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 FOR *AMICI CURIAE* SUBMITTED ON BEHALF OF RESPONDENT BY NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, AND JOHN SHATTUCK AS PAST LEADERS OF THE AMERICAN CIVIL LIBERTIES UNION

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## QUESTIONS PRESENTED

1. Whether the restrictive First Amendment rules enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) and its progeny limiting attempts to regulate the funding of electoral campaigns for legislative and executive office are fully applicable to electoral campaigns for judicial office?

2. Whether Florida's flat ban on the personal solicitation of campaign contributions from attorneys by candidates for judicial office violates the First Amendment?

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*Respondent.*

***On Petition for a Writ of Certiorari to the Supreme Court of Florida***

## INTEREST OF *AMICI CURIAE* AND STATEMENT OF POSITION[1]

*Amici curiae*, past leaders of the American Civil Liberties Union, have devoted much of their careers to the defense of the First Amendment and Equal Justice Under Law. Norman Dorsen is the Frederick I. and Grace A. Stokes Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program at NYU Law School. He served as ACLU General Counsel from 1969-1976, and as its President from 1976-1991. Aryeh Neier has recently retired as President of the Open Society

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Foundations. He served as ACLU Executive Director from 1970-1978. Burt Neuborne is the Inez Milholland Professor of Civil Liberties at NYU Law School. He was a member of the legal staff of the ACLU for eleven years, serving as National Legal Director from 1981-85, and as a member of the New York City Human Rights Commission from 1988-92. John Shattuck is President and Rector of Central European University in Budapest. He served as National Legislative Director of the ACLU from 1976-1984, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993-98, and as Ambassador to the Czech Republic from 1998-2000.

This case presents the Court with its first opportunity to consider the First Amendment ground rules governing efforts by the states to regulate the financing of judicial elections. *Amici* urge the Court to adopt a First Amendment paradigm governing the financing of judicial elections that reflects and reinforces the complex role of an American judge as both an impartial applier of existing law, and a creative force in the making of new law for the common good.

## SUMMARY OF ARGUMENT

The restrictive First Amendment rules enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and its progeny reflect the Court's understanding of the functioning of our rough and tumble representative democracy, where resources are often unequal, and elected representatives are expected to in favor their electoral supporters, including their financial supporters. It would, *amici* believe, be a

serious mistake for the Court to transpose the *Buckley* rules to the judicial election context without carefully considering whether their operation would jeopardize the principles of Equal Justice Under Law.

Most importantly, since behavior that would not corrupt the proper operation of the Court's vision of a "winner take most" representative democracy would unquestionably erode the principles of strict equality and unwavering impartiality that are the hallmarks of the American judicial process, *amici* urge the Court to assure that First Amendment constraints on regulation of the funding of judicial election campaigns do not jeopardize public confidence in the operation of the judicial process itself.

## STATEMENT OF THE CASE

Whether the rationale is a desire to: (1) safeguard attorneys from undue pressure to contribute to a judicial election campaign; (2) insulate judges against being tempted (either consciously or subconsciously) to favor generous attorney/donors; or (3) foster a public image of strict judicial impartiality, the vast bulk of the 39 states that have chosen to elect some or all of their judges have also elected to ban candidates for judicial office from soliciting campaign funds personally from attorneys.[2] Most states that elect judges, including Florida, ban judicial candidates from personally

[2] The two major exceptions are Texas and California, neither of which regulates the personal solicitation of campaign contributions from attorneys by candidates for judicial office.

soliciting campaign contributions from attorneys, even in the context of a mass mailing directed to the general public.[3] Instead, they permit judicial candidates to rely on authorized third-parties who are free to solicit campaign funds supporting the judicial candidate from the general public, including attorneys.

Petitioner, a candidate for judicial office in Florida, unwittingly violated Canon 7 (C) (1) by circulating a personally signed mass mailing soliciting campaign contributions from the general public, including attorneys. The Florida Supreme Court recognized that the text of Canon 7(C) (1) is ambiguous, and that petitioner had acted under a good faith, plausible mistake of law,[4] but, nevertheless, imposed a disciplinary sanction of public reprimand on her. Petitioner contests the

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[3] Canon 7 (C)(1) provides in relevant part:

"A candidate…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…."

According to petitioner, thirteen states exempt mass mailings to the general public (or speeches to large groups) from the personal attorney solicitation ban. Many of those states provide an exemption, however, only because Circuit courts have required them to do so. See *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir 2005) (en banc); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).

