No. 13-1499

In The Supreme Court of the United States

LANELL WILLIAMS-YULEE

Petitioner,

–v–

THE FLORIDA BAR,

Respondent.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF CAMERON A. BLAU, ESQ. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

In this *Amicus Brief*, Cameron Blau addresses whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. STRICT SCRUTINY APPLIES AND THE CANON IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST 3

II. THE CANON RESULTS IN A FRAUD BEING PERPETUATED ON THE PUBLIC 7

III. THE CANON DOES NOT FURTHER ANY DUE PROCESS INTEREST, BUT INSTEAD FRUSTRATES IT 12

IV. THE CANON IS FACIALLY INVALID 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) 10

Caperton v. *A.T. Massey Coal Co.*,
556 U.S. 868 (2009) 6, 12, 13

Carey v. Wolnitzek,
614 F.3d 189 (6th Cir. 2010) 4, 5, 7, 8

Citizens United v. FEC,
558 U.S. 310 (2010) 10

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 4

McCutcheon v. FEC,
134 S. Ct. 1434 (2014) 12

Mullane v. Central Hanover Trust Co.,
339 U.S. 306 (1950) 12

Republican Party of Minnesota v. White,
536 U.S. 765, 122 S. Ct. 2528 (2002) 2, 3, 9, 10

United States v. Alvarez,
132 S. Ct. 2537 (2012) 9

United States v. Playboy Entm't Grp., Inc.,
529 U.S. 803 (2000) 4

United States v. Stevens,
559 U.S. 460 (2010) 13, 14

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 13

TABLE OF AUTHORITIES—Continued

Page

Winter v. Wolnitzek,
2014 U.S. Dist. LEXIS 154287
(EDKY Oct. 29, 2014) 8, 11

Wolfson v. Concannon,
750 F.3d 1145 (9th Cir. 2014) 3, 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, First Amendment 1, 13

JUDICIAL RULES

Florida Code of Judicial Conduct,
Canon 7C(1) 6, 12, 13, 15

Kentucky Code of Judicial Conduct 7, 8

Kentucky Judicial Canon 5 ..... 1, 7, 8

OTHER AUTHORITIES

http://courts.ky.gov/commissionscommittees
/JEC/JEC_Opinions/JE_125.pdf (last
visited November 11, 2014) 7

http://election.dos.state.fl.us/campaign-finance/
contrib.asp#cand 5

http://www.kref.state.ky.us/krefsearch/ 5

James Madison to W. T. Barry, August 4,
1822, Writings 9:103-9 12

STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae Cameron Blau is a former candidate for District Judge for the November, 2014 election, and will be a candidate for District Judge in future elections, as well as an Intervening Plaintiff in the matter of *Winter, et. al. v. Wolnitzek, et. al.*, EDKY 2:14-cv-00119-ART-CJS, which involves challenges to various aspects of Kentucky's Judicial Canon 5, which governs political activities, including a prohibition upon personal solicitation.

Amicus Curiae seeks to engage in various activities that fall within the scope of the First Amendment, but is prohibited by certain Judicial Canons, in the course and scope of his campaigns, and has an interest aligned with many other potential and future judicial candidates. His interest in this matter includes both the narrow issue that certiorari was granted on—personal solicitation—and includes a much wider interest, since the decision in this matter could have a significant impact upon judicial candidates, judges, and the general public. *Amicus Curiae* adheres to the belief that a fully informed electorate is the best remedy and prevention to bad government, and that

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

obtaining a fully informed electorate is best achieved not through more restrictions on speech and activities such as fundraising that implicate speech, but rather through more speech, and less restrictions.

This Court, in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002), first entered the fray of speech in judicial elections, and invalidated the so called "announce clause," determining that it was not narrowly tailored to advance a compelling state interest—namely the avoidance of bias against parties. Since *White*, the American Bar Association has failed to substantially revise their model canons, and, furthermore, certain state supreme courts have promulgated a series of rules that inhibit or restrict various aspects of speech in judicial campaigns. This has included limitations on fundraising, variations of the "announce clause" invalidated in *White*, participation in political parties, restrictions on disclosure of a candidate's political party affiliation and that of her opponent, prohibitions on the time such fundraising can occur, and, as is present in this matter, prohibitions on personal solicitation.

