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 AMICI CURIAE PUBLIC CITIZEN, INC., AND DEMOCRACY 21 IN SUPPORT OF RESPONDENT

SETH P. WAXMAN
CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

DONALD J. SIMON
SONOSKY, CHAMBERS
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street NW
Suite 600
Washington, DC 20005
(202) 682-0240

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
RACHEL M. CLATTENBURG
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

FRED WERTHEIMER
DEMOCRACY 21
2000 Mass. Ave. NW
Washington, DC 20036
(202) 355-9600

Attorneys for Amici Curiae

December 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. States may limit solicitation of campaign contributions to serve sufficiently important government interests. 4

II. Preserving the reality and appearance of judicial impartiality is a sufficient, and indeed compelling, governmental interest. 7

III. Solicitation of campaign contributions threatens public confidence in the fairness and integrity of elected judges. 12

IV. Canon 7C(1) is tailored to improve public confidence in the judiciary and prevent the appearance of partiality. 15

V. Recusal is not a sufficient protection against partiality or the appearance of partiality. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases:

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 5

Buckley v. Valeo, 424 U.S. 1 (1976)..... 4, 5, 6, 7, 9, 19

Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981)..... 5

Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009)..... 7, 10, 20, 22

Citizens United v. FEC, 558 U.S. 310 (2010)..... 5, 8, 9

FEC v. Beaumont, 539 U.S. 146 (2003)..... 5

FEC v. Colo. Repub. Fed. Campaign Comm., 533 U.S. 431 (2001)..... 5

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982)..... 6

In re Gault, 387 U.S. 1 (1967)..... 10

J.R. v. State, 959 So. 2d 833 (Fla. Dist. Ct. App. 2007)..... 21

Liljeberg v. Health Servs. Acquisition Corp., 496 U.S. 847 (1988)..... 22

McConnell v. FEC, 540 U.S. 93 (2003).....*passim*

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

In re Murchison,
349 U.S. 133 (1955) 10

Offutt v. United States,
348 U.S. 11 (1954) 10

Randall v. Sorrell,
548 U.S. 230 (2006) 5

Renne v. Geary,
501 U.S. 312 (1991) 12

Repub. Nat'l Comm. v. FEC,
130 S. Ct. 3544 (2010) 5

Repub. Nat'l Comm. v. FEC,
698 F. Supp. 2d 150 (D.D.C. 2010) 5

Repub. Party of Minn. v. White,
536 U.S. 765 (2002) 7, 11, 12, 18, 19

Tenn. Secondary School Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007) 17, 18

Tumey v. Ohio,
273 U.S. 510 (1927) 10

Statutes and Rules:

Fla. Code of Jud. Conduct, Canon 7C(1) 15, 16

Fla. R. Jud. Admin. 2.330(f) 22

Fla. Stat. Ann. §§ 38.01–38.10 16

Fla. Stat. Ann. § 38.07 21

Fla. Stat. Ann. § 105.071 16

Nev. Code of Jud. Conduct, Rule 4.4, cmt. 1 17

Other:

20/20 Insight LLC, *Justice at Stake/Brennan Center National Poll* (2013), http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf 13

20/20 Insight LLC, *National Registered Voters Frequency Questionnaire Ref. 2011-184* (2011), http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf 12

Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USAToday.com, Feb. 16, 2009, http://usatoday30.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm 12

Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, Followthemoney.org (Mar. 2014), http://beta.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012/#item_1 14

Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006, http://www.latimes.com/nation/la-na-justice080606-story.html#page=3 ..... 14, 15, 17, 18

Greenberg Quinlan Rosner Research Inc. *et al.*, *Justice at Stake Frequency Questionnaire* (2001), http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf 12

Greenberg Quinlan Rosner Research Inc., *Justice at Stake: State Judges Frequency Questionnaire* (2001–2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf 13

Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, http://www.nytimes.com/2006/10/01/us/01judges.html. ... 14, 21

James Oliphant, *When Judges Go Courting*, Nat'l J. Magazine, Oct. 18, 2014, http://www.nationaljournal.com/magazine/when-cash-turns-judges-into-politicians-20141017 15

Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 Global Jurist 4 (2010), http://www.ewi-ssl.pitt.edu/econ/files/courses/101221_misc_viewcontent.pdf 21

James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice (2008), http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf..... 20, 21

Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* (2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf..... 13

INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is an advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of governmental processes that can result from infusions of private money into campaigns for public office. Public Citizen therefore seeks to enact and defend workable and constitutional campaign finance reform legislation at both the federal and state levels. Public Citizen and its attorneys have been involved in various capacities, including as amicus curiae and counsel, in many cases in this Court and others involving the constitutionality of such legislation.

Public Citizen also has a longstanding interest in the actual and perceived fairness of our judicial systems. That concern is acutely implicated by this case and others involving the potentially distorting effects of campaign contributions on the administration of justice and on public confidence in the courts. Thus, Public Citizen has consistently advocated sensible limits on the raising of campaign contributions by judicial candidates in states that have chosen to elect their judges, while at the same time respecting the First Amendment rights of such candidates to engage in campaign activities. *See*, *e.g.*, Brief of Amicus Curi-

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

ae Public Citizen in Support of Reversal, *Repub. Party of Minn. v. Kelly*, No. 01-521 (U.S. filed Jan. 2002).

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented. Democracy 21 has participated as counsel or amicus curiae in many cases before this Court involving the constitutionality of the campaign finance laws.

SUMMARY OF ARGUMENT

States that choose to give their citizens a direct say in electing judges do not forfeit the right to protect the appearance and reality of a fair judicial system. Elected judges, no less than appointed judges, must not only be, but also appear to be, fair and impartial as between the parties who appear before them. Florida's restriction on personal solicitation of campaign contributions by judicial candidates is an appropriate and constitutional tool for protecting the integrity of its courts—and the critically important public perception of their integrity.

Like other regulations of campaign contributions, Florida's restriction on solicitations by judicial candidates is constitutional under the First Amendment if it is closely drawn to serve a sufficient state interest. The vital state interest here—preservation of the judicial system's appearance of impartiality—is more

than sufficient. Indeed, this Court's recent campaign finance decisions addressing the scope of the legitimate governmental interest in combating corruption in elections for *political* office underscore the differences between elections for judicial and political office and the significance of a state's interests in protecting judicial integrity through regulations applicable solely to judicial elections. Critical to the Court's analysis in those cases was the view that favoritism and influence are to some degree inherent and expected attributes of representative politics. Quite the opposite is true of judicial officers: Favoritism, influence, preferred access, and ingratiation have no place in judicial decisionmaking, and all states have compelling interests in protecting the actual and perceived neutrality of judges.

Florida's restriction of solicitation by judicial candidates directly serves those interests. Political contributions to judges can create at least the appearance, and quite possibly the reality, of judicial partiality and harm the judicial system's legitimacy. Although contributions may be an inherent feature of privately financed judicial election campaigns, restrictions targeting solicitation aim at the transaction in the fundraising process that is most likely to create the appearance or reality that justice is for sale: The judicial candidate's direct request for financial support from a donor who is or may be interested in the outcome of cases the candidate, as judge, is supposed to preside over with strict neutrality.

After-the-fact remedies, such as recusal, do not obviate the need to restrict practices at the root of the problem. Even assuming their efficacy, which is doubtful in all but extreme cases, such remedies in-

volve substantial systemic costs and difficulties. Measures such as the Florida rule that aim at preventing rather than palliating appearances of partiality are superior—and constitutional—ways of pursuing the state's interest in protecting its judicial system.

ARGUMENT

I. States may limit solicitation of campaign contributions to serve sufficiently important government interests.

This Court has long held that restrictions on campaign contributions are not subject to strict First Amendment scrutiny, but to "a lesser but still rigorous standard of review," under which "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 29, 25 (1976); internal quotation marks omitted); *see also* Pet. Br. 12 (conceding application of "closely drawn" review to contribution restrictions).

