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 PETITIONER

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-18a) is reported at 138 So. 3d 379. The referee's report (Pet. App. 19a-25a) and order on recommendation of guilt (Pet. App. 26a-30a) are not reported.

JURISDICTION

The final judgment of the Supreme Court of Florida was entered on May 1, 2014. The petition for a writ of certiorari was filed on June 17, 2014, and was granted on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257.

RULE INVOLVED

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

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

STATEMENT

Whether state court judges should be chosen through election or appointment is the subject of vigorous debate in our country. Under our Constitution, "States are free to choose [elections] rather than * * * appointment and confirmation" as the method that

will "select those persons likely to achieve judicial excellence." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 795 (2002) (*White I*) (Kennedy, J., concurring). But "[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Ibid.*

That is precisely what Florida has done here—providing for judicial elections but imposing an across-the-board prohibition on candidate speech requesting campaign contributions. Florida's prohibition applies even if the request is through mass mailing of a letter signed by the candidate, or a request posted on a campaign website.

That content-based limitation of core campaign speech cannot withstand strict scrutiny review. Florida's asserted interests in preventing corruption and bias are undermined by the limited nature of its prohibition—although Canon 7C(1) prevents a judicial candidate from soliciting donations, the candidate may nonetheless learn the identities of those who have—and have not—donated to her campaign. The candidate may even write thank-you notes to donors. Canon 7C(1)'s regulation of candidate speech at most creates an illusion of separation between candidate and contributor, which in turn undermines any claim of compelling interest.

Moreover, the State has other means of preventing bias that do not limit protected speech. Judicial recusal is the appropriate remedy for addressing the risk of bias. And limits on campaign contributions serve to preserve impartiality and prevent bias. The availability of those less restrictive alternatives dooms Florida's across-the-board speech ban.

"Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, * * * the cost of campaigning requires judicial candidates to engage in fundraising." *White I*, 536 U.S. at 789-790 (O'Connor, J., concurring). Florida's choice of popular election as a means of choosing particular categories of judges, combined with the availability of alternative means for addressing the risk of judicial bias, require the invalidation under the First Amendment of Canon 7C(1)'s regulation of candidate speech.

A. Legal Background.

Florida's Constitution provides that judges serving on circuit courts and county courts—the State's general-jurisdiction trial courts—shall be selected by election unless the voters of a particular circuit or county choose by referendum to adopt the alternative system of appointment by the Governor followed by retention elections. Fla. Const. art. V, sec. 10(b). Elections to select judges and to retain judges chosen by appointment are conducted on a nonpartisan basis. Fla. Stat. §§ 105.071, 105.09.

State laws governing reporting and disclosure of campaign contributions and imposing limits on contributions to candidate committees apply to judicial candidates. Fla. Stat. §§ 106.011(3) (definition of "candidate"), 106.021 (appointment of campaign treasurer), 106.06 (record requirements), 106.08(1)(a) (contribution limits).

Judicial candidates' election activities are also regulated by Canon 7 of Florida's Code of Judicial Conduct. That canon provides in pertinent part that candidates "for a judicial office that is filled by public election between competing candidates"—including

incumbent judges—"shall not personally solicit campaign funds, or solicit attorneys for publicly stated support." Fla. Code of Jud. Conduct, Canon 7C(1). Candidates may "establish committees of responsible persons to secure and manage the expenditure of funds" for their campaigns and to solicit support. "Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." *Ibid*.

A judge in a retention election is subject to Canon 7C(1)'s restrictions only until he or she certifies to Florida's secretary of state and judicial qualifications commission "that the judge's candidacy has drawn active opposition, and specifying the nature thereof." Fla. Code of Jud. Conduct, Canon 7C(2). Following that certification, the general restrictions on soliciting campaign funds and public support no longer apply. *Ibid*. However, a Florida Judicial Ethics Advisory Committee Opinion indicates that even solicitation activities not prohibited by Canon 7 could violate the general requirement that "a candidate for a judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary." Opinion 2004-07 (Fla. Jud. Eth. Adv. Comm. 2004).[1]

B. Factual Background.

Petitioner stood as a candidate for County Court Judge in Hillsborough County, Florida, which in-

