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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 FOR THE STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, MISSISSIPPI, NORTH DAKOTA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

Amici States Arizona, Arkansas, Idaho, Indiana, Mississippi, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, and Washington adopted provisions similar to Canon 7C(1) of the Florida Code of Judicial Conduct, which prohibits judicial candidates who are subject to public election from personally soliciting campaign contributions but allows campaign committees to solicit funds on their behalf. Amici States have a fundamental interest in ensuring the accountability of judges and thus choosing to elect judges while still maintaining their constitutional duty to ensure the impartiality of the judiciary and the public's confidence in the integrity of the judiciary. In addressing the issue of judicial candidates soliciting campaign contributions from lawyers and litigants who may appear before those candidates if they are elected judges, Amici States have adopted rules that vary to some degree but the interests that they are trying to protect—judicial impartiality and the appearance of judicial impartiality—are the same and those interests are compelling. Although Amici States recognize that First Amendment principles foreclose absolute prohibition of the solicitation of campaign contributions, the States need sufficient breathing room to craft and amend rules to protect against the very real harm that would occur if they were precluded from regulating judicial candidates' solicitation of campaign contributions.

STATEMENT

1. The majority of States that have judicial elections or retention elections with active opposition prohibit judicial candidates from personally soliciting

campaign funds and require that the solicitation be conducted through a campaign committee. *See* Alaska Code of Jud. Conduct, Canon 5C(3); Ariz. Code of Jud. Conduct, Canon 4.1(A)(6); Ark. Code of Judicial Conduct, Rule 4.1(A)(8); Colo. Code of Jud. Conduct, Rule 4.1(A)(8), 4.3(A)(4); Conn. Code of Jud. Conduct, Rule 4.1(A)(4); Florida Code of Jud. Conduct Canon 7C(1); Delaware Code Jud. Conduct, Rule 4.1(A)(3); Idaho Code of Jud. Conduct, Canon 5C(2); Ill. Code of Jud. Conduct, Canon 7B(2); Ind. Code of Jud. Conduct, Canon 4.1A(8); Iowa Code of Jud. Conduct, 51:4.1A(8); Ky. Sup. Ct. R. 4.300, Canon 5B(2); La. Code of Jud. Conduct, Canon 7A(6); Me. Code of Jud. Conduct, Canon 5C(3); Mich. Code of Jud. Conduct, Canon 7B(2)(a); Minn. Code of Jud. Conduct, Rule 4.1,A(6); Miss. Code of Jud. Conduct, Canon 5C(2); Mo. MO R Bar Rule 2-4.2; Mont. Code of Jud. Conduct, R CJC Rule 4.4; Neb. Code of Jud. Conduct, § 5-304.1(A)(8); N.M. Code of Jud. Conduct, Rule 21-402; N.Y. Code of Jud. Conduct, Canon 5A(2)(i); N.D. Code of Jud. Conduct, Rule 4.6; Ohio Code of Jud. Conduct, Canon 4, Rule 4.4(A); Okla. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(8); Or. Code of Jud. Conduct, Rule 5.1E; R.I. R. S. Ct. Art. VI, Code of Jud. Conduct, Canon 5B(1); S.C. Code of Jud. Conduct, Canon 5C(2); S.D. Code of Jud. Conduct, Canon 5A(1)(e); Tenn. Rules S. Ct., Rule 10, Rules of Jud. Conduct 4.1; Utah Code of Jud. Conduct, Canon 4, Rule 4.2B(2); Vt. Code of Jud. Conduct, Canon 5C(3); Wash. Code of Jud. Conduct, Rule 4.1A(7); W. Va. Code of Jud. Conduct, Canon 5C(2); Wis. Code of Jud. Conduct, Rule 60.06(4); Wyo. Code of Jud. Conduct, Canon 4, Rule 4.2B(4).

2. This case involves Respondent the Florida Bar's complaint against Petitioner Ms. Williams-Yulee,

alleging that she personally solicited campaign contributions while she was a judicial candidate. Pet. App. 3a. The referee (akin to a magistrate) who initially considered the complaint recommended that Ms. Williams-Yulee be found guilty of violating a rule regulating the Florida Bar, which requires judicial candidates to follow the Florida Code of Judicial Conduct, including Canon 7C(1), which in turn prohibits judicial candidates from personally soliciting campaign contributions but allows them to establish a committee to solicit campaign contributions. Pet. App. 4a.