That standard reflects the Court's recognition that laws affecting contributions impose a lesser restriction on the communication of campaign messages and on political association than do direct limits on campaign spending. *Buckley*, 424 U.S. at 20, 21–22; *see also McConnell v. FEC*, 540 U.S. 93, 135–37 (2003). The Court's opinions have consistently ad-

hered to these views, and the Court has declined repeated invitations to reconsider them.[2]

The Court's application of the standard has also reflected its recognition that because contributions involve direct transactions between candidates and contributors, they may pose substantial threats to the integrity of officeholders and electoral processes. *See Citizens United*, 558 U.S. at 356–57; *McConnell*, 540 U.S. at 136–37; *Buckley*, 424 U.S. at 26–27. Thus, not only has the Court applied a less stringent standard to laws restricting contributions, it has also been much more likely to find that such laws survive scrutiny under the applicable standard than to sustain campaign finance laws that more directly limit campaign speech. The same is true of Justices who have expressed disagreement with the Court's standard of review: They, too, have similarly recognized that the receipt and solicitation of contributions poses distinctive risks to the integrity of officeholders that may justify restrictions under the First Amendment. *See*, *e.g.*, *McConnell*, 540 U.S. at 308 (Kennedy, J., concurring in part and dissenting in part).

These principles are fully applicable to the restriction on solicitation of contributions by judicial candidates at issue here. Soliciting and making a

---

[2] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1445; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011); *Citizens United v. FEC*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring); *Randall v. Sorrell*, 548 U.S. 230, 246–48 (2006) (opinion of Breyer, J.); *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981); *see also Repub. Nat'l Comm. v. FEC*, 130 S. Ct. 3544 (2010) (summarily affirming 698 F. Supp. 2d 150 (D.D.C. 2010)).

campaign contribution are two sides of the same transaction, and the Court has accordingly treated them similarly in its First Amendment analysis. Thus, as the Court put it in sustaining limits on solicitation in *McConnell*, "for purposes of determining the level of scrutiny, it is irrelevant that [a law] regulate[s] contributions on the demand side rather than the supply side." 540 U.S. at 138; *see also id*. at 177 (applying "closely drawn" standard to limits on solicitation). Likewise, in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), the Court upheld a limitation on solicitation of contributions by a political action committee under *Buckley*'s standard of scrutiny for contribution limits. *See id.* at 208.

The "relevant inquiry," as the Court has explained, is whether a restriction on solicitation of contributions "burdens speech in a way that a direct restriction on the contribution itself would not." *McConnell*, 540 U.S. at 138–39. Unless it does so, its constitutionality turns on the same considerations that govern restrictions on contributions. In this case, the solicitation prohibition is actually *less* restrictive than a direct restriction of contributions, as it does not impede supporters of a candidate from associating themselves with his campaign or the candidate's committee from raising the funds needed to compete in privately financed elections. Thus, the restriction is properly treated as a regulation of contributions for First Amendment purposes.

Justice Kennedy's partial concurrence and dissent in *McConnell*, which joined the majority in upholding a ban on the solicitation of soft money by federal candidates and officeholders, likewise recognized that the solicitation prohibition served the same interests as,

and could be sustained by the same rationale as, the contribution limits upheld in *Buckley*. *See id*. at 308. Justice Kennedy began with the premise that "the regulation of a candidate's receipt of funds furthers a constitutionally sufficient interest," *id*., and concluded that "regulation of a candidate's solicitation of funds" likewise "does further a sufficient interest"—even if, as in the statutory provision at issue in *McConnell*, the funds are solicited for someone else. *Id*. The reason, as Justice Kennedy explained, is that "[r]ules governing candidates' or officeholders' solicitation of contribution are … regulations governing their receipt of *quids*," and such regulations are sustainable "under *Buckley*'s anticorruption rationale." *Id*. at 308.

II. Preserving the reality and appearance of judicial impartiality is a sufficient, and indeed compelling, governmental interest.

