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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 *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Respondent. The ABA urges this Court to affirm the Florida Supreme Court and hold that Canon 7C(1) of the Florida Code of Judicial Conduct does not violate the First Amendment. Canon 7C(1) is narrowly tailored to promote the State's compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption by properly prohibiting judicial candidates from personally soliciting campaign contributions, while placing no limits on candidates' ability to communicate their views or qualifications for office, or to form campaign committees to solicit funds to support their election efforts.

The ABA is the largest voluntary professional membership organization in the United States and the nation's leading organization of legal professionals. Its nearly 400,000 members come from all fifty states, the District of Columbia, and the U.S. territories. Its voluntary membership includes attorneys in law firms, corporations, non-profit organizations, and local, state, and federal governments. Members also include judges,

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.

law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including those protected by the First Amendment. One of the ABA's continuing goals is to "[p]reserve the independence of the legal profession and the judiciary."[3] In service of that goal, the ABA formulated and, in 1924, adopted the first model rules for judges, the *Canons of Judicial Ethics*.[4]

The *Canons* were replaced in 1972 by the *Code of Judicial Conduct*. The *Code* included Canon 7B(2) which,

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2. Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

3. *ABA Mission and Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Dec. 19, 2014).

4. The *Canons* were drafted by the ABA's Committee on Judicial Ethics, which was comprised of judges, lawyers, and experts in judicial ethics, and chaired by Chief Justice William Howard Taft. Charles E. Geyh & W. William Hodes, Reporters' Notes to the Model Code of Judicial Conduct, p. vii (2009). The *Canons* became ABA policy only after adoption by vote of the ABA's House of Delegates ("HOD"). The HOD remains the ABA's policy-making body, and now has 560 delegates representing states and territories, state and local bar associations, affiliated organizations, and the ABA's sections, divisions, and its members, among others. *See ABA Leadership, House of Delegates - General Information*, http://www.abanet.org/leadership/delegates.html (last visited Dec. 19, 2014).

for the first time, specifically limited a judicial candidate's ability to personally solicit contributions. Canon 7B(2) stated in pertinent part:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.

Canon 7B(2) was based on the drafters' concern that "[t]he problem of funding a campaign for judicial office probably presents the greatest of all conflicts between political necessity and judicial impartiality."[5] That is, "[i]f outside financing is permitted, then as a practical matter there are only a few sources available; most citizens are not interested in helping finance a campaign for judicial office. Those sources are the coffers of a political organization, lawyers, and those persons who are, or are likely to be, involved in litigation."[6]

The 1972 Code was revised as the *Model Code of Judicial Conduct* in 1990, which in turn was updated in 2007. Both versions of the *Model Code* retained

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5. E. Wayne thode, Reporter's Notes to the Code of Judicial Conduct 98 (1973).

6. *Id.* at 99.

the solicitation ban.[7] The current ABA Model Code's solicitation ban recognizes the continuing reality that campaign fundraising can create the appearance or actuality of *quid pro quo* corruption. The ban thus focuses on removing the judicial candidate from the solicitation process by eliminating, *first*, the opportunity for the party solicited to feel obligated or "strong-armed" by the judicial candidate into making a contribution; and *second*, the potential for public perception that a party who has accepted the candidate's request has purchased the candidate's favor.[8]

Of the 39 states that use a form of elections for judicial selection, 30 have adopted a version of the ABA *Model Code's* solicitation ban.[9] This includes Florida's Canon 7C(1) at issue in this case. *The Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 385-86 (Fla. 2014); Pet. App. 11a.

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7. *See* ABA *Model Code of Judicial Conduct*, Canon 4.1, which states in pertinent part:

> "(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> * * *
>
> (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4.

8. Arthur Garwin et al., Annotated Model Code of Judicial Conduct 477 (2nd ed. 2011).

9. The Appendix provides a table identifying each state's judicial selection method and whether the state has adopted a solicitation ban.

These solicitation bans play a critical role in preserving the integrity of the judicial branch, as well as the public's perception of that integrity, which are state interests of the highest order. *Republican Party of Minn. v. White (White I)*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.").

For the following reasons, the ABA respectfully requests this Court affirm the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

The ABA's personal solicitation ban, Florida's Canon 7C(1), and the similar personal solicitation bans adopted by 29 other states, support the states' compelling interest in protecting the integrity of their judicial systems. These bans are narrowly tailored to add ress the potential for corruption and the appearance of corruption of state judges by removing them from the *quid* of a potential *quid pro quo,* without limiting their ability to communicate their views and qualifications for office, or to form campaign committees to solicit funds to support their election efforts.

