No. 13-1499

IN THE
Supreme Court of the United States

LANELL WILLIAMS-YULEE,
Petitioner,

v.

THE FLORIDA BAR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices ("Conference") was founded in 1949 to enable the highest judicial officers of the states to discuss matters of importance in improving the administration of justice, rules and methods of procedure, as well as the organization and operation of state courts and judicial systems. The Conference also makes recommendations on these matters. The Conference is comprised of the Chief Justices or Chief Judges of the courts of last resort in all fifty states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands. The Conference has been a leading national voice on important issues concerning the administration of justice in state courts.

This *amicus* brief is being filed pursuant to a policy unanimously approved by the Conference's Board of Directors. The policy authorizes the filing of a brief if critical interests of state courts are at stake, as they are in this case. In most states, standards for ethical behavior of judges and candidates for judicial office are prescribed in codes of judicial conduct ("the Codes") promulgated by the state's highest court. The Conference therefore has the highest interest in ensuring that the Codes are constitutional, clear, respected, and effective. The Conference's policy is to

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for Petitioner and Respondent consented to the filing of this *amicus* brief by letters dated December 15 and 18, 2014, respectively.

avoid taking a position on a specific state's code of judicial conduct or on the specifics of the decision of the state supreme court at issue. Rather, the Conference supports the constitutionality of the Codes in general.

The Conference has filed *amicus curiae* briefs in this Court in prior cases where the constitutionality of the Codes was implicated, and this Court has relied on those briefs. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009); *id.* at 901 (Roberts, C.J., dissenting); *Republican Party of Minn.* v. *White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting). Pursuant to the Conference's policy, this brief has been reviewed and approved by a special committee of the Conference chaired by the Chief Justice of North Dakota and composed of the Chief Justices of Arizona, New Hampshire, Pennsylvania, and South Carolina, and the former Chief Justice of Utah (a past president of the Conference and a current member of the Utah Supreme Court).

INTRODUCTION

The authority of the judiciary rests on its credibility and the respect accorded to its rulings. "The citizen's respect for the judgments depends … upon the issuing court's absolute probity." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Judicial elections, and the associated judicial campaigns and electoral fund-raising, often create a tension between "the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U.S. 380, 400 (1991). To mitigate this tension, the highest courts of most states have adopted codes of judicial conduct regulating electoral activities of incumbent judges as well as candidates for judicial office. The Codes serve as "'[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (citation omitted).

Among other rules of conduct for the judicial profession, many Codes impose a restriction on direct personal campaign solicitation by a judge or a judicial candidate. Instead, both incumbent and non-incumbent candidates must conduct fund-raising through campaign committees. These committees serve as a buffer between the judge or judicial candidate and the potential donor, who is often either a lawyer or a litigant appearing in front of the judge. In doing so, the restrictions on direct judicial solicitation safeguard the critical state interests in a judiciary that is impartial in both fact and appearance, and protect lawyers and litigants from

potential coercion. Canon 7C(1) of the Florida Code of Judicial Conduct is such a restriction, mandating that judicial candidates, including incumbent judges, "shall not personally solicit campaign funds," but may conduct solicitation through campaign committees.

The restrictions on direct personal judicial campaign solicitation impede no more speech than is necessary to vindicate the compelling state interest in the judiciary's integrity. By prohibiting a direct monetary transaction between a judicial candidate and a contributor likely to appear in front of that judge, the restrictions guard against the appearance of impropriety and partiality. At the same time, these restrictions enable judicial candidates to solicit contributions needed to fund their campaigns, so long as the solicitation is channeled through an easily established campaign committee. The solicitation restrictions also protect a citizen from the potential coercion present in any contribution request by a judge or judicial candidate. They ensure that the citizen does not feel compelled to "speak" in favor of that judge through a nominally voluntary contribution. This Court should affirm the ability of states' highest courts to fashion appropriate rules for the judicial profession, designed to safeguard judicial impartiality while adhering to constitutional free speech requirements.

SUMMARY OF ARGUMENT

State codes of judicial conduct have long served as the primary means by which states protect the integrity of their judiciaries and preserve the appearance of judicial impartiality. In enacting the Codes, states have emphasized the importance of

avoiding both actual impropriety and the appearance of impropriety, and the majority of the Codes forbid direct campaign solicitations by judges or judicial candidates. A judge whose appearance of impartiality is compromised undermines the public's confidence in the judiciary as a whole, and imperils public respect for its judgments. The preservation of judicial integrity and the appearance of judicial impartiality are compelling state interests.