Ms. Williams-Yulee urged the Florida Supreme Court to reject the referee's finding of guilt, arguing that Canon 7C(1) violated her right to free speech. Pet. App. 6a. The court initially determined that Canon 7C(1) restricted a judicial candidate's speech and then found that it "must be narrowly tailored to serve a compelling government interest." Pet. App. 7a. The court determined that "Florida has 'a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary.'" *Id.* (quoting *In re Kinsey*, 842 So.2d 77, 87 (Fla. 2003)). The court then held that Canon 7C(1) was narrowly tailored to further those interests because it separated judicial candidates from the direct solicitation and receipt of campaign funds but allowed a separate campaign committee to engage in the task of fundraising. Pet. App. 15a.

SUMMARY OF ARGUMENT

The federal and state courts that have upheld judicial code provisions that prohibit judicial candidates from personally soliciting campaign

contributions have uniformly found that these provisions further the compelling interests of preserving judicial impartiality and the appearance of judicial impartiality—interests that this Court recognized as compelling in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002).

The type of speech that this Court found invalid in *White* is substantially different from the speech that Canon 7C(1) and similar provisions prohibit. The announce clause at issue in *White* prohibited core political speech based on its content. In contrast, Canon 7C(1) prohibits judicial candidates from personally solicitating campaign contributions but allows campaign committees to solicit campaign funds on behalf of judicial candidates. It thus marginally affects a judicial candidate's ability to inform the electorate about his or her qualifications and therefore should be reviewed under the closely-drawn scrutiny framework of *Buckley v. Valeo,* 424 U.S. 1, 15 (1976). The *Buckley* framework is also appropriate for reviewing Florida's personal solicitation prohibition because the prohibition furthers the anticorruption rationale articulated in *Buckley*.

Canon 7C(1) is narrowly tailored because it permits campaign committees to solicit funds on behalf of judicial candidates and this provides an adequate, alternative means of obtaining funding. Requiring any greater precision in personal solicitation bans is futile because absolute precision in this area is unattainable and unnecessary.

ARGUMENT

I. The Personal Solicitation Ban Is Sufficiently Tailored to Further the Compelling Interests of an Impartial Judiciary and the Appearance of an Impartial Judiciary.

A. Canon 7C(1) Furthers Compelling Interests.

This Court recognized that the interest in "preserving the impartiality of the state judiciary and the appearance of the impartiality of the state judiciary" is compelling. *White*, 536 U.S. at 775-76. The Court defined impartiality as "the lack of bias for or against either *party* to the proceeding." *Id.*

The Florida Supreme Court below and the federal and state courts that have upheld judicial code provisions that prohibit judicial candidates from personally soliciting campaign contributions have uniformly found that these provisions further the compelling interests of preserving judicial impartiality and the appearance of judicial impartiality. *See* Pet. App. 9a-10a (concluding that Canon 7C(1) furthers the compelling interests of judicial impartiality by diminishing the possibility that judges will decide issues in favor of those who financially supported their campaigns and ensuring the public's trust in the judicial system by avoiding a party's fear that judges will be influenced by those who contributed to their campaign); *Wersal v. Sexton*, 674 F.3d 1010, 1031 (2012) (en banc) (holding that Minnesota's personal solicitation ban was narrowly tailored to serve Minnesota's interests in preserving judicial impartiality and the appearance of judicial

impartiality); *Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (noting that "[a] contribution given directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge"); *Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010) (noting that the "potential for actual or perceived mutual back scratching, or retaliation against attorneys who decline to donate . . . is the same whether or not the judge knows the potential donor's first name"); *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) (noting that "solicitation in person does have an effect—one that lends itself to the appearance of coercion or expectation of impermissible favoritism"); *Simes v. Ark. Jud. Discipline and Disability Comm'n*, 247 S.W.3d 876, 881 (Ark. 2007) (finding Arkansas has a "compelling interest in impartiality, as lack of bias for or against either party involved in a proceeding, where the direct solicitation of money by a judge is at issue"); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (noting that the "spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary").[1]

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[1] Even the Sixth Circuit did not doubt that Kentucky's solicitation ban "serves Kentucky's compelling interest in an impartial judiciary" and "in preserving the appearance and reality of a non-corrupt judiciary," although it concluded that the ban did not meet strict scrutiny." *Carey v. Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010).

The personal solicitation prohibition is significantly different from the announce clause, which this Court found "is barely tailored to serve [the impartiality or appearance of impartiality] interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *White,* 536 U.S. at 776. A solicitation prohibition does further the interest of impartiality and the appearance of impartiality toward particular *parties*.