The concerns that motivated the adoption of these personal solicitation bans, and that support their continued enforcement, are not inchoate. In *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 247 S.W.3d 876 (Ark. 2007), for example, the Arkansas Supreme Court

disciplined a sitting judge who had personally called two lawyers who appeared before him (one of whom had cases pending before the judge) and asked them to contribute to his reelection campaign. The Florida Supreme Court, in this case, disciplined a lawyer who sent a personally-signed mailing asking people to contribute to her judicial campaign. These two cases lie within the continuum of direct solicitation conduct by judicial candidates. Without the ban in place, these and other personal solicitations will not only be permissible, but will also become commonplace, compounding the current public perception that campaign contributions are affecting judicial decisions.

The First Amendment does not require this result. This Court previously upheld a similar solicitation ban in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 182 (2003), overruled in part on other grounds by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). In *McConnell,* this Court applied the "closely drawn" scrutiny it had applied to campaign contribution regulations in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). This Court should apply that reasoning here and hold that Canon 7C(1) does not violate the First Amendment.

Even if this Court were to apply strict scrutiny, however, the Florida Supreme Court should still be affirmed because Canon 7C(1) is narrowly tailored to the state's compelling interest in protecting its judiciary's integrity and does not prohibit judicial candidates from discussing their qualifications or announcing their views. It only removes candidates from the "ask."

Today, rules like Florida's Canon 7C(1) are even more important for the avoidance of the actuality and

appearance of *quid pro quo*. As the pressure to spend more on judicial campaigns increases and as interest groups become important funding sources, the bans protect against a public perception that judicial candidates are personally soliciting funds from contributors who may expect more in return than judicial competence.

States should be allowed to protect their judicial systems through campaign bans that limit only a judicial candidate's personal solicitation while serving an interest of the highest order: countering the public perception that money influences judicial decisions.

ARGUMENT

I. In Prohibiting Judicial Candidates From Personally Soliciting Campaign Contributions, Canon 7C(1) Is A Permissible Campaign Contribution Regulation That Does Not Violate The First Amendment.

a. Canon 7C(1) of the Florida Code of Judicial Conduct provides, in relevant part:

> 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.

Pet. App. 6-7a. *See also Williams-Yulee*, 138 So. 3d at 385.

By its plain language, Canon 7C(1) does not limit judicial candidates' political speech. They remain free to put forward their qualifications for office and their positions on issues, whether in person or by mail. Nor does it limit contributions that can be made to judicial candidates. It regulates only the solicitation of those contributions by requiring that such solicitations be made by campaign committees and not by the judicial candidates personally.

Because Canon 7C(1) does not restrict actual "speech," it should be analyzed under the "closely drawn" scrutiny standard, rather than under strict scrutiny. However, even under the strict scrutiny analysis that the Florida Supreme Court applied, Pet. App. 10a, *Williams-Yulee*, 138 So. 3d at 384, its narrow personal solicitation ban does not violate the First Amendment.

b. In *McConnell,* this Court upheld a similar solicitation ban that barred federal candidates and officeholders from soliciting soft money in connection with federal elections because "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all the same corruption concerns posed by contributions made directly to the candidate or officeholder." *McConnell*, 540 U.S. at 182. The *McConnell* Court thus applied the "closely drawn" scrutiny review that it had applied to campaign contribution regulations in *Buckley*. *Id.* at 141-42.

The *Buckley* Court had recognized that states have a compelling interest in preventing corruption or the appearance of corruption in elections through campaign finance regulation. The Court stated that "the appearance of corruption stemming from public awareness

of the opportunities for abuse inherent in a regime of large individual financial contributions" was "[o]f almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27. Concluding that contribution limits impose a lesser restraint on political speech, the *Buckley* Court applied the less rigorous "closely drawn" scrutiny. *Id.* at 25. Likewise, the *McConnell* Court concluded that strict scrutiny should not be applied to the soft-money solicitation ban.

Applying *Buckley*, the *McConnell* Court concluded that a legitimate interest "extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *McConnell*, 540 U.S. at 150, quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001). The danger that officeholders would decide issues based on the desires of contributors, and not on the merits or wishes of their constituents, was just as troubling as *quid pro quo* corruption. *McConnell*, 540 U.S. at 153. Because this danger "is neither easily detected nor practical to criminalize[, t]he best means of prevention is to identify and remove the temptation." *Id.* The *McConnell* Court also stated that "it is irrelevant that Congress chose … to regulate contributions on the demand rather than the supply side." *McConnell*, 540 U.S. at 138.

Republican Party of Minn. v. White (White I), 536 U.S. 765 (2002), is not to the contrary. In *White I*, this Court applied strict scrutiny to Minnesota's "announce clause," because that canon prohibited judicial candidates from expressing their views on legal and political issues that might come before the court. *White I*, 536 U.S. at

768. Further, that canon regulated judges "only when and because they are candidates." *Id*. at 796 (Kennedy, J., concurring). A candidate could "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." *Id*. at 779-80.