The Codes' restriction on direct personal solicitation is instrumental in protecting both the actual impartiality of the judiciary and the appearance of impartiality. By channeling solicitation through a campaign committee, the restriction on direct solicitation removes the specter of a litigant with a pending case or an attorney frequently appearing before the judge of bowing to an unmediated request for money by the judge. This is the form of solicitation where the appearance of corruption or bias is particularly acute, even if the judge remains actually impartial. The restriction prohibits judges or judicial candidates from directly soliciting campaign funds but allows a campaign committee to do so; thus, it extends only so far as necessary to remedy the potential ills posed by direct solicitation.

The restriction also eliminates the intimation of coercion that a lawyer or a litigant reasonably senses from a direct solicitation made by a sitting or prospective judge. By preventing coercive requests, the solicitation rule protects citizens from potentially involuntary contributions, while leaving open ample fund-raising options. As a measure designed to ensure the voluntariness of electoral campaign

contributions, the Codes' restriction on direct solicitation by judges promotes First Amendment interests.

Judicial recusal is not an effective or more narrowly tailored alternative. Recusal cannot address the threat that the act of direct solicitation poses to the appearance of judicial impartiality. Recusal is also inconsistent with a judge's ethical and professional duty to minimize the conflicts that could require recusal, and an increased use of recusals would risk creating a systemic problem of judge-shopping by litigants or lawyers.

States, being responsible for designing a judicial system that meets the needs of their citizenry, should be permitted to fashion their judicial campaign solicitation restrictions in a way that most effectively combats the threats posed by direct solicitation. States should be afforded latitude in making their policy determinations of how best to address those potential harms while adhering to the First Amendment's free speech guarantees.

Finally, this Court should not entertain Petitioner's overbreadth challenge to Florida's solicitation canon. The overbreadth doctrine is not designed for instances where, as here, Petitioner contends that the law is unconstitutional as applied to her. Moreover, it is unclear whether Petitioner has even preserved an overbreadth or other type of facial challenge, and Petitioner fails to demonstrate that the solicitation canon's numerous other applications — which would pose an even greater threat to judicial impartiality and the appearance of impartiality — would fail the narrow tailoring analysis.

ARGUMENT

A. *State Codes of Judicial Conduct Are Vital Safeguards of Public Confidence in the State Judiciary's Integrity and Impartiality.*

As this Court has acknowledged, the necessity of campaigns and campaign fund-raising results in "[a] fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. Accordingly, all thirty-eight states with elected judiciaries impose safeguards — most of which rarely, if ever, would apply to elected officials other than judges — to help maintain the judiciary's unique role in the democratic process. In many states judges are the only elective officials, aside from attorneys general or prosecutors, who must meet special training or experience requirements, are subject to mandatory age retirement requirements, or must resign before running for a non-judicial elective office. These "[e]xplicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service." *White*, 536 U.S. at 794 (Kennedy, J., concurring).

The Codes "are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton*, 556 U.S. at 889 (quoting Brief for the Conference as *Amicus Curiae* at 4, 11). As this Court emphasized, "[t]hese codes of

conduct serve to maintain the integrity of the judiciary and the rule of law," and are a critical component of "the judicial reforms … implemented to eliminate even the *appearance* of partiality." *Caperton*, 556 U.S. at 888-89 (emphasis added).

The Codes' origins date to 1924, when the American Bar Association ("ABA") adopted the *Canons of Judicial Ethics*. *See White*, 536 U.S. at 786. According to Chief Justice William Howard Taft, who chaired the ABA Committee on Judicial Ethics, these canons were intended to be "the statement of standards, announced as a guide and reminder to the judiciary." *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A.J. 449, 449 (1923), *quoted in* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1065 n.26 (1996). With respect to judicial campaigns, the *Canons* admonished that "[a] candidate for judicial position … should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination." *See Canons of Judicial Ethics* (1924), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf (Canon 30). The *Canons* also imposed specific restrictions on solicitation by judges. *See, e.g.*, *id.* (Canon 28) (a judge "should avoid … soliciting payment of assessments or contributions to party funds"); *id.* (Canon 25) (a judge "should not solicit for charities," in order to "avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to … contribute"). In the subsequent years, state courts

and legislatures adopted the *Canons* as substantive rules. Shepard, *supra*, at 1065.

In 1972, the *Canons* were replaced by the ABA's *Model Code of Judicial Conduct* (hereinafter, "*Model Code*"), which was developed in order to provide a more detailed set of substantive rules concerning judicial ethics. With some variations, nearly every state adopted the new *Model Code*. Shepard, *supra*, at 1066. Subsequently revised on several occasions (most recently in 2010), the *Model Code* continues to serve as the basis for the Codes adopted by states to safeguard their judiciary's impartiality and integrity.