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[1] The Committee "render[s] written advisory opinions to inquiring judges concerning the propriety of contemplated judicial and non-judicial conduct." *Petition of the Comm. on Standards of Conduct Governing Judges*, 698 So. 2d 834, 835 app. (Fla. 1997). Those advisory opinions are available at http://perma.cc/-5ACT-SY9V, and many are available on Westlaw.

cludes the city of Tampa. Pet. App. 3a. On September 4, 2009, she signed a mass-mail campaign fundraising letter in which she announced her candidacy and requested campaign contributions. *Id.* at 27a, 31a-32a. The letter explained that "[a]n early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public." *Id.* at 32a. The letter concluded with petitioner's signature. *Ibid.*

The letter was mailed to a number of individual voters and was posted on the website maintained by petitioner's campaign committee. Hearing Tr. 19-20 (Apr. 13, 2012). At the time petitioner signed the letter, there were no other announced candidates for the judgeship. Pet. App. 3a.

C. Proceedings Below.

Respondent filed a complaint against petitioner in the Supreme Court of Florida, alleging (so far as relevant here) a violation of Canon 7C(1) of the Florida Code of Judicial Conduct. Pet. App. 2a.

1. The matter was referred to a referee (akin to a magistrate), who recommended a finding of guilt. Pet. App. 19a-30a. Observing that Canon 7C(1) applies by its terms only to elections "between competing candidates," petitioner testified that she had read the canon as not applying to candidates in uncontested races. *Id.* at 27a. But the referee rejected that interpretation, holding that the words "between competing candidates" are "used to describe the *type* of judicial office where the prohibition would apply," and not the case-by-case circumstances of any particular race. *Id.* at 27a-28a (emphasis added). Thus,

while finding that petitioner's violation of the canon was based on a good faith mistake as to its meaning, the referee recommended a finding of guilt because "the reason for violation" is irrelevant. *Id*. at 28a.

With respect to discipline, the referee found that petitioner had no prior disciplinary history; had no dishonest or selfish motive; made a timely and good faith effort to rectify her misconduct; and was fully cooperative with the disciplinary board. Pet. App. 24a. The referee accordingly recommended that petitioner receive a public reprimand and pay the costs of the proceedings. *Id*. at 23a-24a.

2. The Florida Supreme Court approved the referee's findings of fact and recommended determination of guilt "for personally soliciting campaign contributions in violation of Canon 7C(1) of the Florida Code of Judicial Conduct." Pet. App. 1a.[2] The court rejected petitioner's contention that the imposition of sanctions violated the First Amendment.

The Florida court began its analysis by acknowledging that, because "Canon 7C(1) clearly restricts a judicial candidate's speech," it "must be narrowly tailored to serve a compelling state interest." Pet. App. 7a. But the court held that "Florida has 'a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary,'" observing that "other state supreme courts that have addressed the constitutionality of judicial ethics canons similar to Florida's Canon 7C(1) have reached the same conclusion." *Id*. at 7a (alteration in original), 10a.

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[2] The court rejected the referee's recommendations concerning a separate alleged violation respecting certain statements made to a reporter. Pet. App. 2a, 15a-16a.

With respect to narrow tailoring, the court explained that "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." Pet. App. 11a. The canon "is narrowly tailored," the court concluded, because candidates still may "utilize a separate campaign committee to engage in the task of fundraising" on their behalves, thereby "leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns." *Id.* at 15a (quoting *Simes* v. *Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 883 (Ark. 2007)).

In reaching that conclusion, the court explained that Canon 7C(1) is "similar to Canons 4.1(A)(8) and 4.4 of the American Bar Association Model Code of Judicial Conduct," that "[a] majority of states have enacted similar provisions," and that "every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional." Pet. App. 11a-13a. The court acknowledged, however, that the federal courts of appeals, "whose judges have lifetime appointments and thus do not have to engage in fundraising," were divided on the question. *Id.* at 13a n.3.

The court declared that "[b]y publication of this opinion, Lanell Williams-Yulee is hereby publicly reprimanded," and required petitioner to pay the costs of the proceeding. Pet. App. 18a. Pursuant to Florida Bar Rule 3-5.4(a) all disciplinary sanctions "are public information." Sanctions imposed within the last ten years are posted to attorneys' individual Florida Bar profiles at the Bar's website. Petitioner's profile notes that she has been subject to a sanction

within the past ten years and provides a link to obtain the details of the case.[3]

Chief Justice Polston and Justice Canady dissented in part without opinion. Pet. App. 18a.[4]

SUMMARY OF ARGUMENT

Canon 7C(1)'s ban on contribution solicitations by judicial candidates is subject to strict scrutiny review, for two reasons. It is a content-based regulation, applicable only to speech soliciting campaign contributions. And it prohibits speech at the core of the First Amendment—the speech of candidates for elective office.