Unlike the announce clause at issue in *White I*, Canon 7C(1) does not burden speech that is "'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." *White I*, 536 U.S. at 774. Further, the limitation imposed by Canon 7C(1) applies any time the request is for a campaign contribution, but limits only requests made by the person who is or will be the judicial candidate. Canon 7C(1), therefore, should be considered under the "closely drawn" scrutiny review that this Court applied to campaign contribution regulations in *McConnell*.

c. Florida's personal solicitation ban survives *McConnell*'s "closely drawn" standard. The interest identified in *McConnell*—that officeholders would decide issues not on the merits or their constituents' wishes but, instead, because of donations made "at a candidate's or officeholder's behest," *id.* at 182—is even more compelling in the context of our judicial system, with its fundamental postulate that cases be decided on their merits, and not based on the identity of the litigants or their lawyers.

Canon 7C(1) is properly aimed at eliminating the pressures of appeasing donors from whom a judicial candidate has personally asked for a contribution. And the pressure to appease a donor may be present even when that donor is not a litigant before the judge, if

the judge's decision will nevertheless benefit or hinder the interests of the non-party donor. Barring judicial candidates from personally soliciting contributions avoids even the appearance of this kind of *quid pro quo* simply by removing judicial candidates from asking for the *quid*.

Successful judicial candidates sitting as judges may know that a lawyer or party appearing before them contributed to their campaigns, and may, of course, feel a debt of gratitude toward these contributors. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 882 (2009). But it is one thing to feel a debt of gratitude because of a contribution, and another thing for the judge to know that the contribution was made by that litigant because of the judge's personal request—a request that the litigant may well have felt she could not refuse. *See McConnell,* 540 U.S. at 303 (Kennedy, J., dissenting) ("one of the handful of Senators on whom the Government relies to make its case candidly admits the pressure of appeasing soft-money donors derives from the Members' solicitation of donors, not from the donors' otherwise giving to their party.").

The fact that Petitioner's solicitation was a mailing, rather than an in-person solicitation, does not change the analysis. Even a printed mass-mailed request for contributions coming from a judge or judicial candidate is likely to have a profound effect on a litigant or lawyer who appears before, or is interested in a matter before, the judge. A mass-solicitation letter may avoid the intimacy of a personal request, but applying the ban to all forms of personal solicitation is a "valid anticircumvention measure[,]" *McConnell*, 540 U.S. at 182, that avoids the need for fact-specific determinations as to whether any particular litigant or lawyer was or felt coerced by any

particular contribution request. It avoids the necessity of determining, for instance, whether a small-volume "mass mailing" is actually a personal letter directed to specific potential donors, or to people known to represent well-funded potential donors, who are included among the recipients. Additionally, the objective ban avoids the difficulty of distinguishing whether a campaign event should be considered a large mass event or, for example, one for several dozen carefully chosen potential donors.

The solicitation ban on judicial candidates was imposed by the Florida Supreme Court, the entity responsible for the ethical regulation of Florida's judicial branch. In *McConnell*, the Court stated that applying the "closely drawn" scrutiny standard to the solicitation ban at issue showed "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id*. at 137. The Florida Supreme Court, similarly, has weighed the competing constitutional interests, including the due process concerns, that are implicated by personal solicitations for contributions in Florida judicial campaigns. *See Caperton*, 556 U.S at 885 ("Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true[,]" quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). In fact, every state supreme court that has considered whether its solicitation ban violates the First Amendment has held it does not. *See Williams-Yulee*, 138 So. 3d at 384 (citing *Simes*, 247 S.W.3d at 881; *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *In re Fadeley*, 310 Or. 548, 802 P.2d 31, 41 (Or. 1990)).

This Court should apply *McConnell's* "closely drawn" scrutiny standard and conclude that Canon 7C(1)'s personal solicitation ban is closely drawn to avoid the appearance of *quid pro quo* corruption by removing the judicial candidate from the fundraising process. Balancing Florida's interest in judicial integrity against a judicial candidate's ability to personally solicit campaign contributions weighs heavily in the State's favor.