One of the central concerns of the Codes is "avoid[ing] impropriety *and the appearance* of impropriety." *See, e.g.*, Ariz. Code of Jud. Conduct, Canon 1 (emphasis added); N.H. Code of Jud. Conduct, Canon 1 (same); N.D. Code of Jud. Conduct, Canon 1 (same); *see also Model Code*, Canon 1 (2011) (same). As the *Model Code* explains, "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety." *Model Code*, Rule 1.2 cmt 1. Accordingly, Rule 1.2 of the *Model Code* requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and [to] avoid impropriety and the appearance of impropriety." *Id.* Rule 1.2.

The concern about safeguarding both impartiality and the appearance of impartiality also animated Rule 4.1(A)(8) of the *Model Code* — the analogue of Canon 7C(1) of the Florida Code of Judicial Conduct at issue in this case — which provides that "a judge or a judicial candidate shall not … personally solicit

or accept campaign contributions other than through a campaign committee." *See, e.g.*, ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, *Summary of Meeting Minutes* at 3 (Oct. 21-23, 2004) (observing that the absence of a provision restricting personal solicitation by judges would create a "public perception … problem").

Preserving judicial integrity and the appearance of judicial impartiality are compelling state interests. This Court recognized the compelling nature of these interests in *Republican Party* v. *White*, when it considered whether the announce clause of the Minnesota Code of Judicial Conduct was "narrowly tailored to serve impartiality (or the appearance of impartiality)" — two state interests asserted in support of the announce clause. 536 U.S. at 775-77. Indeed, "[e]very court to consider the issue has affirmed that states have a compelling interest in the appearance and actuality of an impartial judiciary." *Wolfson* v. *Concannon*, 750 F.3d 1145, 1156, *reh'g en banc granted*, 768 F.3d 999 (9th Cir. 2014).[2]

The appearance of impartiality is imbedded in the concept of due process, for "due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972). "Due process requires both fairness and the appearance of fairness in the tribunal." *Siefert* v.

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[2] In her briefs before the Florida Supreme Court, Petitioner has likewise acknowledged that "maintaining the public's confidence in an impartial judiciary" is a compelling state interest. *See* Initial Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 5275028 at *9, *14 (Fla. Sept. 10, 2012); *see also* Reply Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 8944669 at *3-*4 (Fla. Oct. 29, 2012).

Alexander, 608 F.3d 974, 985 (7th Cir. 2010). As this Court has observed, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). Thus, states have a compelling interest in ensuring — and, indeed, are required by the Fourteenth Amendment to ensure — that their judiciary is free from both actual and probable bias, and that it is impartial in appearance as well as in fact. *See Caperton*, 556 U.S. at 877; *see also id.* at 890 (Roberts, C.J., dissenting) (agreeing with "the need to maintain a fair, independent, and impartial judiciary — and one that appears to be such").

In the Conference's view, it is vital that the elected state judiciary is not only impartial in fact, but is also perceived as impartial and unbiased. "[M]aintaining the appearance of impartiality is systemic in nature, as it is essential to protect the judiciary's reputation for fairness in the eyes of all citizens … . [P]ublic confidence in the judiciary is integral to preserving our justice system." *Wersal* v. *Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012) (*en banc*); *see also Bauer* v. *Shepard*, 620 F.3d 704, 711 (7th Cir. 2010) ("judges … must be seen as impartial if judicial decisions are to be accepted by the public"). As Justice Kennedy has observed,

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends

> in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

White, 536 U.S. at 793 (Kennedy, J., concurring); *see also* The Federalist No. 78 (Alexander Hamilton) (the judiciary "may be said to have neither FORCE nor WILL, but merely judgment"). "Articulated standards of judicial conduct may advance this interest." *White*, 536 U.S. at 793 (Kennedy, J., concurring) (citation omitted).

The preservation of judicial integrity, or the appearance of judicial impartiality, is not an amorphous concept. Rather, the Conference respectfully submits, the appearance of impartiality is a standard well ascertainable and familiar to members of the states' judiciaries. "[T]he appearance of impartiality may be defined as the perception the public maintains regarding the judiciary's lack of bias for or against either party to a proceeding." *Wersal*, 674 F.3d at 1021-22. Nor are judges unable to determine whether a particular type of conduct could endanger this important interest. As the ABA *Model Code* stated,

> "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Model Code, Rule 1.2 cmt. 5.