This Court has repeatedly emphasized that a challenged speech restriction rarely survives strict scrutiny. Canon 7C(1) is not one of the rare exceptions to that general rule, because it is not narrowly tailored to serve a compelling state interest.

To begin with, the restriction cannot be justified based on a state interest in preventing *quid pro quo* corruption. The State has the very same interest with respect to other elected officials but limits its ban on solicitations of financial support to judicial candidates. That fact alone demonstrates that the

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[3] Petitioner's profile can be accessed at https://www.floridabar.org/names.nsf/MESearchDK?OpenForm by searching for her name. Clicking "Yes" next to "10-Year Discipline History" accesses the case reference number, and clicking on the reference number accesses the Bar complaint, referee decision, and Florida Supreme Court decision in this case.

[4] Chief Justice Polston and Justice Canady had concluded in a prior case that Canon 7C(1) violated the First Amendment. *In re Turner*, 76 So. 3d 898, 910-913 (Fla. 2011) (Canady, C.J., concurring in result).

prohibition is not necessary to promote that state interest.

The state has a compelling interest in preventing judicial bias, but Canon 7C(1)'s underinclusiveness substantially "diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52-53 (1994). That is because the regulation does not prohibit judicial candidates from learning who has contributed and who has not—and it is the *knowledge* of who does and does not contribute, not the identity of the individual making the solicitation, that introduces the potential for bias.

Indeed, the judicial candidate may be told who donated to her campaign (and how much they gave) and who did not. She may serve as campaign treasurer. She may write thank-you notes to donors. And she may ask individuals to contribute time and effort to her campaign. The prohibition against solicitation of contributions cannot be justified as necessary to prevent bias when the candidate is free to learn who donates and to acknowledge contributors' assistance to her campaign.

Canon 7C(1) fails strict scrutiny for the additional reason that it is overinclusive, prohibiting speech that carries no risk of bias. "No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Carey* v. *Wolnitzek*, 614 F.3d 189, 205 (6th Cir. 2010) (Sutton, J.).

Moreover, the State can and does employ alternative measures to prevent bias that are less restrictive of protected speech. Recusal rules prevent judges

from presiding over matters in which their impartiality might plausibly be questioned, without intruding on First Amendment rights. And contribution limits effectively prevent bias as well.

Finally, even if these flaws do not render Canon 7C(1) unconstitutional on its face, the regulation is unconstitutional as applied to petitioner in this case. The disciplinary sanctions imposed on petitioner for engaging only in written speech to a broad audience clearly violate the First Amendment.

ARGUMENT

PETITIONER'S SOLICITATION OF CAMPAIGN CONTRIBUTIONS IS PROTECTED BY THE FIRST AMENDMENT.

"The interests here at issue are at the heart of the First Amendment," which "'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Nev. Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2353 (2011) (quoting *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). Florida's rule prohibiting candidates for judicial office from personally soliciting campaign funds infringes core First Amendment interests—prohibiting an essential category of speech by candidates for elective judicial office.

The justifications advanced in support of this prohibition do not come close to satisfying strict scrutiny review. Florida's ban is underinclusive, neglecting other serious threats to the claimed state interests—and thereby demonstrating that those interests are not sufficiently compelling to justify the broad speech restriction—and overinclusive, because less restrictive alternatives are available to further Florida's claimed interests. The regulation under

which petitioner was sanctioned therefore violates the First Amendment and should be overturned by this Court.

A. Canon 7C(1) Is Subject To Strict Scrutiny Review.

"[T]he proper test to be applied to determine the constitutionality" of a restriction that either "prohibits speech on the basis of its content" or "burdens a category of speech that is 'at the core of our First Amendment freedoms'" is "what [this Court's] cases have called strict scrutiny." *Republican Party of Minn.* v. *White* (*White I*), 536 U.S. 765, 774 (2002) (quoting *Republican Party of Minn.* v. *Kelly*, 247 F.3d 854, 861 (8th Cir. 2001)). Canon 7C(1) is subject to strict scrutiny on both grounds.