B. Strict Scrutiny Does Not Apply to Canon 7C(1).

The type of speech that this Court found invalid in *White* is also substantially different from the speech that Canon 7C(1) and similar provisions prohibit. The announce clause at issue in *White* "both prohibit[ed] speech based on its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2002)). In contrast, Canon 7C(1) does not restrict speech about a judge's qualifications. Although it prohibits the solicitation of campaign contributions by judicial candidates themselves, it allows judicial candidates to form a campaign committee that may solicit and accept campaign contributions on behalf of the judicial candidate. Whether the judicial candidate or his or her campaign committee solicits the contributions, the judicial candidate still maintains the ability to inform the electorate about his or her qualifications. Because Canon 7C(1) does not affect judicial candidates' core speech, it should therefore be

reviewed under a less rigid standard than strict scrutiny.

Although the Florida Supreme Court did not explicitly state that it was not applying strict scrutiny or that Canon 7C(1) was content neutral, the cases on which it relied applied a less exacting scrutiny. *See* Pet. App. 7a (citing *Firestone v. News-Press Publ'g Co.*, 538 So.2d 457, 459 (Fla. 1989) (invalidating a ban on the presence of non-voters within fifty feet of polling places)); *id.* at 10a (citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding a municipal ordinance that prohibited picketing before or about an individual's residence or dwelling)). After determining that the ordinance was content neutral in *Frisby*, the Court articulated the standard "as whether the ordinance is 'narrowly tailored to serve a significant government interest' and whether it 'leaves ample alternative channels of communication.'" 487 U.S. at 482 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also Firestone*, 538 So.2d at 459 (noting that "[r]estrictions on first amendment rights must be supported by a compelling governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary"). The Florida Supreme Court determined that Canon 7C(1) "is narrowly tailored because it seeks to 'insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" Pet. App. 15a (quoting *Simes*, 247 S.W.3d at 883). Thus, the Florida Supreme Court recognized that Canon 7C(1) was not a content-based regulation of pure speech.

In *Siefert*, the Seventh Circuit recognized that prohibiting judicial candidates from personally soliciting campaign contributions is analogous to contribution limitations and therefore governed by the closely-drawn scrutiny framework of *Buckley*, 424 U.S. at 15. 608 F.3d at 988 (noting that because Wisconsin's solicitation ban "does not restrict the amount or manner in which a judicial candidate can spend money on his or her campaign" and is at heart a campaign finance regulation, it should be reviewed under the *Buckley* framework); *see also Wersal*, 674 F.3d at 1032 (Loken, J., concurring in the judgment) (characterizing Minnesota's personal solicitation ban as a restriction that does not directly burden speech and "is part of Minnesota's regulation of judicial campaign financing"); *Stretton*, 944 F.2d at 145-46 (affirming the district court's conclusion that Pennsylvania's personal solicitation ban "was not a restriction on what could be expended for promulgating political views" and concluding that the "means currently employed are narrowly tailored to further" the compelling interest in judicial impartiality and "there are alternative, less objectionable means for raising campaign funds").[2]

The Seventh Circuit also determined that the *Buckley* framework applied because both the personal

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[2] The Oregon Supreme Court also distinguished the kind of speech involved when judges directly solicit campaign contributions from speech deserving greater protection by comparing it to the commercial speech at issue in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 458 (1978). *Fadeley*, 802 P.2d at 43. The court reasoned that "in the context of in-person solicitation of campaign funds, [there is] a certainty of an appearance of impropriety and a high degree of likelihood of overreaching or undue influence by the requesting judge." *Id.*

solicitation ban and the contribution limits upheld in *Buckley* further a "compelling state interest in preventing corruption or the appearance of corruption." *Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 26-27). The court found that "a direct solicitation closely links the quid—avoiding the judge's future disfavor-to the quo-the contribution" and that "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Id.* at 989-90. The court thus found that the prohibition serves the "anticorruption rationale articulated in *Buckley* and acts to preserve judicial impartiality." *Id.* at 989; *see also Stretton*, 944 F.2d at 145 ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.").[3]

The Seventh Circuits reasoning in *Seifert* and *Bauer* is sound: there is an important distinction between the restriction on core speech that the Court held subject to strict scrutiny in *White* and Canon 7C(1)'s restriction on judicial candidates personally soliciting campaign contributions. This Court should therefore apply exacting scrutiny to determine whether Canon 7C(1) violates the First Amendment.

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[3] In upholding a federal ban on corporate political contributions, this Court rejected the argument that strict scrutiny should apply to the ban, which limits contributions based on their source. *F.E.C. v. Beaumont*, 539 U.S. 146, 161 (2003). The Court relied on *Buckley*'s reasoning that restrictions on contributions "have been treated as merely 'marginal' speech restrictions" because they "lie closer to the edges than to the core of political expression." *Id.*

C. Canon 7C(1) Is Narrowly Tailored to Further the Compelling Interests of Judicial Impartiality and the Appearance of Judicial Impartiality.