The state interest against which the restriction at issue here must be assessed is the "vital state interest" in "maintain[ing] the integrity of the judiciary and the rule of law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Protection of that interest requires that the Court give due regard to the differences between judicial office and political office in determining the nature of the interests that justify restrictions on campaign fundraising. Because both the due process rights of the persons who appear before the courts and the public's "respect for [their] judgments depend[] … upon the issuing court's absolute probity," *Repub. Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring), avoiding appearances of partiality, influence, preferential ac-

cess, or ingratiation are state interests of the highest order where judicial elections are at issue.

The legitimate scope of these interests contrasts with the considerations this Court's recent decisions have applied in cases addressing campaign finance restrictions applicable to elections for *political* office. In those cases, the Court has stated, a regulation "must ... target what we have called '*quid pro quo*' corruption or its appearance"—that is, "a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441. Moreover, the Court has stated that the government may not treat the "[i]ngratiation and access" that may result from financial support of a candidate for political office as corruption, *id*., nor may it "seek to limit the appearance of mere influence or access." *Id*. at 1451.

These conclusions rest on the majority's analysis of the nature of representative politics, not the functions of judicial elections or elected judges. As the Court explained in *Citizens United*, adopting a passage from Justice Kennedy's opinion in *McConnell*:

> Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

For these reasons, *Citizens United* said, the likelihood that campaign spenders and contributors "may have influence over or access to elected officials does not mean that these officials are corrupt." *Id*. Nor, the Court said, will "[t]he appearance of influence or access … cause the electorate to lose faith in our democracy." *Id*. at 360. Rather, the Court has said, the "[i]ngratiation and access" that result from financial support for candidates "embody a central feature of democracy—that constituents support candidates who share their believes and interest, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 134 S. Ct. at 1441.[3]

That analysis does not apply with respect to the interests a state may pursue in protecting the integrity of judicial elections. Even if "[f]avoritism and influence" are inevitable in "representative politics," *Citizens United*, 558 U.S. at 359, judicial elections are not exercises in *representative* politics. Judges, whether appointed or elected, are not charged with representing constituencies, but with dispensing justice without

---

[3] The Court's statements in *McCutcheon* and *Citizens United* about the scope of the governmental interest in preventing corruption and its appearance were disputed by the dissenters in both cases, who argued that they were inconsistent with previous decisions of the Court stretching from *Buckley* to *McConnell*. *See McCutcheon*, 134 S. Ct. at 1466–71 (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 447–52 (Stevens, J., dissenting); *see also McConnell*, 540 U.S. at 150–54. Although amici believe the position of the dissenters is correct, there is no need to reargue the merit of those criticisms here.

fear or favor. Favoritism, preferential influence or access, ingratiation, and responsiveness to donors are all anathema to the judicial process, which is defined by "the actuality of fairness, impartiality and orderliness." *In re Gault*, 387 U.S. 1, 26 (1967). Indeed, even the appearance of such improper influence, access, or ingratiation is unacceptable, *see id.*, as "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 13 (1954).

These principles are so fundamental that this Court has long held them to be constitutional requirements incorporated in the Due Process Clause. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Due process does not permit any temptation that might lead a judge "not to hold the balance nice, clear, and true" between the parties. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Moreover, due process requires not only the absence of "actual bias," but the absence even of its appearance. *Murchison*, 349 U.S. at 136.

The requirement of judicial neutrality extends equally to elected and appointed judges: The demands of due process do not vary depending on the manner in which a judge found his way to office. *See*, *e.g.*, *Caperton*, 556 U.S. at 882–90. Moreover, due process requirements do not fully define a state's interests in ensuring the fairness of its judicial proceedings. States have legitimate interests in preserving an appearance of impartiality in their judicial systems that exceeds the minimum required by due process, and the states have sought to pursue those interests in a variety of ways that may be "more rigorous" than what the Due Process Clause requires. *Id*. at 889. A state's interests

also may properly reflect the concern that public confidence in the impartiality of the judiciary is more likely to be shaken by appearances of political favoritism and influence than by similar appearances in the legislative arena, where some may see such preferences as "expected" or proper. *McCutcheon*, 134 S. Ct. at 1441.