To begin with, the canon is triggered by "the message [that the speech] conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). If a candidate for judicial office sends a letter that includes a request for campaign contributions, she has violated the canon; if she sends the same letter, minus the request for money, she has not. There is no denying, therefore, that applicability of the canon "is determined by the content of a [candidate's speech]." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). For that reason alone, the canon "must satisfy strict scrutiny." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 469 (2009).

Canon 7C(1) also burdens speech that "'is at the core of our electoral process and of the First Amendment freedoms.'" *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-223 (1989) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)). "[I]t can hardly be doubted that the constitutional

[free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam)). That is certainly so here because, although solicitation of money by itself may not constitute a purely political message, "the reality [is] that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

To survive a constitutional challenge, therefore, Canon 7C(1) must satisfy strict scrutiny. See *Eu*, 489 U.S. at 223-224 (applying strict scrutiny to a law that "hamper[ed]" and "censor[ed]" the speech of candidates for elective office); *Pleasant Grove*, 555 U.S. at 469 ("any restriction based on the content of the speech must satisfy strict scrutiny").

Neither respondent nor the Florida Supreme Court disputed the applicability of strict scrutiny review here. But some lower courts have held that the constitutionality of similar speech restrictions should be evaluated under the less rigorous "closely drawn scrutiny" standard. See *Siefert* v. *Alexander*, 608 F.3d 974, 988 (7th Cir. 2010); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990). That is manifestly wrong.

Closely drawn scrutiny applies only to "contribution limits" and "mechanism[s] adopted to implement * * * contribution limit[s]." *McConnell* v. *FEC*, 540 U.S. 93, 137 (2003). Canon 7C(1) does not fall within those categories: it does not regulate *who* may contribute or *how much* they may contribute, but is instead a categorical ban on particular speech by can-

didates for elective office. *Cf. Schaumburg*, 444 U.S. at 637 (applying strict scrutiny to a prior restraint on the solicitation of charitable contributions). Strict scrutiny is the applicable standard here.[5]

B. Canon 7C(1) Is Not Narrowly Tailored To Serve A Compelling State Interest.

This Court has emphasized that it is "the rare case in which * * * a law survives strict scrutiny" (*Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)), and this is not one of those rare instances. "To survive strict scrutiny, * * * a State must do more than [identify] a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest" (*id*. at 199) and "that it does not 'unnecessarily circumscribe protected expression'" in the process (*White I*, 536 U.S. at 775 (quoting *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982))). Canon 7C(1) fails on both scores: it is "both underinclusive and overinclusive." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1978).

Even if, contrary to our submission, the ban on candidate solicitation were subject to closely drawn scrutiny, the First Amendment would bar its application to petitioner here. The disconnect between the

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[5] The Court in *McConnell* did suggest that closely drawn scrutiny applies to limited restrictions on the personal solicitation of contributions to third-party PACs, but it did so because the selective solicitation ban was designed to "prevent political parties from using tax-exempt organizations as soft-money surrogates" to create an end-run around contribution limits. *McConnell*, 540 U.S. at 177. Thus, the limited ban was one element of a broader regulation of third-party contributions, not candidate speech. See *id*. at 138. The rationale is wholly inapplicable to Canon 7C(1), which is a standalone, across-the-board ban on all solicitations by candidates for judicial office.

governmental interests asserted and Canon 7C(1) is so substantial that the regulation is unconstitutional even under this somewhat reduced standard.

1. Preventing judicial corruption and bias are compelling state interests.

The threshold inquiry in applying the strict scrutiny standard is identifying the government interests advanced as sufficiently weighty to justify the speech restriction. *White I*, 536 U.S. at 775 ("[c]larity on [the asserted interest] is essential" to a strict scrutiny analysis). Respondent asserted below that Canon 7C(1)'s purposes are "to prevent the appearance of quid pro quo, bias or corruption, and to preserve the integrity of our judiciary and maintain the public's confidence in an impartial judiciary." Am. Answer Br. 8. For its part, the Florida Supreme Court concluded that "protecting the integrity of the judiciary, as well as maintaining the public's confidence in an impartial judiciary, represent compelling State interests." Pet. App. 10a.