[4] The Florida Supreme Court found that petitioner believed in good faith that Canon 7(C) (1) did not apply until a declared opponent emerged. Pet. App. at 27a. Since the applicability of Canon 7 (C) (2), dealing with retention elections, turns on the existence of a declared opponent, petitioner's mistake of law was plausible.

disciplinary sanction, arguing that she was entitled under the First Amendment to solicit campaign contributions personally pursuant to a signed mass mailing directed to the general public, including attorneys.[5]

## ARGUMENT

## FIRST AMENDMENT RULES GOVERNING THE FUNDING OF JUDICIAL ELECTIONS SHOULD REFLECT AND REINFORCE THE UNIQUE NATURE OF THE AMERICAN JUDICIAL PROCESS

### INTRODUCTION

A decade ago, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court invalidated a state regulation banning candidates for judicial office from discussing controversial public issues. The *White* Court ruled that if a state chooses to elect its judges, it must, under the First Amendment,

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[5] Petitioner does not appear to have argued that her good faith, reasonable mistake of law should constitute a First Amendment-based defense. If, however, as the Court has recently held, police officers enjoy a good faith mistake of law defense in connection with the administration of the 4th Amendment (see *Heien v. North Carolina*, ___ U.S.___ (December 15, 2014)), speakers may well enjoy a similar defense as an extension of this Court's First Amendment *scienter* and void-for-vagueness jurisprudence. See *Elonis v. United States*, Docket No. 13-983 (awaiting decision); *Smith v. California*, 361 U.S. 147 (1959); *Smith v. Goguen*, 415 U. S. 566 (1974). Since the possible existence of a mistake of law defense has not been briefed or argued, the Court may wish to remand this case to the Supreme Court of Florida to permit re-consideration in light of *Heien* and *Elonis*.

permit free discussion of public issues relevant to the casting of an informed vote. 536 U.S. at 787-88. The Court's decision in *White* laid the First Amendment foundation for modern, issue-driven state judicial elections. The *White* Court had no occasion, however, to consider the constitutional ground rules governing how such judicial election campaigns are to be financed.

In beginning the process of mapping the relationship between the First Amendment and efforts to regulate the funding of judicial elections, *amici* urge the Court to assure that the constitutional ground rules governing the funding of judicial elections reflect and reinforce the unique nature of the American judicial process. American judges, no matter how they are selected, perform three crucial functions in administering Equal Justice Under Law. First, they preside over (and often carry out) fact-finding that shapes the narrative underlying a case or controversy. Second, they search for, identify, and apply pre-existing law (both textual and judge-made) to the facts of a case. Finally, unlike judges in many other countries dedicated to the rule of law, American judges routinely exercise power to make new law by altering the common law, overturning or reinterpreting past judicial precedent, and/or interpreting ambiguous statutory and constitutional text. The performance of each of the three judicial functions calls for a complex and varying mix of constrained and discretionary judicial behavior involving high levels of legal expertise, coupled with strict, unwavering impartiality and equal treatment.

Given the complexity and technical difficulty inherent in carrying out the multiple functions assigned to an American judge, it is very often impossible for litigants and the general public to assess either the quality or the impartiality of a judge's behavior. In the end, therefore, continued public confidence in judicial outcomes (especially unpopular judicial outcomes) is deeply dependent on continued public confidence in the integrity, fairness, and impartiality of the judicial process itself, including the manner in which judges are s/elected

### A. Highly Restrictive First Amendment Ground Rules Governing the Financing of Legislative and Executive Elections Are Poorly Suited to the Regulation of Judicial Elections

In the almost 40 years since this Court's foundational decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court has imposed highly restrictive First Amendment norms on efforts to regulate the financing of legislative and executive elections. Inevitably, the First Amendment norms enunciated by the Court have reflected the Justices' understanding of the proper operation of our rough and tumble representative democracy, a contested political process that expects and encourages the winners of partisan elections to forge closer bonds with their political supporters, including their financial supporters, than with their political opponents. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1461-62 (2014) (citing Edmund Burke); *Citizens United v. FEC*, 558 U.S. 310, 356-61 (2010). Much behavior that would be deemed appropriate (or, at least, inevitable) in the partisan political process

would, however, be utterly destructive of a fair and impartial judicial process. The *White* Court itself recognized that the nature of the judicial process might call for electoral regulations that differ from regulations governing partisan political elections. 536 U.S. at 770, 780, 783. For example, political candidates have a First Amendment right to make campaign promises. *Brown v. Hartlage*, 456 U.S. 45 (1982). But judicial candidates, while they are free to discuss public issues, are not free to promise voters that they will effectuate particular changes in public policy because keeping such a promise would compromise the reality and appearance of strict impartiality and an open-minded willingness to be persuaded.