For these reasons, in its one previous decision in a First Amendment challenge involving restrictions on judicial candidates, the Court did not contest that states have a sufficient, and indeed compelling, interest in ensuring that judicial elections do not compromise the appearance or reality of judges' impartiality as between the parties who appear before them. *See White*, 536 U.S. at 775–76. To the contrary, the Court emphasized that "[i]mpartiality in this sense" is essential to "assure[] equal application of the law." *Id.* Justice Kennedy, in concurrence, likewise emphasized that "[j]udicial integrity is … a state interest of the highest order." *Id.* at 793 (Kennedy, J., concurring).

The Court in *White* held that laws censoring judicial candidates' expression of ideas about legal issues do not serve the interest in protecting judicial impartiality, and that a state that chooses to elect its judges may not "leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about." *Id.* at 788 (majority opinion).[4] But the Court did not denigrate the states' interest in preserving the reality and appearance of judges' impartiality as between the parties who appear before

---

[4] *White*, moreover, was a direct restriction on core speech and was not subject to the less stringent review to which this Court has subjected limits on the raising of campaign contributions.

them. And it did not suggest that the First Amendment requires it to ignore the fundamental differences between judicial and political office in determining whether the state has "accord[ed] participants in [the electoral] process … the First Amendment rights that attach to their roles." *Id*. (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). One of those fundamental differences is that the favoritism, ingratiation, and influence that the Court's recent opinions see as unavoidable in the context of political elections remain absolutely unacceptable for judges, elected or otherwise.

III. Solicitation of campaign contributions threatens public confidence in the fairness and integrity of elected judges.

Campaign contributions to judicial candidates can corrode the vital state interest in the appearance of judicial impartiality and the public's confidence in the fairness and integrity of elected judges. Polls from 2001 to 2013 consistently show that more than three-quarters of respondents believe that campaign contributions to judges influence their decisions.[5] Even the

---

[5] Greenberg Quinlan Rosner Research Inc. et al., *Justice at Stake Frequency Questionnaire* (2001), at 4, http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf (76% believe that campaign contributions have a "great deal" or "some" influence on judges' decisions); Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USAToday.com, Feb. 16, 2009, http://usatoday30.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm (89% of respondents believed that the "influence of campaign contributions on judges' rulings is a problem."); 20/20 Insight LLC, *National Registered Voters Frequency Questionnaire Ref. 2011-184* (2011), at Q6, http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf (83% believe campaign con-

(*Footnote continued*)

judges themselves believe in large numbers that campaign contributions sway their decisions. *See* Greenberg Quinlan Rosner Research Inc., *Justice at Stake: State Judges Frequency Questionnaire*, at Q12 (2001–2002) (finding that 46 percent of state judges believe that campaign contributions influence decisions to some degree).[6]

The public's wariness of decisions made by judges who receive campaign donations is warranted: Studies indicate that the large amount of money pouring into judicial races is correlated with outcomes of cases in ways that, at a minimum, may adversely affect the critically important appearance of judicial neutrality. An analysis of the decisions of 439 state supreme court justices in over 2,000 business-related cases between 2010 and 2012 shows that there is a "significant relationship between campaign contributions from business groups and justices' voting in favor of business interests." Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 9, 13 (2013).[7] An elected judge who receives half of her donations from business

---

tributions to judges have a "great deal" or "some" influence on their decisions); 20/20 Insight LLC, *Justice at Stake/Brennan Center National Poll* (2013), at Q8, http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf (87% of those surveyed believe that both direct campaign donations to a judge as well as spending by outside groups have either "some" or "a great deal" of influence on judges' decisions).