II. Even Under The Strict Scrutiny Standard, Canon 7C(1) Is The "Rare Case" That Survives.

Even under the rigorous strict scrutiny standard, Canon 7C(1)'s personal solicitation ban presents "the rare case in which…a law survives[.]" *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

To survive strict scrutiny, Canon 7C(1) must (1) be narrowly tailored to (2) serve a compelling state interest. *White I,* 536 U.S. at 774-75. Florida Canon 7C(1) satisfies both requirements. There is no question Florida has a compelling interest in a fair and impartial judiciary free from the appearance of corruption. Every court to apply strict scrutiny to a similar solicitation ban has found the states have a compelling interest in the appearance and actuality of an impartial judiciary. *See, e.g.*, *Wolfson v. Concannon*, 750 F.3d 1145, 1156 (9th Cir. 2014). And, as discussed above, Canon 7C(1) is narrowly tailored because it does not "unnecessarily circumscrib[e] protected expression." *White I*, 536 U.S. at 775 (quoting *Brown v. Hartlage,* 456 U.S. 45, 54 (1982)). It limits only a judicial candidate's ability to personally solicit campaign contributions.

The solicitation at issue in this case was a solicitation letter personally signed by Petitioner. This Court has upheld bans on solicitation letters for campaign contributions under *quid pro quo* concerns. *Fed. Election Comm'n v. Nat'l Right To Work Comm.*, 459 U.S. 197, 210 (1982). This Court has also recognized the states' interest in preventing the appearance of *quid pro quo* corruption. *Buckley*, 424 U.S. at 27; *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014); *Citizens United*, 558 U.S. at 359. *See also Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (contributions made at a judicial candidate's request carry greater potential for the appearance of *quid pro quo* than those made at a non-candidate's request).

Canon 7C(1)'s personal solicitation ban is neither overinclusive nor underinclusive. It removes judicial candidates from the appearance of *quid pro quo,* but does not limit a candidate's ability to communicate her views or qualifications. It does not prohibit a candidate from soliciting other forms of support, like asking for votes or putting up yard signs. Nor does it bar her from sending mailings under her signature, or from giving campaign speeches to a crowd or an intimate group; it only bars the judicial candidate from including a personal request for a contribution in her campaign communications.

Petitioner is incorrect that recusal offers a less restrictive alternative to the solicitation ban. Pet. Br. 23. In the first place, recusal of judges imposes serious costs on a state's judicial system when judges become unavailable to decide cases. Second, asking judges to recuse themselves places the parties and lawyers before them in an often-confrontative position before the judge. Third, recusal often requires that a judge subjectively

determine whether a litigant's contribution has or has not resulted in bias or the appearance of bias, which can be difficult despite a judge's most sincere efforts. "[J]udges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge in the context of specific cases, that despite their best efforts to preserve impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges."[10] *See also Caperton*, 556 U.S. at 883 ("[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules."). And, a judge's subjective conclusion as to whether the contribution resulted in actual bias or the appearance of bias does nothing to address the public perception created when a judge is asked to recuse because he personally solicited a litigant now before him for a campaign contribution. After-the-fact recusal is simply not a sufficient alternative to an objective solicitation ban.

Canon 7(1) addresses Florida's concern that personal solicitation by judicial candidates creates the perception of either actual or apparent *quid pro quo* corruption, but it does not limit the candidates' ability to communicate their views or qualifications for office, or to form campaign committees to solicit funds to support their election efforts. The rule is thus narrowly tailored to Florida's

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10. *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey*: Hearing before Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Charles G. Geyh, Assoc. Dean of Research, Professor of Law, Indiana Univ., Maurer Sch. of Law, Bloomington, IN), http://judiciary.house.gov/_files/hearings/printers/111th/111-118_53947.PDF (last visited Dec. 22, 2014).

compelling interest in a fair and impartial judiciary free from the appearance of corruption.[11]

III. The Cost of Judicial Elections Makes The Prohibition On Personal Solicitation By Judicial Candidates More Important Today.

In 1812, Georgia became the first state to provide for the election of judges. *White I*, 536 U.S. at 785. Today, although the forms of judicial elections vary, 39 states provide for the election of at least some of their judges. While judicial elections were once seen as sleepy affairs, they have attracted ever increasing amounts of money and attention in the past few decades, and the need for judges and judicial candidates to raise ever-increasing sums of money has had a corrosive effect on the public's perception of the integrity of our state judicial systems. "As interest-group spending rises, public confidence in the judiciary declines."[12]

11. In *White I*, this Court left open the question of whether states may "restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct" under the rationale of *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). *White I*, 536 U.S. at 796 (Kennedy, J., concurring). *See also Wolfson*, 750 F.3d at 1163 (Berzon, J., concurring) ("I suggest that the analogy to the *Pickering* line of cases has much to commend it."). The ABA asserts that, under *Pickering*, the solicitation ban should also be upheld.

12. Justice Sandra Day O'Connor (Ret.), Opinion, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Court*, Wall St. J., Nov. 15, 2007, at A25.