Even more dramatically, judicial elections are not governed by the one-person one-vote principle because, unlike political figures, judges do not represent an electoral constituency. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973). American judges, even when they exercise the power to make new law, are expected to speak and act impartially on behalf of the entire community in a search for the common good. Unlike political figures, judges are not free, after their election, to form "the strictest union" with the voters who supported them. See 134 S. Ct. 1461 (quoting Edmund Burke).

It follows, therefore, that many First Amendment ground rules that are appropriate for a robust "winner take most" representative democracy would be deeply inappropriate, indeed destructive, in regulating the election of judges.

### B. The First Amendment Postulates Governing Efforts to Regulate the Financing of Legislative and Executive Elections Are Not Applicable to the Effort to Regulate the Financing of Judicial Elections at Issue in This case

Constitutionally-based limits on efforts to regulate the financing of legislative and executive elections rest on four First Amendment postulates enunciated in *Buckley*:

(1) the raising and spending of money in the context of an election is "pure speech" protected by First Amendment "strict scrutiny" (424 U.S. at 15-19);

(2) the government's interest in preserving political equality does not justify imposing limits on campaign spending (*Id* at 48-49, n. 55);

(3) the government's interest in preventing "corruption," conceived narrowly as extortion or *quid pro quo* bribery, justifies the imposition of reasonable limits on the size of campaign contributions to a particular candidate (*Id* at 25-29); and

(4) independent campaign expenditures, as opposed to campaign contributions, do not pose a risk of extortion or *quid pro quo* corruption (*Id* at 45).

None of the four postulates is applicable to the effort to regulate the funding of judicial elections at issue in this case.

### 1. The Personal Solicitation of Campaign Contributions From Attorneys by Candidates for Judicial Office is Far Closer to "Communicative Conduct" Than It Is to "Pure Speech"

*Buckley* held that the twin acts of raising and spending campaign money in connection with legislative elections must be treated as the legal equivalent of "pure speech," rather than as a form of "communicative conduct,"[6] forcing virtually all efforts to regulate the funding of legislative and/or executive election campaigns to run the gauntlet of First Amendment strict scrutiny. First Amendment strict scrutiny, in turn, requires the government to demonstrate a "compelling governmental interest" in regulating speech that cannot be advanced by "any less drastic means." *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).

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[6] The *Buckley* Court defended its equation of campaign money and speech by analogizing the relationship between the two to the link between gasoline and driving a car. In each setting, the amount of money or fuel determines how much speaking or driving can take place. Accordingly, reasoned the Court, raising and spending campaign funds must be treated as integral parts of the speech they enable. 424 U.S. at 19, n.18. With respect, however, a political campaign is not a simple drive in the country. It is a competitive race. And a race that depends on which driver has more fuel isn't worth watching. The current Court has, however, repeatedly equated campaign money and speech to the point where the linkage has become the cornerstone of the Court's campaign finance jurisprudence. With respect, *amici* agree with Justice Stevens that it is a cornerstone resting on intellectual sand.

Government efforts to regulate "communicative conduct," like burning a draft card or engaging in a protest march, are, on the other hand, tested under a less stringent First Amendment formula that asks whether the regulation is a narrowly tailored effort to deal with an important governmental interest that is unrelated to the viewpoint of the message. Eg,. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning draft card to express opposition to Vietnam War); *Heffron v. International Society for Krishna Consciousness* (*ISKON*), 452 U.S. 640 (1981) (upholding ban on leafleting and soliciting funds at crowded Minnesota State Fair, except from fixed booths); *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992); *Lee v. ISKON*, 505 U.S. 830 (1992) (upholding ban on solicitation of funds in airport; striking down ban on leafleting); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1994) (upholding ban on demonstrative sleeping by demonstrators in Lafayette Park). First Amendment strict scrutiny is usually lethal.[7] But, as *O'Brien*, *ISKON*, *CCNV* demonstrate, the government is more successful under intermediate First Amendment scrutiny precisely because the somewhat relaxed standard of review permits government a degree of prophylactic regulatory space.