[6] *Available at* http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

[7] *Available at* http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf.

groups would be expected to vote pro-business almost two-thirds of the time, and the correlation has grown stronger over time. *Id.*

A report on 12 years of decisions of the Ohio Supreme Court suggests a similar relationship between contributions and judges' voting behavior. *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006.[8] On average, the justices "voted in favor of contributors 70 percent of the time." *Id.* One justice voted for his contributors a startling 91 percent of the time. *Id.*

Nevertheless, the reality that most contested judicial elections occur in states where such elections are privately financed—and that effective campaigning costs money—means that judicial candidates must have some means of financing their candidacies. In the 2011–2012 state court races, nearly two-thirds of the 494 judicial candidates raised money and of those who raised money, 71 percent of the candidates who raised the most money won. Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, Followthemoney.org (Mar. 2014).[9] Consequently, a judicial candidate will personally solicit donations if that option is available. "The one standard for a judicial candidate in Nevada today is, 'How much money can you raise?'" explained Nevada state Judge Brent Adams, who also said that judges should be prohibited from directly soliciting campaign contributions. Mi-

---

[8] *Available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

[9] *Available at* http://beta.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012/#item_1.

chael J. Goodman and William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. Times, June 8, 2006.[10]

The pressure to raise money means that even those who find the campaigning and personal solicitations abhorrent have to engage in them to remain competitive. "It's awful," said the North Carolina Supreme Court Justice Robin Hudson, who ran for reelection in 2014 and often personally solicited contributions. James Oliphant, *When Judges Go Courting*, Nat'l J. Magazine, Oct. 18, 2014.[11]

IV. Canon 7C(1) is tailored to improve public confidence in the judiciary and prevent the appearance of partiality.

A state's regulation of judicial campaign contributions must take into account not only the interest in preserving the public confidence in the impartiality and integrity of its elected judiciary, but also the need to allow judicial candidates the ability to finance their campaigns. Florida's Canon 7C(1), restricting direct solicitation of contributions by judicial candidates, balances these interests by prohibiting the aspect of contributions to judges that is most likely to be abusive and to impair the public's faith in an impartial judiciary, while allowing judicial candidates to raise funds through campaign committees. The restriction is consistent with, and reinforces, other means by which Florida law seeks to promote the state's critical goals of judicial impartiality and nonpartisanship. *See*

---

[10] *Available at* http://www.latimes.com/nation/la-na-justice080606-story.html#page=3.

[11] *Available at* http://www.nationaljournal.com/magazine/when-cash-turns-judges-into-politicians-20141017.

Fla. Stat. Ann. §§ 38.01–38.10 (recusal provisions); Fla. Stat. Ann. § 105.071 (providing for nonpartisan judicial elections). And by targeting that part of the campaign contribution transaction that poses the greatest risk of actual bias and is most likely to raise concerns of an appearance of partiality, Canon 7C(1) meets the requirement of an adequate "fit between the stated government objective and the means selected to achieve that objective," while "'avoid[ing] unnecessary abridgment' of First Amendment rights." *McCutcheon*, 134 S. Ct. at 1445–46.

Florida's restriction on solicitation satisfies these requirements by addressing the circumstances that present the greatest opportunity for compromising the appearance or reality of judicial impartiality. The Court has recognized that the risk of explicit or tacit understandings between contributors and candidates is at its highest when a candidate directly requests money from a potential contributor and that restrictions on solicitation are a tailored response to that threat. *See McConnell*, 540 U.S. at 136–37; *id.* at 308 (Kennedy, J., concurring in part and dissenting in part). By contrast, "there is not the same risk of … corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." *McCutcheon*, 134 S. Ct. at 1452.

Where the state has a legitimate interest not only in avoiding actual or apparent quid pro quo corruption, but also the appearance or reality of the favoritism, influence, access, and ingratiation that are antithetical to the judicial process, regulation of solicitation is particularly well suited to protecting that interest. The threat to impartiality and its appearance

is gravest when the solicitor of campaign donations is also the one tasked with being a neutral adjudicator in matters directly affecting the potential contributor's interests.

Thus, when a judge or judicial candidate directly puts the arm on a potential donor, the target has every reason to believe that his response, positive or negative, will be memorable to the judge, and that subsequent encounters will be awkward if not hostile should the contributor not comply. Likewise, written fundraising solicitations signed by a judicial candidate are likely to convey the message that the candidate has targeted the recipient as a potential financial supporter and that the candidate will be paying attention to the response. Such a message conveys the "suggestion, subtle or otherwise," *Tenn. Secondary School Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 298 (2007), that a contribution will be an effective means of currying favor, while not contributing may have a negative effect. The request itself, much more so than other forms of campaign fundraising that are at least one step removed from the potential adjudicator, creates the apprehension that a contribution may be the price of a fair hearing in the judge's courtroom—or of preferential treatment if an opposing attorney or party has not ponied up.