Indeed, judges are routinely called upon to make determinations about appearances of impartiality or impropriety. As one commentator has noted, "the term 'appearance' is already the familiar standard in the codes of judicial conduct around the country." Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DePaul L. Rev. 529, 542 (2010); *see also id.* at 542 n.61 (collecting examples). Similarly, a federal judge or justice is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *see also Cheney* v. *United States Dist. Ct.*, 541 U.S. 913, 914, 920 (2004) (Scalia, J.) (mem.); *Code of Conduct for United States Judges*, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities."); *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974) (the disqualification inquiry "must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance'") (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964)). There is no reason this Court (or other state and federal courts) would be unable to determine whether a particular type of conduct covered by the Codes — such as the restriction on direct solicitation — would present a danger of undermining the appearance of judicial impartiality.

B. *The Restriction on Direct Solicitation Is Narrowly Tailored To Protect Judicial Impartiality and the Appearance of Impartiality.*

The restriction on direct personal solicitation in the Codes is instrumental to protecting both the

actual impartiality of the judiciary and the *appearance* of impartiality. The restriction is designed to eliminate the specter of current or potential litigants handing over money directly to judges or prospective judges, and the risk that such an exchange poses to public perception of judicial integrity even if the judge remains, in fact, impartial. A state could reasonably conclude that an unmediated financial transaction between a judge and a litigant or attorney appearing before or likely to appear before the judge would seriously undermine the public's respect for the judiciary and its judgments. *See White*, 536 U.S. at 793 (Kennedy, J., concurring); *see also id.* at 790 (O'Connor, J., concurring) ("the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary"). "[T]he public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." *Simes* v. *Ark. Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876, 882 (Ark. 2007).

By prohibiting direct personal solicitations by judges and judicial candidates alike, the restriction also insulates judges from the pressure to make direct solicitation requests; if judicial candidates could make such requests, sitting judges might be forced to do the same or campaign at a disadvantage. On the other hand, a sitting judge would likely expect his direct request for a campaign contribution to be met; the absence of a restriction on direct solicitation also favors incumbency. At the same time, the

personal solicitation clause restricts speech only insofar as necessary. Both sitting judges and non-incumbent candidates for judicial office remain free to conduct fund-raising through a campaign committee. When a contribution is solicited by a campaign committee, the danger that the contribution will be wrongly perceived as a personal favor is diminished.

The personal solicitation restriction is narrowly tailored to the compelling state interest of protecting judicial impartiality and the appearance of impartiality. The restriction is designed to prohibit only the form of solicitation where the appearance of corruption (as well as potential coercion) is most likely: personal solicitation by judges and judicial candidates. *See Siefert*, 608 F.3d at 989-90 ("[T]he appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means."). In these circumstances, it is the act of asking for funds directly — not just the act of presiding over a case involving solicited parties — that threatens the appearance of judicial impartiality. Therefore, there is no other, less restrictive way to address this harm, except to restrict the judge's ability to personally make the solicitation request.[3]

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[3] These considerations may apply to mass mailings as well as to direct in-person solicitation. Here, the record does not indicate whether any recipients of Petitioner's fund-raising letter had a case pending in the court where she was seeking to serve as a judge, or whether any recipients were potential litigants or counsel who regularly appear before that court, such as sheriffs, prosecutors, or public defenders.

The restrictions do not prohibit judges from soliciting campaign funds altogether; they simply channel such solicitation through a campaign committee. The drafters of the ABA *Model Code of Judicial Conduct* recognized the danger of direct solicitation and the need for a buffer between the candidate and the party, potential party, or attorney. *See supra* at 9-10. The campaign committee acts as that buffer, eliminating the specter of a direct financial transaction between judge and party or potential party. Use of campaign committees also insulates litigants from personal requests by sitting or prospective judges, reducing the possible coercive effect. *See infra* at 23-24.

By permitting fund-raising through committees, the personal solicitation restriction extends only so far as necessary to remedy the potential ills posed by direct solicitation. It restricts less conduct, for instance, than the *Code of Conduct for United States Judges*. Canon 4(C) of that Code dictates that, except for solicitation of family members and other judges, a federal judge "should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of the judicial office for that purpose." It also requires that a judge "not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism." And a federal judge may not even participate in *planning* fund-raising, except for certain non-profit organizations. Solicitation restrictions are thus a common regulatory feature designed to uphold the integrity and impartiality of governmental decision-making. *See, e.g.*, *id.* Canon

5(A)(3) (prohibiting political fund-raising); 18 U.S.C. § 602 (restricting solicitation by members of Congress from federal employees); *id.* § 607 (restricting solicitations in federal buildings); 52 U.S.C. § 30119 (restricting solicitations of federal contractors); 52 U.S.C. § 30125 (restricting solicitations by federal candidates for organizations).