Whatever the wisdom of treating the raising and spending of campaign money as "pure speech" in the context of a legislative election, however, the

[7] For a rare—perhaps unique—example of a government regulation of "pure" speech that survived strict scrutiny, see *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering within 100 feet of the polls).

personal solicitation of a campaign contribution from an attorney by a judicial candidate with the potential to affect the attorney's future professional life (and the lives of her clients) is much closer to "communicative conduct" than it is to "pure speech."[8] To the extent the distinction between pure speech and communicative conduct is anything more than conclusory, it attempts to capture the legal difference between an act of communication with no consequence other than the transmission of an idea (pure speech), and an act of communication that generates collateral, legitimately regulable by-products in addition to the communication of an idea (communicative conduct). For example, picketing, demonstrating, and burning draft cards each communicates a message. But each act of communication also generates by-products like obstruction of the public way and non-possession of a

[8] This Court has considered the communicative aspects of soliciting funds in non-electoral contexts on numerous occasions. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)(invalidating tax on canvassers); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (invalidating standardless permit system); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating overbroad regulation); *Heffron v. International Society for Krishna Consciousness* (*ISKON*), 452 U.S. 640 (1981) (upholding ban on soliciting funds at crowded Minnesota State Fair, except from fixed booths); *Sec'y of State v. Joseph H. Munson Co.,* 467 U.S. 947 (1984) (invalidating overbroad regulation); *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781 (1988) (invalidating limits on professional fundraisers); *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding ban on soliciting funds on government property); *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992); *Lee v. ISKON*, 505 U.S. 830 (1992) (upholding ban on solicitation of funds in airport; *Illinois v. Telemarketing Associates*, 538 U.S. 600 (2003) (upholding ban on misleading solicitation of funds).

draft card that, in the Court's view, justify a less stringent standard of review, allowing the government broader regulatory power, even when enforcement of the regulation impinges on the act's communicative aspects.

Applying the distinction to this case, the act of personally soliciting campaign funds from a potential subordinate clearly has a communicative aspect. As such, it qualifies for First Amendment protection. But a personal solicitation by a hierarchical superior, such as an employer or a judge with potential power to affect an attorney's professional life, carries with it a regulable by-product - a significant risk of undue pressure (real or imagined), and/or the currying of favor - that justifies government regulation, even prohibition of the practice. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act); *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (same); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding state "little Hatch Acts")

Accordingly, unlike the "pure speech" at issue in *Buckley*, personal solicitation of campaign funds from attorneys by a judicial candidate should trigger the intermediate level of First Amendment scrutiny applied in communicative conduct cases like *O'Brien*; a standard that asks whether the government interest is "important" (as opposed to "compelling), and whether the regulation is a "narrowly tailored" (as opposed to "the least drastic means") of advancing the government's interest.

### 2. The Advancement of Equality in the Context of Judicial Elections Constitutes a "Compelling" Governmental Interest Justifying a Ban on the Personal Solicitation of Campaign Funds from Attorneys By Candidates for Judicial Office

The *Buckley* Court declined to recognize the preservation of political equality as a "compelling governmental interest" that would justify limits on massive campaign spending by the extremely rich, including corporations under *Citizens United v. FEC*, 558 U.S. 310 (2010). More precisely, the *Buckley* Court recognized that the preservation of the ideal of political equality is an extremely important interest, but invoked the "least drastic means" prong of strict scrutiny to argue that electoral equality in the context of legislative elections must be advanced by the less drastic means of subsidizing the weak speakers, not limiting the spending of the strong ones. 424 U.S, at 48-49, n.55.

In the years since *Buckley*, the Court has repeatedly rejected efforts to justify campaign finance regulation on the basis of equality. See *Davis v. FEC*, 554 U.S. 724 (2008) (striking down waiver of contribution limits for legislative candidates facing extremely wealthy opponents); *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (invalidating public funding scheme designed to match the amounts raised by privately funded candidates); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). . On each occasion, the Court has stressed the availability of less drastic means for advancing

electoral equality. The Court's rejection of egalitarian justifications for regulating the funding of legislative electoral campaigns rests, therefore, on an antecedent finding that First Amendment strict scrutiny applies. Without that antecedent finding, there is no requirement that the government utilize the "least drastic means" to advance its asserted interest in regulation. "Narrowly tailored" regulations are sufficient.