For instance, Nevada does not ban personal solicitation of campaign contributions by judges. *See* Nev. Code of Jud. Conduct, Rule 4.4, cmt. 1. One prominent Nevada attorney described how some lawyers "are in almost terror of not giving" to judges asking for campaign contributions. *In Las Vegas, They're Playing With a Stacked Judicial Deck*, *supra*. "When

judges come around and say, 'I need money,'" the attorney continued, "it's a nasty bit of business." *Id.*

Restricting solicitation by judicial candidates is thus consistent with the Court's acceptance, in other contexts, of "rules prohibiting direct, personalized communication in a coercive setting." *Brentwood Acad.*, 551 U.S. at 296. Indeed, the interests supporting the restriction here are heightened because the implicitly coercive nature of the request is destructive not only of the perception of judicial fairness of those who are touched for contributions, but also of public confidence in the judiciary: Public awareness of judicial solicitations and their inevitable effects will erode the perception that the courts are fair and impartial to all and contribute to the view that, like legislatures, they are arenas where favoritism, influence, preferential access, and ingratiation hold sway, and where judges, like political officeholders, "can be expected to be responsive" to their financial supporters. *McCutcheon*, 134 S. Ct. at 1441.

Where, as here, solicitation itself threatens important state interests, restrictions directly targeting it readily meet First Amendment requirements of fit between ends and means. As the Court pointed out in *McCutcheon*, if solicitation by candidates is the source of the problem, restrictions on "direct solicitation by an officeholder or candidate" may be more narrowly targeted than other forms of regulation of contributions. *Id*. at 1462 (citing *McConnell*, 540 U.S. at 298–99, 308 (Kennedy, J., concurring in part and dissenting in part)). Such restrictions pose no threat to a candidate's ability to communicate substantive messages "discussing what the elections are about." *White*, 536 U.S. at 788. Nor do they impair a candi-

date's ability to compete in a setting where campaigns require private funding, as they allow campaign fundraising even while targeting the fundraising practice most likely to be destructive of the appearance and reality of judicial impartiality. Thus, far from creating a prohibited "substantial mismatch" of ends and means, *McCutcheon*, 134 S. Ct. at 1446, the restriction on solicitation by judicial candidates is closely drawn to advance critical state interests while simultaneously accommodating the need to "accord participants in [the electoral] process … the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788 (citation omitted).

That the regulation may not prevent every possibility that campaign contributions may influence or appear to influence a judge does not render it invalid. In this area, as in others, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley*, 424 U.S. at 105 (citation omitted). Moreover, a statute "is not invalid under the Constitution because it might have gone further than it did." *Id*. (citation omitted). These considerations are particularly apt when, as here, going further (by, for example, eliminating all private contributions, applying extremely low limits, or regulating communications between the candidate and his or her own campaign committee) might make the states' choice to have judicial elections impracticable or provoke constitutional challenges asserting that the state had gone too far. The state need not achieve the impossible: The fit between ends and means need not be "perfect, but reasonable," representing "not necessarily the single best disposition but one whose scope is 'in proportion to

the interest served ….'" *McCutcheon*, 134 S. Ct. at 1456.

V. Recusal is not a sufficient protection against partiality or the appearance of partiality.

Although recusal of judges is a critically important measure to remedy breakdowns in judicial impartiality, it is not sufficient by itself to safeguard against the risk of bias posed by personal solicitation of donations or to obviate the need to restrict such solicitation. To begin with, as a matter of due process, this Court has held that recusal is a remedy limited to "extreme facts" and "extraordinary situation[s]," *Caperton*, 556 U.S. at 886–87, which do not exhaust the circumstances in which states have an interest in protecting their judicial systems against appearances of favoritism. *See id*. at 888. Such a tool is unlikely to be effective in addressing the pervasive problems that stem from solicitation practices that, if not restricted, are likely to become ubiquitous.