As revealed in a 2009 Gallup poll, 89 percent of voters believed that the influence of campaign contributions on a judge was a problem.[13] Equally troubling is a 2002 poll, in which 46 percent of state court judges polled believed campaign donations had at least "a little influence" on judicial decisions.[14]

And the effect campaign contributions have on the public's perception of judicial integrity and independence is a concern no longer limited to states that hold partisan, contested judicial elections, but extends to states that hold non-partisan, uncontested elections as well. For example, despite Iowa's adoption of the Missouri plan for merit selection of its supreme court justices—a system designed to "reduce[] threats to judicial impartiality," *White I*, 536 U.S. at 791 (O'Connor, J., concurring)—three Iowa supreme court justices were defeated in an uncontested retention election in 2010 after an out-of-state group mounted an anti-retention campaign that focused on the justices' votes in a single, unanimous opinion.[15]

If the solicitation ban is invalidated, judges facing retention or reelection, having the benefit of the Iowa example, may well begin to build their campaign coffers by personally asking for contributions from those likely to support a decision, perhaps as soon as the decision is rendered. Moreover, when faced with a controversial

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13. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA Today, Feb. 16, 2009.

14. Greenberg Quinland Rosner et al., Justice At Stake - State Judges Frequency Questionnaire, Q. 12 at 5 (2002).

15. Grant Schulte, *Iowans Dismiss Three Justices*, Des Moines Register, Nov. 3, 2010.

decision, judges may consider the potential level of campaign financial support—for or against them as candidates.

If this happens, judges may begin to be perceived as little different from their legislative and executive branch counterparts. But while legislators and executive branch officials should be expected to consider the views of their constituents when making policy decisions, "[j]udges are not political actors. They do not sit as representatives of particular persons, communities or parties; they serve no faction or constituency. '[I]t is the business of judges to be indifferent to popularity.'" *White I*, 536 U.S. at 806 (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991)). Furthermore, judicial races, unlike legislative and executive races, have due process implications. *See Caperton*, 556 U.S. 868.

As the pressure to spend more on judicial campaigns increases, rules like Florida's Canon 7C(1), which restrict a candidate's ability to personally ask for campaign contributions, become more important in the avoidance of the actuality and appearance of *quid pro quo*. The amount of money spent on judicial races more than doubled between the 1990s and the first decade of the 21st century.[16] And in the 2014 election cycle, spending on television advertising in state supreme court races increased by $2 million from 2010.[17] As discussed above, when adopting *Code of Judicial*

16. *Campaign Spending and the Courts*, Justice At Stake, http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/campaign-spending-and-the-courts/ (last visited Dec. 19, 2014).

17. Joseph Tanfani, *Judicial Elections Getting More Political with New Campaign Spending*, LA Times, Nov 23, 2014,

Conduct in 1972, the ABA concluded that most citizens were not interested in helping finance a campaign for judicial office, and that the sources for judicial campaign finances were "the coffers of a political organization, lawyers, and those persons who are, or are likely to be, involved in litigation."[18] Today, however, large out-of-state groups must be added as important sources, and without the personal solicitation ban, judicial candidates are likely to be faced with the decision of whether to personally solicit them for contributions, regardless of the effect on public perception.

Whether judicial elections are the best form of judicial selection is a topic that has been the subject of much debate, and the debate will no doubt continue after this case has been decided. "[T]he struggle to balance independence and accountability has played itself out over the course of more than two centuries [resulting in] distinct methods of selecting judges—each striking a balance in different ways."[19] But 39 states have chosen some form of elections to select at least some of their judges.[20] And those states have the right to make that choice, for it is "[t]hrough the

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http://www.latimes.com/nation/politics/la-na-judicial-elections-20141123-story.html#page=1 (last visited Dec. 19, 2014).

18. *See* discussion in Interest of the *Amicus Curiae* Section, supra at 5, quoting E. Wayne Thode, Reporter's Notes to the Code of Judicial Conduct 99 (1973).

19. Charles G. Geyh, *The Endless Judicial Selection Debate And Why It Matters For Judicial Independence*, 21 Geo. J. Legal Ethics 1259, 1261 (2008).

20. *See* Appendix, which provides a table identifying each state's judicial selection method and whether the state has adopted a solicitation ban.

structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The ABA does not, "even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor,'" *White I*, 536 U.S. at 796 (Kennedy, J., concurring) (quoting *Bridges v. Cal.*, 314 U.S. 252, 273 (1941)). Still, the fact remains that "[t]he power and the prerogative of a court to perform [its] function rest[s], in the end, upon the respect accorded to its judgments." *White I*, 536 U.S. at 793 (Kennedy, J., concurring); *see also Bauer v. Shepard*, 620 F.3d 704, 712 (7th Cir. 2010) ("The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and adverts vigilantism and civil strife.").