As *amici* have demonstrated *supra*, strict scrutiny is not applicable to viewpoint-neutral regulations banning the personal solicitation of campaign contributions from individuals who are subject to the hierarchical authority of the person seeking the funds.[9] And, as the Court's decisions in *O'Brien*, *Letter Carriers*, *Broadrick*, and *ISKON* demonstrate, the existence of a potential less drastic means is not necessarily lethal in First Amendment settings that are not governed by strict scrutiny.[10] Accordingly, states are free to invoke "narrowly tailored" means to protect egalitarian values in the context of regulating the personal solicitation of campaign contributions from attorneys by candidates for judicial office, without being required to utilize the alternative of public funding.

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[9] For a particularly egregious example of the coercive solicitation of campaign funds by hierarchical superiors, see *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir), cert. denied, 483 U.S. 1021 (1987).

[10] For example, in *O'Brien*, although the government's interest in requiring possession of a draft card could have been advanced by requiring that a replacement card be obtained immediately, as with lost or stolen draft cards, the Court did not require the government to use such a less drastic means.

Even more importantly, the concept of equality differs in judicial and political settings. One of the joys of practicing law in American courtrooms is the judicial system's intense (and still evolving) commitment to treating each litigant equally, no matter how rich or poor they may be. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (invalidating effort to limit arguments available to indigent clients represented by federally-funded lawyers). While equality is also an important ideal in the political realm, the spectacle of well-financed candidates being able to purchase substantially more time with the electorate than poorly-financed candidates, while disturbing to some, is tolerated by the Court as a fact of political and economic life. *LSC v. Velazquez* demonstrates, however, that the Court's response would be far different if procedural rules permitted the permissible length of Supreme Court briefs, or the amount of argument time before the judge or jury, to be auctioned to the highest bidder. In a judicial system where equal justice under law is more than a slogan, the importance of preserving the reality (and appearance) of strict equality in the operation of the judicial process cannot be overestimated.

A campaign finance regime that leaves wealthy individuals, for-profit corporations, and well-funded special interests wholly free to expend unlimited sums in securing the election of judges of their choice will inevitably erode the sense that courts provide an equal, level playing field for all. It is bad enough that unlimited campaign spending has eroded the real world value of the luminous principle of "one-person one-vote" to the point where millions of ordinary Americans have lost faith in the democratic

process.[11] It would be nothing short of tragic if, as the result of massive uncontrolled campaign spending in judicial elections, Americans come to view the election of their judges as a matter of "one-dollar one vote," resulting in a judiciary no longer seen as impartial.

### 3. The Concept of "Corrupting" the Judicial Process Is Far Broader Than Engaging in Extortion and/or *Quid Pro Quo* Bribery

The *Buckley* Court held that prevention of the reality or appearance of "corruption" of the representative democratic process is a compelling governmental interest that justifies prophylactic limits on the amount of campaign contributions to a given candidate.[12] Later cases like *Citizens United*

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[11] *Amici* believe that the torrent of campaign spending by the ultra-rich has spawned levels of cynicism and anomie in the general public about the impact of big money that is eroding faith in American democracy, contributing to an anemic national voter turnout in the 2014 elections that has been preliminarily estimated at 36.4% of the eligible electorate, the lowest rate of democratic participation in 72 years. See www.electionproject.org/2014g. If the preliminary figures are accurate, *amici* fear that the real winner in the 2014 elections was lack of faith in democracy itself.

[12] The Court noted that campaign contributions (as opposed to campaign expenditures) are a form of "indirect" speech entitled to somewhat diminished First Amendment protection. 424 U.S. at 24-29. The Court reasoned that the process of transferring cash from contributor to candidate provides a fertile opportunity to extort support, or to trade political influence for cash. *Ibid*. In the years since *Buckley*, the Court has upheld contribution limits of $1,075 in statewide elections (*Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), but invalidated Vermont's $400 cap on statewide contributions because the Court found it implausible to believe that a $401

and *McCutcheon* restricted the nature of the feared "corruption" to extortion and/or the *quid-pro-quo* trading of votes for money. The Court reasoned in both *Citizens United and McCutcheon* that, in the context of partisan politics, we expect (indeed encourage) elected legislative or executive officials to discriminate on the basis of political views, favoring their political supporters (including their financial supporters), and rejecting their political opponents. In such a system of "winner take most" representative democracy, a majority of the Court has opined that unequal access to an elected official, keyed to financial support, is not corruption. It is, the Court observed, only natural for an elected official to listen more closely to those supporters, including financial supporters, who have been instrumental in securing the official's election.