SUMMARY OF THE ARGUMENT

Strict scrutiny applies. Thus, if a law does too little, or too much, to meet compelling state interests, it cannot stand. The canon at issue in this case, similar to canons that restrict party identification by candidates, limitations on speech of candidates,

endorsements by candidates, and other provisions, are both overbroad and under-inclusive. As with any campaign related speech restriction, the prohibition on a judge's personal solicitation of campaign donors, as is the case with other canons, causes the general public to achieve a less than accurate picture of the candidate they are voting for. Furthermore, the canon is facially unconstitutional.

ARGUMENT

I. STRICT SCRUTINY APPLIES AND THE CANON IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST

"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." *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014), *Rehearing, en banc, granted by Wolfson v. Concannon*, 2014 U.S. App. LEXIS 18602 (9th Cir. Sept. 26, 2014). "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." *Id.*

To begin with, the solicitation ban—like all of the political activity prohibitions found within many states' judicial canons, is subject to strict scrutiny review. *Republican Party of Minn. v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002). Thus, the canon in question must be "(1) narrowly

tailored, to serve (2) a compelling state interest." *Id.* at 775. The canon does not prohibit any communication to the public, would-be supporters, or even litigants from the judge or judicial candidate. Rather, it prohibits only a specific kind of communication—a solicitation for a donation of money.[2] As this Court held in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), there is a content-based restriction, subject to strict scrutiny because "[p]laintiffs want to speak to [particular groups], and whether they may do so . . . depends on what they say." The same is true here: a judge can ask for help on the campaign, for instance, help with door-to-door canvassing, but cannot ask for a donation. The canon "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (internal quotation marks omitted). Strict scrutiny applies.

States have a recognized compelling interest in preventing bias against parties, which includes the prevention of so-called "*quid pro quo*" bias, in appearance and fact. *Carey v. Wolnitzek*, 614 F.3d 189, 198-99 (6th Cir. 2010).

Nevertheless, the existence of a compelling interest is not the end of the analysis. The canon

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[2] The Florida ban goes further than many states, and also prohibits the judge or judicial candidate from personally soliciting attorneys for statements of support. But it does not prevent attorneys from announcing their support, and it does not prevent the judge's campaign committee from soliciting that same support. The analysis is thus largely the same as the solicitation for fundraising.

must be narrowly tailored to meet that interest. Thus, if the "law does too much, or does too little, to advance the government's objectives, it will fail." *Carey*, 614 F.3d 189, 201. This canon does both.

Here, the canon at issue prevents a judge from personally soliciting for certain narrow things: monetary donations (and statements of support from attorneys). But it does not prevent the judge's campaign committee from doing so, nor does it prevent the judge's family and close friends from doing so. It also does not restrict the judge from receiving, or even litigants who are presently appearing before the court from offering to make a donation to a judge's campaign committee. It does not restrict the judge or judicial candidate from learning who donated—and who did not. And it does not restrict the judge from saying "thank you" for those same donations. *Carey*, 614 F.3d 189, 198-99. With the advent of online campaign finance reporting in most states, it does not keep the judge, or the public, from seeing who donated what to the judge.[3] The canon permits a person—including a litigant—to approach the judge and offer a donation—but does not permit the judge to ask for it.

The canon does not prevent the potential judicial candidate from calling family, friends, and others, and asking the question: "If I run, will you donate?" but after the candidate declares his or her candidacy that same call, email, or other action cannot be made.

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[3] http://election.dos.state.fl.us/campaign-finance/contrib.asp#cand
http://www.kref.state.ky.us/krefsearch/

Importantly, it does not restrict the judge from soliciting for non-monetary support. The judge or candidate can ask litigants in cases before the court, as well as the candidate's friends, family, or the general public for their votes, can ask these same persons to assist with the campaign by engaging in the time-honored tradition of door-to-door canvassing or campaigning, can ask these same persons to make phone calls for the judge, or even to record video endorsements of the judge or her campaign.[4] In fact, the canon allows the judge or candidate to engage in every other form of campaigning, and to solicit others to help the judge, except for fundraising. Thus, the canon is under-inclusive.