The solicitation clause "is not just one provision …, but is part of an integrated system, designed to ensure a fair and impartial judiciary." *Simes*, 247 S.W.3d at 883. Thus, the direct solicitation canon is not underinclusive on the asserted ground that it would not prohibit, for instance, a judicial candidate's "best friend" from soliciting an attorney who frequently practices before the court, and reporting to the candidate the result of the inquiry. *See* Pet. Br. 19-20. This type of conduct would be covered by prohibitions elsewhere in the Code. *See, e.g.*, Fla. Code of Jud. Conduct, Canon 7A(3)(d) ("except [as otherwise] permitted …, [a candidate] shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing"); *Id.* Canon 7A(3)(b) ("[a] candidate for a judicial office … shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity, and independence of the judiciary").

No rule or set of rules can completely insulate a judge from potential bias or preserve the appearance of impartiality. All codes of judicial conduct reflect a balance between judicial impartiality and independence on one hand and First Amendment interests on the other. A rule that bars a judge from accepting a contribution in a courtroom, for example,

may not bar the judge from stepping outside onto the sidewalk to accept the contribution and therefore could be considered underinclusive. But the fact that a state has struck a particular balance between concerns about judicial integrity and First Amendment interests should not provide a basis for condemning a rule reflecting that balancing — or other appropriate prophylactic measures that are not complete cures for the harms they seek to prevent.

C. *The Direct Solicitation Restriction Prevents Coercion, and Thereby Promotes First Amendment Interests.*

In addition to protecting impartiality and the appearance of impartiality, the solicitation rule is essential to preventing coercion. States have a compelling interest in protecting their citizens from being forced to make political contributions to judges and judicial candidates. By preventing such coercive donations, the solicitation restriction, on balance, promotes First Amendment interests.

1. Direct Solicitations by Judges Present Inherent Dangers of Coercion.

A personal solicitation by a person in a position of authority presents the potential donor with a classic Hobson's choice: contribute money or risk disappointing a person with power over his future. As this Court explained,

> [i]f contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a

> demand, and that a failure to meet the demand may be treated by those having [authority] as a breach of some supposed duty, growing out of the political relations of the parties.

Ex parte Curtis, 106 U.S. 371, 374 (1882); *see also United States* v. *Wurzbach*, 280 U.S. 396, 398-99 (1930) ("Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment"); *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby* v. *City of Philadelphia*, 763 F.3d 358, 375 (3d Cir. 2014) ("paycheck deduction mechanisms … may create pressure … to donate … because when contributions are 'solicited by others in official authority … what begins as a request may end as a demand'") (quoting *Ex parte Curtis*, 106 U.S. at 374).

The concern that a solicitation will coerce a contribution — even unintentionally — is particularly acute when a judge is making the solicitation. Judges hold enormous power over the litigants or lawyers who appear before them. And situations in which a judge's solicitation of a contribution may cause coercion are easy to envision, such as where a judge solicits contributions from an attorney in a pending case during a break in trial or from a litigant or attorney who regularly appears before the court. *See also Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) (personal solicitation by a judicial candidate is where "the coercive effect, or its appearance, is at its most intense"); *Simes*, 247 S.W.3d at 882 ("Allowing a

judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, … inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate."). As then-Chief Justice of Texas Wallace B. Jefferson observed, when a sitting judge calls a lawyer asking for a campaign contribution, the lawyer has no "[r]ealistic[] choice" but to donate. Wallace Jefferson, *Reform from Within: Positive Solutions for Elected Judiciaries*, 33 Seattle U. L. Rev. 625, 625-26 (2010).

Similarly, Rule 3.1(D) of the ABA's *Model Code* provides that a judge shall not "engage in conduct that would appear to a reasonable person to be coercive," and Comment 4 to that rule notes that "depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization … might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge." *See also Model Code*, Rule 3.7(A)(2) (permitting a judge to solicit contributions for organizations or governmental entities concerned with the law and certain nonprofit organizations, "but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority"). The concern animating these restrictions is that personal solicitations by judges present an inherent possibility of coercion.

2. Restrictions on Direct Personal Judicial Solicitation Promote First Amendment Interests.

Because direct personal solicitations by judges are inherently coercive, prohibitions on such solicitations are designed to protect citizens from being forced to make political contributions. At the same time, such prohibitions impose only a minor burden on First Amendment interests.

The coercive nature of direct judicial solicitations implicates a compelling state interest in protecting citizens from extraction of coerced payments by government officials. As this Court observed in *Ex parte Curtis*, in upholding a law prohibiting executive officers or employees of the United States (with certain exceptions) from "requesting, giving to, or receiving from" another government official or employee any political donation, even "[i]f there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would … be clear." 106 U.S. at 374. Similarly, in rejecting a constitutional challenge to the Federal Corrupt Practices Act, this Court in *Wurzbach* explained that "[i]t hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment." 280 U.S. at 398-99. Indeed, as the Third Circuit has observed, the contention that personal solicitation by a judicial candidate "is the most effective means for raising money only underscores the fact that solicitation in person does

have an effect — one that lends itself to the appearance of coercion or expectation of impermissible favoritism." *Stretton*, 944 F.2d at 146.