Even where, as in Florida and under federal recusal statutes, governments have asserted their powerful interests in the appearance of judicial impartiality by making recusal available in a broader set of circumstances than those where it would be constitutionally required, recusal may be both underused and underenforced. *See* James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice, 20 (2008).[12] In many states, including Florida, the judge accused of bias is

---

[12] *Available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf.

the judge who first decides the recusal motion. *See* Fla. R. Jud. Admin. 2.330(f); *J.R. v. State*, 959 So. 2d 833, 834 (Fla. Dist. Ct. App. 2007). The risk of angering that judge and the cost of a recusal motion that is unlikely to be successful can thus deter parties from seeking recusal. *Fair Courts: Setting Recusal Standards*, *supra*, at 20. Moreover, the inherent difficulty of judging one's own partiality means that even when a motion is brought, a judge may be strongly inclined not to grant it. *Id.*

A study of campaign contributions to the justices of the Supreme Court of Ohio found that recusal indeed appears to be underenforced. *See Campaign Cash Mirrors a High Court's Rulings*, *supra*. Out of 215 cases before the court identified as raising the most direct potential conflict of interest from campaign contributions, justices recused themselves just nine times. *Id.* A similar result was found in a review of cases before the Louisiana Supreme Court in which there was at least one campaign contributor to a justice before the court. *See* Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 Global Jurist 4, 10 (2010).[13] Between 1992 and 2006, a Louisiana justice ruled on a contributor's case in 425 instances. *Id.* at 4. There was not a single recusal. *Id.*

Recusal, moreover, imposes significant costs of its own. Recusal motions may generate satellite litigation and appeals that raise difficult line-drawing questions and consume resources of litigants and courts. *See*

---

[13] *Available at* http://www.ewi-ssl.pitt.edu/econ/files/courses/101221_misc_viewcontent.pdf.

Caperton, 566 U.S. at 893–99 (Roberts, C.J., dissenting). When recusal motions are denied by a challenged judge, their resolution on appeal may result in reopening of judgments, necessitating relitigation of issues already addressed once in a tainted proceeding. *See* Fla. Stat. Ann. § 38.07 (providing that a recused judge's rulings are subject to reconsideration); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 496 U.S. 847, 862–63 (1988) (affirming the granting of a new trial as a remedy for a judge's failure to recuse). Moreover, when a judge is sidelined by a well-founded motion for recusal, another judge must step in, straining the court system's resources. And frequent recusals, or even recusal motions, may themselves impair public confidence in judges by confirming popular impressions that judicial partiality is common or that litigation is a "game" with outcomes determined by lawyerly gambits, connections, and, perhaps, referees who play favorites. *See Caperton*, 566 U.S. at 903 (Scalia, J., dissenting).

Thus, while recusal remains a necessary fail-safe remedy against injustice or its appearance, recusal is by no means a panacea. A system of wide-open solicitation with resulting recusals would be a broken system, not a fair one. Although bearing the costs of recusal, when it is warranted, is essential if the judicial system is to provide the appearance and actuality of fairness essential to its legitimacy, a far better solution is to avoid circumstances that call judicial fairness into question to begin with. States thus have powerful interests in *preventing* practices that "tempt adjudicators to disregard neutrality," *Caperton*, 556 U.S. at 878, not just in remedying them after the fact. The solicitation restriction at issue here is a critical, and constitutional, tool to achieve that end.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

FRED WERTHEIMER
DEMOCRACY 21
2000 Mass. Ave. NW
Washington, DC 20036
(202) 355-9600

DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street NW
Suite 600
Washington, DC 20005
(202) 682-0240

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
RACHEL M. CLATTENBURG
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

SETH P. WAXMAN
CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Penn. Ave. NW
Washington, DC 20006
(202) 663-6000

Attorneys for Amici Curiae

December 2014