Florida's Canon 7C(1) and the similar personal solicitation bans adopted by 29 other states are consistent with the First Amendment in their limitation of only the personal solicitation of campaign funds by judicial candidates. The choice of these narrowly tailored vehicles to protect the integrity of their judicial branches by avoiding the appearance of corruption, therefore, should be left to the states to make. As this Court has stated, "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Gregory*, 501 U.S. at 457 (quoting *Tex. v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869)).

The personal solicitation ban embodied in Florida's Canon 7C(1) should be upheld.

CONCLUSION

For the reasons set out above, *amicus curiae* American Bar Association respectfully requests this Court affirm the judgment of the Florida Supreme Court.

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APPENDIX

APPENDIX — STATE VARIATIONS OF PROHIBITIONS OF PERSONAL SOLICITATION OF CAMPAIGN CONTRIBUTIONS

STATE VARIATIONS OF PROHIBITIONS OF PERSONAL SOLICITATION OF CAMPAIGN CONTRIBUTIONS

AL

Alabama elects its judges. Judges are discouraged, but not prohibited from soliciting campaign contributions for their election.

Canon 7(A)(1) reads:

It is desirable that a judge or a candidate for election to judicial office endeavor not to be involved in the internal workings of political organizations, engage in campaign activities in connection with a political candidate other than a candidate for a judicial office and not be involved in political fund solicitations other than for himself or herself. However, so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself or herself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his or her election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he or she at all times conduct himself or herself in a manner as to prevent any

political considerations, entanglements, or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

Canon 7(B)(4)(a) reads:

A candidate is strongly discouraged from personally soliciting campaign contributions. It is highly recommended that a candidate establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept campaign contributions and public support from lawyers.

AK

Alaska uses merit selection and retention elections to select their judges. The Alaska Judicial Council screens applicants and the governor appoints judges. Judges stand for retention election. Canon 5(C)(3) prohibits personal solicitation. It provides:

A judge who is a candidate for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy or personally solicit publicly stated support for his or her candidacy. However, if there is active opposition to the judge's candidacy, the judge's election committees may engage in media advertisements, brochures, mailings, candidate forums, and any other legal methods of pursuing the judge's election. Such committees

may solicit and accept reasonable campaign contributions, manage and expend these funds on behalf of the judge's election campaign and solicit and obtain public statements of support for the judge's candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.

AZ

The Arizona judiciary is composed of three courts of general jurisdiction--the supreme court, the court of appeals, and the superior court. Appellate judges and superior court judges in Maricopa and Pima Counties are chosen through merit selection. After an initial two-year term, judges must stand for retention. Superior court judges in smaller counties are chosen in nonpartisan elections.

Arizona Rule 4.1(A)(6) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

AR

Arkansas elects its judges in a non-partisan election.

Arkansas Code of Judicial Conduct, Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

CA

In California, the governor nominates supreme court judges and court of appeal judges who must then be confirmed by the commission on judicial appointments. Appellate judges must stand for retention. Superior court judges are chosen in nonpartisan elections.

Judges are not prohibited from personally soliciting campaign contributions for their elections. The Advisory Committee Commentary to Canon 5(A) of the Code of Conduct explains:

In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone, including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions.

CO

Colorado judges are appointed by the governor and stand for retention after serving two years. They are prohibited from personally soliciting campaign contributions by

Rule 4.1(A)(8) of the Colorado Code of Judicial Conduct. Additionally, Rule 4.3 provides:

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

* * * * *

(3) a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;

(4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses;

(5) the judge should not be advised of the source of funds raised by the committee or committees;

CT

Judges are appointed in Connecticut.

DE

Judges are appointed in Delaware.

DC

Judges are appointed in the District of Columbia.

FL

While appellate judges are appointed in Florida, trial judges are elected. Canon 7(C)(1) prohibits judges who stand for election from personally soliciting campaign funds.

GA

Georgia judges are elected in non-partisan elections. They may personally solicit campaign contributions and publicly stated support. However, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committee of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidates.

HI

Judges are appointed in Hawaii.

ID

Idaho judges are elected in non-partisan elections. They are prohibited from personally soliciting campaign contributions by Canon 5(C)(2).

Additionally, "a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign."

IL

Illinois elects its judges in partisan elections, while retention elections are non-partisan. Canon 67(B)(2) prohibits a judge from personally soliciting campaign contributions.

IN

In Indiana, appellate court judges are appointed by the governor and trial court judges are elected in partisan elections. Four counties in Indiana have opted to either non-partisan elections or merit selection to select judges of trial courts created by statute.

Indiana's Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

IA

Iowa judges are appointed by the governor and voters decide whether to retain them.

Rule 51:4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

KS

In Kansas, a nominating commission is used to appoint supreme court judges, appellate court judges are appointed by the governor, and trial court judges may be selected through the merit system or elected as decided by the district.