If one accepts a vision of partisan representative democracy as a place where the spoils belong to the victors, and where elected officials function primarily as agents of the people who supported their election, financially and otherwise, it is, indeed, difficult to corrupt such a process by anything other than extortion and/or bribery. On the other hand, if one believes in Edmund Burke's vision of representative democracy, a vision that occasionally calls on elected representatives to exercise independent judgment in a search for the common

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dollar contribution could corrupt anyone (*Randall v. Sorrell*, 548 U.S. 230 (2006). In *McCutcheon v. FEC*, *supra*, the Court reaffirmed the validity of the $5,200 cap on contributions to a federal candidate, but invalidated a $123,500 cap on total contributions to all federal candidates in a single election cycle as inadequately linked to the *quid pro quo* corruption of a particular candidate.

good,[13] such a more disinterested representative democracy is vulnerable to "corruption" whenever a representative's behavior is likely to be inordinately influenced, not by her independent judgment of what is best for all, but by her beliefs about what is best for herself, and her largest campaign contributors.

Whether or not, however, the Court was justified in ignoring Edmund Burke's vision of a partially disinterested representative democracy in determining what types of behavior risk "corrupting" the representative democratic process, judges, including elected judges, are different. Selfish, discriminatory behavior that is tolerated, expected, even applauded in the Court's vision of partisan representative democracy would almost certainly be viewed as corrupt if committed by a judge, or a judge's financial supporters. The very essence of judicial impartiality is to avoid favoring supporters, especially financial supporters. Elected judges (as opposed to elected representatives) may neither follow political commands from their supporters, nor seek to advance the narrow interests of their campaign contributors. Unlike elected representatives, who speak for their constituencies,

[13] With respect, the majority opinion in *McCutcheon* incompletely describes Edmund Burke's complex ideas on the role of a democratic representative. 134 S. Ct. at 1461. It is true that Burke urged a close relationship between an elected representative and her constituents. But the very speech cited in *McCutcheon*, Burke's celebrated Address to the Electors of Bristol, argued for Burke's duty to cast a vote on a tariff bill based upon his independent judgment of what was best for all, not on what the overwhelming majority of his constituents wanted. The complete address is reproduced in The Founders' Constitution, Representation, chapter 13, reproduced at press.pubs.uchicago.edu/founders documents/v1ch13s7.html.

judges, including elected judges, speak for us all in applying pre-existing law impartially, and in generating new law that will advance the common good. In fact, elected judges engaged in the uniquely American practice of judicial lawmaking may well be the last pure Burkean figures in American democracy.

Given the vast difference between the roles of self-interest and partiality in the political and judicial processes, it would, *amici* believe, be a dangerous mistake to apply the narrow idea of "corruption" generated in the context of a vision of the representative political process as driven by political partiality, and a desire to capture the largest slice of any available pie, to the judicial process, where elected judges seek to apply pre-existing law with strict impartiality, and pledge to make new law only to advance the common good. In short, behavior that would not corrupt a political system of representative democracy premised on favoring an elected representative's political supporters would be utterly destructive of a judicial system pledged to equal justice under law.

Viewed through a broader lens of what counts as "corruption" of the judicial process, the action of judges in personally soliciting campaign contributions from attorneys who may someday appear before them, even in the context of mass mailings to the general public, might well lead litigants and reasonable observers to question the impartiality of a judge's rulings involving those generous attorneys who responded particularly favorably to the judge's personal campaign solicitations.

### 4. This Court Has Recognized That Independent Expenditures in Support of a Judicial Candidate May Cause Real or Apparent Corruption of the Judicial Process

The *Buckley* Court also held that independent expenditures in support of a candidate for legislative office do not pose a risk of corruption comparable to the risk posed by a direct contribution. The Court reasoned that campaign contributions carry a unique potential for extortion and a *quid pro quo* agreement to trade votes for money because campaign contributions often involve personal contact between a candidate and donor prior to the transfer of funds; a personal contact that the Court deemed non-existent in the context of independent expenditures. 424 U.S. at 45.