This Court's decisions addressing compelled funding of private speech provide a useful analogy. The Court has observed that "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Harris* v. *Quinn*, 134 S. Ct. 2618, 2639 (2014) (quoting *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012)). This Court has also explained that

> [t]he fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 292, 302 n.9 (1986) (internal quotation marks and citations omitted); *see also Knox*, 132 S. Ct. at 2291 ("any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights") (internal quotation marks omitted); *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990) (limiting the ability of a state bar association to use mandatory dues to advance political causes at odds with a member's beliefs).

Accordingly, measures designed to ensure that political contributions are made voluntarily promote First Amendment interests. Indeed, in upholding the Hatch Act, this Court has pointed out that the act "aimed to protect employees' rights, notably their right to free expression, rather than to restrict those rights." *United States* v. *Nat'l Treasury Emps. Union*, 513 U.S. 454, 471 (1995). Similarly here, given the high likelihood of potential coercion, restrictions on direct personal solicitation of campaign contributions by judges or judicial candidates ensure that contributions to judicial candidates are "shaped by [the donor's] mind and his conscience." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (internal quotation marks and citation omitted).

Restrictions on direct solicitation by judges and judicial candidates impose only a minor burden on First Amendment interests. Solicitations are not pure political advocacy. By definition, a solicitation requests a financial transaction. As Justice Kennedy observed, "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*." *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 308 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part). If solicitations were indistinguishable from pure speech, the laws of most states that require charitable organizations to register before soliciting

contributions from the state's residents would be unconstitutional.[4]

Significantly, restrictions on direct personal solicitation do not prevent a judicial candidate from addressing issues of public concern, the candidate's qualifications for office, or any other issue the candidate believes is relevant to voters. Nor do they prevent candidates from funding that speech through campaign contributions, because candidates' campaign committees remain free to solicit contributions for judicial campaigns. *E.g.*, Fla. Code of Jud. Conduct, Canon 7C(1); *see also In re Fadeley*, 802 P.2d 31, 41 (Or. 1991). In this respect, restrictions on direct personal solicitation are less burdensome on speech than even contribution limits, which are evaluated under "closely drawn" scrutiny. *See Buckley* v. *Valeo*, 424 U.S. 1, 18, 20-21, 25 (1976).

The importance of guarding against coerced contributions is reflected in laws that prohibit solicitations in circumstances where the use of government authority can cause coercion and undermine the contribution's voluntariness. At the federal level, such laws include prohibitions on campaign-funding solicitations from members of Congress to federal employees, 18 U.S.C. § 602; solicitations in federal buildings, *id.* § 607; solicitations of federal contractors, 52 U.S.C.

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[4] *See* Internal Revenue Service, Charitable Solicitation — Initial State Registration, http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Charitable-Solicitation-Initial-State-Registration ("Approximately 40 states have enacted charitable solicitation statutes. Although specifics vary, state statutes usually require organizations to register with the state before they solicit the state's residents for contributions.").

§ 30119(a)(2); and the requirement that a person soliciting a federal employee for a contribution to a separate segregated fund inform the employee of his right to refuse to contribute without reprisal, *id.* § 30118(b)(3)(C). *See also Wurzbach*, 280 U.S. at 398-99.

States have enacted similar restrictions on soliciting in governmental buildings, soliciting subordinate employees and contractors, and soliciting using governmental authority or resources. *See* National Conference of State Legislatures, Staff and Political Activity — Statutes (updated Dec. 2011), http://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx. Indeed, states have gone beyond restrictions that mirror federal law. For example, as of December 2011, twenty-nine states placed restrictions on campaign contributions during the legislative session. *See* National Conference of State Legislatures, Limits on Campaign Contributions During the Legislative Session (updated Dec. 6, 2011), http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-during-session.aspx. These laws reflect a widespread consensus among states that solicitation restrictions are necessary to prevent governmental authority from being used to coerce contributions. As independent sovereigns, states have a strong interest in ensuring that state authority is not used to pressure citizens to act contrary to their beliefs. That interest should not be lightly weighed and measures promoting that interest should not be invalidated solely because they may not be completely effective.