There is yet another, equally problematic aspect of this matter: there is nothing that keeps political parties from raising funds to aid the judge, or political action committees from making independent expenditures in favor of bringing about the judge's election. Are we to presume that, merely because the judge cannot herself ask for a donation, we eliminate the possibility or appearance of *quid pro quo* corruption? If a political action committee were to invest millions in a judicial race at the behest of a litigant, is bias or its appearance eliminated? This Court has answered the question: "No." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

The canon in question is also overbroad—"indirect methods of solicitation [such as speeches to

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[4] The Florida Canon does not permit the solicitation of attorneys to engage in these activities, but makes no restriction as to the general public.

large groups and signed mass mailings] present little or no risk of undue pressure or the appearance of a *quid pro quo*." *Carey*, 614 F.3d at 205.[5] It also prohibits the judge or judicial candidate from asking for donations from persons who, if they were to appear before the judge, would require recusal. The judge is not permitted to solicit his or her parents, siblings, aunts, uncles, or in-laws. Yet if any of these persons appeared before the court, the judge would undoubtedly recuse herself. How does a prohibition that extends to such close family members avoid the appearance of bias, or actual bias, which likely exists in any event?

II. THE CANON RESULTS IN A FRAUD BEING PERPETUATED ON THE PUBLIC

The canon is part of a larger problem: states insist on conducting judicial elections to achieve the imprimatur of the public's consent to the judge being a judge, but they then seek to take the "politics"—including fundraising, participation in parties,

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5 After the Sixth Circuit struck down Kentucky's Judicial Canons in *Carey*, 614 F.3d at 205, as overbroad as to personal solicitation and included emails, speeches to mass groups, and signed mass mailings, the Kentucky Supreme Court added an "in person" qualifier to the Canon, and re-promulgated it to read, in relevant part: "(2) A judge or candidate for judicial office shall not solicit campaign funds in person . . . ." Kentucky Judicial Canon 5(B)(2). The Kentucky Judicial Ethics Commission then thumbed their nose at the Sixth Circuit, and issued a determination that broadly interpreted "in person" to constitute any sort of communication from the judge directly on the subject, including by email or otherwise. http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_125.pdf (last visited November 11, 2014).

endorsements of, or by, other candidates, and a host of other activities—out of the political process. Furthermore, no sooner than a successful challenge is lodged in a piece of constitutional litigation, than the states attempt to end-run around such decisions. *See also, Winter v. Wolnitzek*, 2014 U.S. Dist. LEXIS 154287 (EDKY Oct. 29, 2014) ("Like a recurring bad dream, Kentucky's judicial canons keep getting struck down"). For instance, in *Carey*, 614 F.3d 189, the Sixth Circuit struck down certain provisions of Kentucky's Code of Judicial Conduct. Kentucky responded by re-promulgating various rules, with slight variations, suppressing speech and the political conduct they sought to avoid in the first place. *See* Kentucky Code of Judicial Conduct, Canon 5; *Winter*, 2014 U.S. Dist. LEXIS 154287. Can we not presume, on these facts, that there may be an intent to chill speech with an eye toward removing the politics from the political process?

But to what end? *Amicus Curiae* suggests that the end result is a hiding of truth from the general public—and the restriction of speech by the government that would otherwise reveal truth. If the judge wants to solicit, allow him or her, and let the public see it. The judge most certainly provides the fundraising committee a list of friends, colleagues, and would-be supporters, and the committee then goes about the duties of solicitation. Why? So the judge does not do it himself or herself. But is this not the epitome of hypocrisy, with one goal in mind—the judge gets to fundraise, but does not <u>appear</u> get his or her hands dirty in the process (and receive any public backlash from any fundraising activities himself or herself)?

We preserve the appearance of judges and judicial candidates not involving themselves with the unseemly task of fundraising, even though they are very much involved. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). The Ministry of Truth, of course, is all for the notion that the judge herself is not engaged in fundraising—no how—no way. When the public raises questions about the solicitation of donations from high profile corporate executives, on one potential end of the political spectrum, or solicitation of trial lawyers, on the other, the judge or candidate can simply respond that she did not do the soliciting. Her "committee" did it. Orwell would certainly appreciate this "newspeak."

"[T]here is an equally compelling state interest in the free flow of information during a political campaign." *Wolfson*, 750 F.3d 1145 at 1155. "Deciding the relevance of candidate speech is the right of the voters, not the State." *White I*, 536 U.S. at 794 (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." *Wolfson*, 750 F.3d 1145 at 1155. "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." *Id.*

As this Court noted in *Citizens United v. FEC*, 558 U.S. 310, 356 (2010), "[w]hen Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."). Fundamentally, the solicitation ban prevents the public from learning, and attributing, fundraising activities to the judge or judicial candidate, even though that same candidate is almost certainly engaged—behind the scenes—in the fundraising.