Judges may solicit campaign contributions per *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379 (D. Kan. Nov. 16, 2008), which struck down Kansas's prohibition on personally soliciting campaign contributions. These clauses were omitted when the code was amended in 2009.

KY

Kentucky elects its judges in non-partisan elections. In *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010), the U.S. Court of Appeals for the Sixth Circuit found Kentucky's solicitation clause and the party affiliation clause unconstitutional.

LA

Louisiana elects its judges and judges are prohibited from personally soliciting campaign contributions per Canon 7(A)(6). Comment [2] to Canon 7 explains, "A judge or judicial candidate is prohibited from personally soliciting or personally accepting campaign contributions, but is not prohibited from knowing the identities of his or her campaign contributors. A judge or judicial candidate's campaign committee, but not the judge or judicial

candidate, may send thank you notes to the judge or judicial candidate's campaign contributors."

ME

In Maine, judges are nominated by the governor and confirmed by the senate for both initial and re-appointment.

MD

In Maryland, the governor appoints and the senate confirms appellate judges. Appellate judges then run for retention. Trial court judges are elected in non-partisan elections. The Maryland Code of Judicial Conduct does not prohibit candidates from personally soliciting or accepting contributions.

MA

Massachusetts appoints its judges.

MI

Michigan elects its intermediate and trial court judges in non-partisan elections. Supreme court judges are elected in partisan elections. Judges are prohibited from personally soliciting campaign contributions in Canon 7(B)(2)(a).

MN

Minnesota elects its judges in non-partisan elections.

Until 2005, the Minnesota Code of Judicial Conduct prohibited judges from personally soliciting campaign contributions. That year and again in 2010, the U.S. Court of Appeals for the Eighth Circuit struck down Minnesota's canon because it's scope was not narrowly tailored. Petitioners sought to personally solicit large groups, send letter sent over the candidate's signature, and conduct door-to-door solicitation of non-lawyers.

Minnesota Code of Judicial Conduct provides in Rule 4.2(B) provides: A candidate for elective office may, unless prohibited by law:

* * * * *

(3)(a) make a general request for campaign contributions when speaking to an audience of 20 or more people;

(b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate;

Minnesota Rule 4.4(B)(3) provides: A judicial candidate subject to public election shall direct his or her campaign committee not to disclose to the candidate the identity of campaign contributors nor to disclose to the candidate the identity of those who were solicited for contribution and refused such solicitation. The candidate may be advised of aggregate contribution information in a manner that does not reveal the source(s) of the contributions.

MS

Mississippi elects its judges in non-partisan elections. Judges in Mississippi are prohibited from personally soliciting campaign contributions by Canon 5(C)(2).

MO

Missouri uses merit selection to appoint its judges. Judges stand for retention election and in some circumstances may personally solicit and accept campaign contributions.

Missouri Rule 2-4.2(B) explains: "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds in a courthouse or on courthouse grounds. Such candidate shall not solicit in person campaign funds from persons likely to appear before the judge. A candidate may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge."

Additionally, paragraph (C) of the same Rule notes: "(C) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Rule 2-4.2(B)."

MT

Montana elects its judges in non-partisan elections. The Montana Code of Judicial Conduct does not prohibit a judge or judicial candidate from personally soliciting campaign contributions.

NE

In Nebraska judges are appointed by the governor and stand for retention election.

Nebraska Rule 4.1(A)(8) is identical to ABA Model Rule 4.1(A)(8) prohibiting judges and candidates from personally soliciting or accepting campaign contributions.

NV

Judges are elected in Nevada in nonpartisan elections.

In Nevada, a judge who is opposed in an election may personally solicit and accept campaign contributions under Rule 4.2(B)(4), and unopposed candidate may not personally or through a campaign committee solicit or accept contributions.

NH

In New Hampshire, the executive council appoints judges based on nominations from the governor and selection commission.

NJ

In New Jersey, judges are selected by the governor and approved by the state senate. Reappointment is a similar process.

NM

In New Mexico, the governor appoints judges to fill judicial vacancies. These judges then stand for election, which are partisan. Judges are retained in retention elections.

In Rule 21-402(B) of the New Mexico Code, judges are prohibited from "campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety."

Rule 21-402(C) explains that the candidates may personally solicit contributions for their own campaign, but not for the campaign of others. Rule 21-402(E) prohibits judges from personally soliciting or accepting campaign contributions from lawyers or litigants with pending cases before the judge. A campaign committee may solicit lawyers with matters pending, but may not solicit litigants with matters pending.

Additionally, all lawyer and litigant contributions must be made to the campaign committee not the candidate.

The campaign committee may not disclose to the candidate the identity or source of campaign funds raised.

NY

The majority of judges serving New York state are elected in partisan elections. Trial court judges are selected by delegates to a party convention.