D. *Judicial Recusal Is Not a Workable More Narrowly Tailored Alternative.*

The Codes' restrictions on direct personal solicitation of judicial campaign contributions are an appropriate response to safeguard the compelling state interests of preserving judicial impartiality and the appearance of impartiality. These solicitation restrictions are appropriately focused on the behavior that poses the greatest risk — direct solicitation by a judge or a judicial candidate. Notably, Petitioner does not suggest what kind of judicial campaign solicitation regulation would be a less restrictive way to preserve judicial impartiality and its appearance or to guard against coercion. "Having no rules is, of course, less restrictive. But it isn't an alternative means of furthering the interest at stake here." *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting).

Nor can judicial recusal serve as a workable less restrictive alternative. As an initial matter, "judicial-recusal rules are self-enforced and therefore may not provide adequate safeguards against the risks that flow from treating judicial elections like legislative ones." *Carey* v. *Wolnitzek*, 614 F.3d 189, 194 (6th Cir. 2010). The fact that a judge soliciting a donation could recuse himself also does not prevent the solicitation from being coercive.

In addition, "[i]t is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins. It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution." *Siefert*, 608 F.3d at 990; *cf. Wolfson*, 750 F.3d at 1168

(Tallman, J., dissenting) ("Constant recusal is no solution."). In courts with small bars and repeat litigants — which can be found throughout the country — recusal of a judge could work significant harm to a court's ability to function. The soliciting judge may "be disqualified so often that he will have the equivalent of a paid vacation, while other judges must work extra to protect litigants' entitlement to expeditious decisions." *Bauer*, 620 F.3d at 713.

Moreover, recusal is inconsistent with a judge's "responsibility to decide," which requires judges to minimize the conflicts that could necessitate recusal. *See, e.g.*, Ariz. Code of Jud. Conduct, Rule 2.7; N.D. Code of Jud. Conduct, Rule 2.7; Pa. Code of Jud. Conduct, Rule 2.7. Frequent recusal would conflict with this ethical and professional obligation.

Even if recusal could solve the problem of actual bias,

> recusal serves as an after-the-fact remedy that is insufficient to cure the damage to the appearance of impartiality fashioned by personal solicitations, which is by and large complete at the time of the "ask." At the very least, by the time the Due Process Clause requires recusal of a judge, the appearance of impartiality has already been impaired.

Wersal, 674 F.3d at 1031.

Indeed, an increased use of recusal would risk creating a systemic problem of judge-shopping by litigants or lawyers. In the absence of a campaign committee acting as a buffer between the judge (or

the judicial candidate) and the campaign donor, thereby helping to preserve the appearance of judicial impartiality, lawyers or litigants could selectively contribute to judicial campaigns and then force the recusal of the judge in question.

E. *States Should Be Permitted To Strike the Appropriate Balance in Regulating Judicial Elections.*

The fact that some states fashion their judicial campaign solicitation restrictions in a different way from Florida (at times as a result of lower courts' prior rulings on the question before this Court), and some do not impose restrictions on direct personal solicitation, *see* Pet. Br. 27, is reflective of our Nation's federalist design and does not indicate that restrictions on direct personal solicitation are unnecessary. The Constitution leaves to each state the responsibility for designing a judicial system that meets the needs of its citizenry. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Each state that elects judges seeks to strike a proper balance between the judicial candidate's needs for campaign resources and the state's goal of ensuring the independence and integrity of its judiciary. Just like the judicial qualification requirements at issue in *Gregory*, this is "a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.

The granularity of the policy decisions involved in constructing a regime for regulating judicial conduct counsels deference to state decision-making. In adopting judicial conduct and campaign-finance rules for state judges, a state must choose carefully among a virtually unlimited set of options. The optimal

policy choice may vary based on state-specific factors such as a state's history of judicial misconduct or campaign-finance violations, a state's legal culture, or a particular rule's track record of effectiveness in a given state. This Court's general reluctance to constitutionalize such policy choices, *cf. DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 202-03 (1989), should apply with special force here, where invalidation of a specific Code restriction would have the effect of overriding the policy choices of a separate sovereign constitutionally empowered to make those choices.

Federal courts' authority to prevent the encroachment of state government on citizens' liberties should be exercised with due regard for each state's sovereign interest in designing a judicial system that reflects the state's history and values, while balancing competing constitutional interests. Some states may permit large group solicitations, others may not. Some states may prohibit individualized mailings but allow mass mailings. Most, if not all, would proscribe solicitation in the courthouse. Unless an essential liberty is put into jeopardy by the state's particular choice, care should be exercised so that each state retains an essential feature of sovereignty — the right to construct a mode of government that responds to the expressed desires of its citizens.