This case has wider implications than solicitation. It is, at its core, the natural follow-on to this Court's determination in *White*, 536 U.S. 765, 788. The analysis employed, and determination of this matter, has implications on other issues now pending in constitutional challenges to various states' judicial canons throughout the country. Fundamentally, those cases come down to one key question: do we continue to pretend that politics do not exist in judicial races, or do we acknowledge that politics do exist, and sweep the issue into the light of day?

As Justice Brandeis said: "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 223 (1999) (O'Connor, J. and Breyer, J. dissenting in part and concurring in part).

States cannot pretend that the judges are not involved in fundraising—or that if we keep the

candidates from doing the asking, that solves the underlying issue. We should not pretend that political parties do not work for, endorse, and get involved in judicial races; or that candidates for office—including judicial candidates—do not (though perhaps not publicly) endorse other candidates. Importantly, we should not adhere to the illusion that a candidate for office is not "political" as long as we do not allow that candidate to identify her political party and that of her opponent; or that we need to keep races "clean" and keep facts or opinions near the edges out of the races by banning "misleading" speech by judges (but allowing Political Action Committees and everyone else to make these same statements).

These questions arise in concrete challenges being raised across this nation to political speech regulations present in various states' judicial canons.[6] They have one over-arching policy—and constitutional—question in common: do we continue the mirage of a political-free state judiciary that is popularly elected, or acknowledge the fact that when we elect judges, we make them politicians, and, as such, operate in an environment of transparency and the disinfectant of sunlight?

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or

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6 *See also*, Intervening Complaint, *Winter, et.al. v. Wolnitzek, et. al.*, EDKY 2:14-cv-00119-ART-CJS; *Winter v. Wolnitzek*, 2014 U.S. Dist. LEXIS 154287 (Oct. 29, 2014).

the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." James Madison to W. T. Barry, August 4, 1822, Writings 9:103-9.

III. THE CANON DOES NOT FURTHER ANY DUE PROCESS INTEREST, BUT INSTEAD FRUSTRATES IT

The prevention of *quid pro quo* bias has been determined to be a compelling interest, which raises due process considerations. *Caperton*, 556 U.S. 868. The prohibition on personal solicitation of monetary contributions (but the allowance of solicitation of other non-monetary contributions and support), and the pushing of the task of fundraising to a committee does not further due process. If anything, a person seeking to engage in *quid pro quo* activities would be more likely to funnel significant funds to a political action committee, particularly one that is not subject to disclosure or other transparency requirements. The requirements "may in fact encourage the movement of money away from entities subject to disclosure." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014). This is because "[i]ndividuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors." *Id.*

If the judge—or her committee does the soliciting of those donations, those donations are subject to public disclosure requirements. This, in turn, allows parties to know whether or not a request for recusal may be appropriate. *Caperton*, 556 U.S. 868. Due process, of course, requires notice and an opportunity to be heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). There is no notice to a party or litigant if the campaign

assistance comes from a political action committee that makes only independent expenditures. But the judge, or judicial candidate would likely know who was behind it—if only after-the-fact.

How is it that the recusal issue came about in *Caperton*, 556 U.S. 868? It was only because the company CEO's support of Justice Benjamin was widely known. How much more transparent, and how much better of a basis for recusal would have been presented, in *Caperton*, had proof been given that Justice Benjamin had solicited the same CEO of the coal company for the donations and support at issue? That did not occur, because the West Virginia Canon prevented it. But that simply demonstrates the issues with this canon—it sweeps potential bases for recusal into the darkness, instead of the light of day. In the process, it raises threats to the due process rights of litigants who may not even know it.

Thus, the canons work to make opaque potential violations of due process rights.

IV. THE CANON IS FACIALLY INVALID

In the First Amendment context this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008); *United States v. Stevens*, 559 U.S. 460 (2010).

The under-inclusiveness and over-breadth of the canon, as discussed *infra*, creates just such a case.

Stevens, 559 U.S. 460. Here, *Amicus Curiae* suggests there is no legitimate sweep to the canon at issue. That said, while the canon is certainly invalid as-applied to websites, emails, and other forms of solicitation, it is equally invalid in other contexts, because it is under-inclusive and overbroad. It should be declared invalid on its face.

CONCLUSION

Amicus Curiae requests that this Court reverse the decision of the Florida Supreme Court, and declare Canon 7C(1) of the Florida Code of Judicial Conduct facially unconstitutional under the First Amendment of the Constitution.

Respectfully Submitted,

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