As the Florida Supreme Court observed, "every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional, as one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law." Pet. App. 13a (citing *Simes*, 247 S.W.3d at 884; *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *Fadeley,* 802 P.2d at 44). This is not because state courts do not understand First Amendment requirements; rather, state courts understand the realities of judicial elections and the need for a certain amount of latitude in crafting prophylactic ethical rules.

In finding that personal solicitation bans are narrowly tailored, the state courts have focused on the fact that although a judicial candidate may not personally solicit campaign contributions, the code provisions permit campaign committees to solicit funds on behalf of judicial candidates and this provides an adequate, alternative means of obtaining funding. *See* Pet. App. 15a (holding that Canon 7C(1) was narrowly tailored because Ms. Williams-Yulee "was not completely barred from soliciting funds, but was simply required to utilize a separate campaign committee to engage in the task of fundraising"); *Simes*, 247 S.W.3d at 883 (holding that Arkansas's personal solicitation ban was narrowly tailored because it seeks to "insulate

judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns"); *Fadeley*, 802 P.2d at 41 (holding that Oregon's personal solicitation ban was narrowly tailored because "it permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge").

The federal courts that have invalidated personal solicitation bans like Canon 7C(1) have not suggested that campaign committees are unable to solicit sufficient funding; rather, they are concerned that personal solicitation bans are not the least restrictive alternative method of furthering the States' compelling interests. *See, e.g., Carey*, 614 F.3d at 205 (finding that Kentucky's personal solicitation ban, which prohibited judicial candidates from asking for campaign contributions from large groups and with signed mass mailings, restricted too much speech and did too little to protect Kentucky's interests in allowing "the candidate's best friend to ask for a donation directly from an attorney who frequently practices before the court"). But in responding to arguments that personal solicitation bans like Canon 7C(1) are either underinclusive or overinclusive or both, many federal judges have recognized the practical problem of precise line-drawing with regard to personal solicitation bans. *See Wersal*, 674 F.3d at 1032 (noting that the application of strict scrutiny to Minnesota's solicitation ban "illustrated the 'futility of requiring unattainable precision'") (Loken, J., concurring (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 785 (8th Cir. 2005) (en banc) (Gibson, J., dissenting)); *Bauer*, 620

F.3d at 710 (rejecting the argument that Indiana's personal solicitation ban was not as narrowly tailored as the Wisconsin ban upheld in *Siefert* because "[i]t is the nature of rules to be broader than necessary in some respects" and that "[l]aws need not contain exceptions for every possible situation"); *Stretton*, 944 F.2d at 146 (acknowledging that a judicial candidate may learn who contributed to his or her campaign but determining that the solicitation prohibition "cannot be faulted because it does not go far enough").

Ms. Williams-Yulee argues that either recusal or contribution limits are less restrictive alternatives that would further the State's compelling interests. Petitioner's Br. at 23-25. But these alternatives do not provide the panacea that she suggests.

Recusal is not a valid solution because "'judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins' and thus '[i]t would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution.'" *Wersal*, 674 F.3d at 1031 (quoting *Siefert*, 608 F.3d at 990). This is especially a problem in counties with small populations that may only have one or two superior court judges. Four counties in Arizona have only one superior court judge. http://www.azcourts.gov/2013annualreport/JudiciaryOrganizationalChart.aspx (last visited Dec. 22, 2014); s*ee also Wolfson v. Concannon*, 750 F.3d 1145, 1168 (Tallman, J., dissenting in part), *reh'g en banc granted*, 768 F.3d 999 (9th Cir. 2014). Recusal is also unworkable because it "serves as an after-the-fact remedy that is insufficient to cure the damage to the appearance of impartiality

fashioned by personal solicitation, which is by and large complete at the time of the 'ask.'" *Wersal*, 674 F.3d at 1031.

Although this Court has upheld limits on the amount of campaign contributions under exacting scrutiny in *Buckley*, those limits involve line-drawing that is not as narrowly tailored as personal solicitation bans, especially in jurisdictions with a limited number of judges. And limits on contribution amounts are more likely to limit the amount of a judicial candidate's core speech than a personal solicitation ban. States should be accorded sufficient latitude to determine which regulation or combination of regulations best furthers their compelling interests in judicial impartiality and the appearance of judicial impartiality.

CONCLUSION

This Court should affirm the Florida Supreme Court's decision.

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