing it." *McCutcheon*, 134 S. Ct. at 1451. Accordingly, laws restricting speech in the context of judicial elections should reach no farther than is necessary to prevent the high probability of actual bias. A law that serves

only the lesser interest in preventing the mere appearance of the potential for bias is too speculative to warrant curtailment of core political speech.

In the context of judicial elections, this Court has affirmed a litigant's due process right to a judge free from an intolerably high "probability of actual bias" resulting from an opposing party's substantial financial support of the judge's election campaign. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877–78, 884 (2009). However, preventing the mere appearance of the potential for bias is unnecessary to safeguard due process. *Id.* at 883. Indeed, if the contrary were true, judicial elections would be untenable because a litigant's due process rights would be violated whenever anyone known to have politically supported the judge's election campaign had any interest in the outcome of a case.

It bears noting that states may, without curtailing speech, still serve their lesser interest in preventing the mere appearance of the potential for bias by adopting "recusal standards more rigorous than due process requires, and censur[ing] judges who violate these standards." *Republican Party of Minnesota v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring); *see also Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (Reinhardt, J. concurring) ("[I]f [the state] wants to elect its judges, it cannot deprive its citizens of a full and robust election debate.").

II. A State's Decision to Select Its Judges Through Electoral Contests Demonstrates That it Does Not Have a Compelling Interest in Preventing the Mere Appearance of Potential for Bias

As Justice O'Connor observed, "[i]f 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." *White*, 536 U.S. at 792 (O'Connor, J., concurring); *see also Family Trust Found. of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (observing that "the very practice of electing judges undermines the state's interest in an actual and perceived impartial judiciary"). By forcing judges to run for their seats, the state requires candidates to cull favor, which gives rise to perceptions of bias. *See White*, 536 U.S. at 789 (O'Connor, J., concurring) ("Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."). At a minimum, this Court should cast a skeptical eye on a state's claim to a compelling interest in preventing the mere appearance of the potential for bias if the state itself has undermined the public's confidence in the impartiality of judges by choosing to select them through popular election.

III. Recognizing a Compelling Interest in Preventing the Mere Appearance of Potential for Bias Would Diminish Judges' Roles in the Community

This Court has recognized that judges, like other officials, play important roles in our society, which "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 781–82 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). Judges are increasingly giving talks, writing books, and educating on matters of public importance. Because any participation by judges in public life that deviates from a perfectly cloistered judiciary could affect the public's views on the impartiality of judges, recognizing a compelling state interest in preventing the mere appearance of the potential for bias would invite all manner of restrictions on speech in the public forum by judges and judicial candidates. Such state-directed disengagement from public discourse is antithetical to the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests this Court reject any contention that the state has a compelling interest in preventing the mere appearance of the potential for judicial bias sufficient to warrant restrictions on core political speech.

Respectfully submitted,

/s/ J. Joshua Wheeler

Thomas E. Hogan
Baker Hostetler LLP
Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
The Thomas Jefferson
Center for the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amicus Curiae*