New York's Rule 100.5(A)(5) of the Rules Governing Judicial Conduct notes "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law."

NC

In North Carolina, judges are elected in publicly-funded, non-partisan elections. Canon 7(B)(4) provides that a judge or candidate may "personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds."

ND

Supreme and district court judges are elected in non-partisan races. Judges facing election are prohibited from personally soliciting and accepting campaign contributions. Rule 4.6 prohibits a judge from "directly

and personally solicit or accept campaign contributions or directly and personally solicit publicly stated support."

OH

Judicial candidates run in primary elections to secure a place on a non-partisan ballot in Ohio.

While the Ohio Code of Judicial Conduct does prohibit candidates and judges from personally soliciting campaign contributions in Rule 4.4(A), exceptions to this rule include:

(1) A judicial candidate may make a general request for campaign contributions when speaking to an audience of twenty or more individuals;

(2) A judicial candidate may sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate;

(3) A judicial candidate may make a general request for campaign contributions via an electronic communication that is in text format if contributions are directed to be sent to the campaign committee and not to the judicial candidate.

OK

District court judges are elected in Oklahoma and the governor appoints appellate court judges based on the

recommendation of the nominating commission. All stand for retention election.

Oklahoma's Rule 4.1(A)(8) prohibiting judges and judicial candidates from personally soliciting or accepting campaign contributions mirrors ABA Model Rule 4.1(A)(8).

OR

Oregon voters elected their judges in non-partisan elections. Candidates and judges are prohibited from personally soliciting or accepting campaign contributions by Rule 5.1(E) which reads: "Except as permitted by law, a judge or judicial candidate shall not personally solicit or accept campaign contributions other than through a lawfully established campaign committee except, so long as the procedures employed are not coercive, a judge or judicial candidate may personally solicit or accept campaign contributions from members of the judge's family and judges over whom the judge does not exercise supervisory or appellate authority."

PA

Judges are elected in partisan elections in Pennsylvania. Pursuant to new Rule 4.1(A)(7) of Pennsylvania's Code of Judicial Conduct, candidates and judges are prohibited from personally soliciting or accepting campaign contributions.

RI

In Rhode Island a nominating commission recommends judicial appointments to the governor. The governor's selection must be confirmed by the house and senate.

SC

In South Carolina, a judicial merit selection commission makes recommendations for appointment to the South Carolina legislature.

SD

The governor appoints appellate court judges in South Dakota; trial court judges are elected in non-partisan elections.

Canon 5(C)(2)(c) provides: "A judicial candidate subject to public election may personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority."

TN

Tennessee's hybrid system of judicial selection means that appellate court judges are appointed by the governor based on the recommendation of a nominating commission. Lower court judges are elected in partisan elections.

Tennessee's Code of Judicial Conduct, Rule 4.1(A)(8) prohibits a judge or candidate from personally soliciting or accepting campaign contributions.

TX

Texans elect their judiciary in partisan elections. Canon 4(D)(1) of Texas' Code of Judicial Conduct permits judges to solicit "funds for appropriate campaign or officeholder expenses as permitted by law."

UT

The governor in Utah recommends a candidate for judicial office based on the recommendation of a nominating commission. The governor's selection must be confirmed by the state senate. Appointed judges stand for retention.

Rule 4.2(B) of Utah's Code notes that a judge who is facing opposition in a retention election, the judge may campaign for office. A judge may not personally solicit or accept campaign contributions.

VT

In Vermont, the governor appoints judges based on the recommendation of a nominating commission. Judges must be retained by the general assembly. Probate and assistant judges are elected. They are prohibited from personally soliciting or accepting campaign contributions under Canon 5(C)(3).

VA

In Virginia, judges are elected by the Virginia legislature.

WA

In Washington, judges are elected in non-partisan elections. Washington Code of Judicial Conduct, Rule 4.1(A)(7) prohibits judges and candidate from personally soliciting or accepting campaign contributions "other than through a campaign committee authorized by Rule 4.4, except for members of the judge's family or individuals who have agreed to serve on the campaign committee authorized by Rule 4.4 and subject to the requirements for campaign committees in Rule 4.4(B)."

WV

Judges are elected in partisan races in West Virginia. Judges and candidates are prohibited from personally soliciting or accepting campaign contributions pursuant to Canon 5(C)(2).

WI

Wisconsin's voters select judges in non-partisan elections. Candidates and judges are prohibited from personally soliciting or accepting campaign contributions by Supreme Court Rule 60.06(4).

WY

In Wyoming, judges are appointed by the governor and, then, must be retained by the voters. Only if the judge faces active opposition in the retention race, may the judge campaign. The judge may not personally solicit or accept campaign contributions under Rule 4.2(B)(4).