With respect, the *Buckley* Court appears to have overlooked the fact that many, perhaps most, independent expenditures are not one-shot events. To the extent that independent expenditures recur over multiple election cycles, ample opportunity exists for ongoing *quid pro quo* corruption driven by gratitude for past support, and the hope of future expenditures.

Whether or not, however, the *Buckley* Court was correct in ignoring the potential for corruption inherent in ongoing independent expenditures that transcend a single election cycle, this Court has recognized that independent expenditures in support of a judicial candidate may induce (or appear to induce) partiality towards the donor on the part of a judge who owes his election, in part, to the

donor/litigant's generous support. In *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), an elected appellate judge who had enjoyed massive independent campaign support from a litigant before him was obliged under the Due Process clause to recuse himself to avoid the appearance (and the possible unconscious reality) that he would favor his campaign benefactor. Florida's ban on personal solicitation of campaign contributions from attorneys by candidates for judicial office is a prophylactic effort to make such agonizing *post hoc* recusal proceedings unnecessary.

Given the ease by which a judicial candidate may raise campaign funds through solicitation by third persons, *amici* believe that foregoing personal solicitation of attorneys is a small price to pay to avoid a practice that would trigger time-consuming recusal motions, and inevitably erode the appearance of strict impartiality that is central to the maintenance of public confidence in the judicial process.

### C. Measured by the Appropriate Intermediate First Amendment Standard of Review, Florida's Ban is a Viewpoint-Neutral, Narrowly-Tailored Means of Advancing an Important Governmental Interest

The precise "as applied" First Amendment issue before the Court is whether a sufficient reason exists to ban a candidate for judicial office from *personally* soliciting campaign contributions from attorneys in the context of mass mailings or Internet communications directed to the general public,

instead of authorizing third-persons to solicit the funds on the candidate's behalf. In short, from the standpoint of: (1) the solicited attorney; (2) the future judge; or (3) the general public's faith in the judicial system, is there anything special about a judge's *personal* solicitation of campaign funds from attorneys that justifies Florida's ban?

As *amici* have noted, the Court has already recognized the importance of personal solicitation of campaign funds, basing its distinction between the potentially corrupting nature of campaign contributions and independent expenditures solely on the presence or absence of a personal relationship between candidate and donor. Given the Court's recognition of the unique aspects of personal solicitation of campaign funds, petitioner's argument that Florida's flat ban is not narrowly-tailored within the meaning of *O'Brien* cannot succeed.

Petitioner argues that since thirteen states exempt personally signed mailings soliciting campaign funds from the general public, it follows that attorneys submerged in the general public will not feel pressure to contribute, and that the public will not believe that judges might favor attorneys who respond generously to such a personally-signed mass mailing. Most of the remaining 26 states have, however, opted not to gamble on whether the mass mailing exemption risks: (1) unduly pressuring attorneys to contribute; and (2) eroding public faith in the impartiality of the judiciary. Given the high stakes, and the states' crucial federalism-based interest in autonomously shaping their elected

judiciaries,[14] this Court should defer to Florida's decision to opt for risk averse regulation, especially since Florida provides a prospective judicial candidate ample alternative opportunities to engage in fundraising through third-parties.

*Amici* believe, therefore, that a reasonable Florida regulator should be permitted to view the marginal First Amendment value of a personally signed mass mailing seeking judicial campaign funds (as opposed to one signed by a judicial candidate's supporters) as outweighed by the risk that: (1) attorneys may view the personal solicitation as a form of undue pressure; and (2) litigants and the general public may believe that judicial behavior may be influenced by an attorney's response (or non-response) to a judge's personal solicitation.

There is, of course, a degree of risk-averse prophylaxis in Florida's approach that might well be forbidden under First Amendment strict scrutiny. But the essence of the move from strict to intermediate First Amendment scrutiny is a decision to permit the government to take reasonable, non-discriminatory steps to deal with what it reasonably believes to be risk of a serious harm closely intertwined with a communicative act. Florida's decision to ban candidates for public office from engaging in the personal solicitation of campaign funds from attorneys, no matter what the context, is entitled to that level of regulatory deference.

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[14] See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (construing Age Discrimination Act to permit states to set mandatory retirement ages for judges).

## CONCLUSION

For the above-cited reasons, *amici* urge that the decision of the Florida Supreme Court be affirmed. In the alternative, the Florida Supreme Court should be invited to consider the applicability of *Heien v. North Carolina* and *Elonis v. United States* to this case.

Respectfully submitted,

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