F. *This Court Should Not Entertain an Overbreadth Challenge to the Solicitation Canon.*

For the reasons stated above, the Conference respectfully submits that the Codes' restrictions on

direct solicitations, including restrictions on direct mass mailing, comply with the First Amendment. But in any event, a facial challenge to these regulations — such as an overbreadth challenge — is inappropriate in this case. As this Court cautioned, the "strong medicine" of the overbreadth doctrine should be employed "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Overbreadth is a special type of facial challenge available only in the free speech context. *See United States* v. *Stevens*, 559 U.S. 460, 473 (2010). Whereas the traditional facial challenge requires a plaintiff to "establish that no set of circumstances exists under which the Act would be valid," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), the overbreadth doctrine permits invalidation of a speech restriction where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotations omitted).

The overbreadth doctrine is designed for situations where the law may be constitutionally applied to the challenger, but the challenger contends that a substantial number of other applications would be unconstitutional. As this Court cautioned,

> It is not the usual judicial practice, … nor … generally desirable, to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary

> means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws.

Bd. of Trustees v. *Fox*, 492 U.S. 469, 484-85 (1989); *see also Stevens*, 559 U.S. at 484 (Alito, J., dissenting) ("The 'strong medicine' of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court.").

Principles of judicial restraint counsel against embarking on an overbreadth inquiry prior to rejection of the as-applied challenge. *See Fox*, 492 U.S. at 484-86. "Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Wash. State Grange*, 552 U.S. at 450 (internal quotation omitted). Furthermore, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* at 450 (internal quotation marks and citation omitted). This is such a barebones record, as it is unknown how many litigants or potential litigants Petitioner solicited.

The overbreadth doctrine "was designed as a 'departure from traditional rules of standing,' to enable persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Fox*, 492 U.S.

at 484 (quoting *Broadrick*, 413 U.S. at 610, 613). Here, however, Petitioner has been disciplined under Canon 7C(1) of the Florida Code of Judicial Conduct, and needs no additional incentive to challenge the solicitation restriction at issue.

Moreover, it is unclear whether Petitioner has even preserved an overbreadth or other type of facial challenge. Petitioner's argument to the Florida Supreme Court was that the solicitation restriction was "unconstitutional to the extent that it prohibits a judicial candidate from signing a mass mailing solicitation letter." Initial Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 5275028 at *12 (Fla. Sept. 10, 2012) (capitalization removed). Indeed, Petitioner conceded below that "[i]t is possible that Florida's Canon 7(C)1 could survive strict scrutiny analysis if it didn't prohibit a judicial candidate from signing a mass mailing solicitation." Reply Br. of Resp't, *Fla. Bar* v. *Williams-Yulee*, No. SC11-265, 2012 WL 8944669 at *7 (Fla. Oct. 29, 2012). This Court does not entertain issues not raised below, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), and certainly not issues conceded below.

Petitioner also fails to explain (with the sole exception of speeches before large gatherings, *see* Pet. Br. 23) why the other applications of the Florida solicitation restriction would not be narrowly tailored to the compelling state interests at issue. Like other analogous provisions of the Codes, Florida Canon 7C(1) would also apply to in-person solicitation by a judge from the bench, in-person solicitation in the courthouse (including during court breaks or immediately following a court session), in-person face-to-face solicitation, in-person solicitation of a

small group, in-person solicitation by telephone, and solicitation in a targeted mailing (including a mailing addressed to current or frequent litigants). These situations present an even greater threat to the impartiality of the judiciary, and to the appearance of impartiality, than a direct mass mailing, and are therefore firmly within "the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks and citation omitted).

Petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists," *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003) (quoting *N.Y. State Club Ass'n* v. *New York*, 487 U.S. 1, 14 (1988)) (alterations in original), and this Court "do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *Wash. State Grange*, 552 U.S. at 449 n.6 (internal quotation marks and citation omitted). In such circumstances, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *N.Y. State Club Ass'n*, 487 U.S. at 14 (internal quotation marks omitted).[5] This Court should not take up the difficult task of assessing the constitutionality of the solicitation restriction's numerous potential applications where Petitioner has

[5] Petitioner's failure to address these situations, as well as her failure to preserve the facial challenge below, *see supra* at 32, are likewise fatal to a facial challenge made under the *Salerno* standard, which would require Petitioner to establish that "no set of circumstances exists under which the [law] would be valid." *Salerno*, 481 U.S. at 745.

not demonstrated that they would not be narrowly tailored to the compelling state interests of preserving judicial impartiality and the appearance of impartiality.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Conference of Chief Justices respectfully requests that this Court uphold the constitutionality of the restrictions on direct personal solicitations of the state Codes of Judicial Conduct.

Respectfully submitted,

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