Since *Buckley* v. *Valeo*, this Court has recognized the government's interest in preventing *quid pro quo* corruption. 424 U.S. 1, 25-27 (1976); see also *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1441 (2014); *Citizens United* v. *FEC*, 558 U.S. 310, 359 (2010).

The "integrity of the judiciary" is a somewhat vague concept, but it appears largely coextensive with the notion of "judicial impartiality." The word integrity means "adherence to a code of * * * values," "avoidance of deception," and "honesty" (*Webster's Third New International Dictionary* 1174 (2002))—all of which, in the context of judging, suggests avoidance of bias. The "traditional" understanding of judicial impartiality, as this Court has explained, "is

the lack of bias for or against either party to the proceeding." *White I*, 536 U.S. at 775-776 (emphasis omitted). "Impartiality in this sense assures equal application of the law" and "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Ibid.*[6] Preventing actual judicial bias is for those reasons a compelling governmental interest. See *White I*, 536 U.S. at 793 (Kennedy, J., concurring) ("Judicial integrity is * * * a state interest of the highest order.").

But in the proceedings below, respondent insisted that there was more—that Canon 7C(1) prevents not only *actual* bias and corruption, but also the simple *appearance* of those adverse consequences. Am. Answer Br. 8. The lower court agreed, holding that the State has a compelling interest in "maintaining the public's confidence" in the judiciary, presumably regardless of whether that confidence is based on appearance or reality. Pet. App. 10a.

The Florida court is not alone in reaching that conclusion. Other courts have suggested that "maintaining the appearance of impartiality * * * is essential to protect the judiciary's reputation for fairness in the eyes of all citizens." *Wersal* v. *Sexton,* 674 F.3d 1010, 1022 (8th Cir. 2012) (en banc). "The judicial system depends on its reputation for impartiality,"

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[6] The Court identified two other meanings of impartiality in *White I*, including the "lack of preconception in favor of or against a particular *legal view*" and "willing[ness] to consider views that oppose [a judge's] preconceptions." 536 U.S. at 777-778. To the extent either of those alternative meanings has any relevance here, it is only insofar as each is partially coextensive with the avoidance of favoritism to a particular party (and therefore the legal arguments the party happens to espouse).

those courts have stated, because "it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer* v. *Shepard*, 620 F.3d 704, 712 (7th Cir. 2010).

An "*appearance* of bias" standard raises a host of questions. For example:

- Appearance of bias to *whom*—participants in the legal system or citizens at large?
- Must the appearance of bias be based on the views of the relevant audience in possession of all of the pertinent facts (*e.g.*, other protections against biased decisionmaking) or would it suffice if there were an appearance of bias based on uninformed or erroneous views of the pertinent facts?
- How widely must the perception of bias be held within the target "audience" for its prevention to qualify as a compelling interest?
- How would courts undertake the "appearance" inquiry—based on their own perceptions or based on evidence such as public opinion polls?

These would be uncertain foundations for upholding a restriction on protected speech. Protecting the judiciary's reputation and preventing the perception of judicial bias could conceivably support all manner of restrictions—not only on speech uttered by candidates for judicial office, but also on speech by "campaign committees, lawyers, law firms, contributors, solicitors, endorsers, supporters, opponents, the press and others too numerous to mention." *Wersal*, 674 F.3d at 1046 (Beam, J., dissenting).

The Court need not determine whether avoiding the mere appearance of judicial bias and corruption, and not just their actuality, is a compelling governmental interest. Canon 7C(1) is so poorly tailored to even those potentially broad interests that it clearly fails strict scrutiny review.

2. The prohibition's dramatic underinclusiveness demonstrates that it does not accomplish the State's claimed purposes.

To survive strict scrutiny, a content-based regulation of speech must "satisfactorily accomplish[] its stated purpose." *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 541 (1989). A regulation that is "underinclusive[]" in scope—one that does too little to meaningfully advance the interests invoked to justify the rule—"raises serious doubts about whether [the State] is, in fact, serving, with [the regulation], the significant interests" asserted. *Id.* at 540. After all, "[a] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *White I*, 536 U.S. at 780 (quoting *The Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part and concurring in the judgment)).

The dramatic underinclusiveness of Canon 7C(1)—the State's willingness to permit injury to the claimed interests through other means—therefore "render[s] belief in that purpose a challenge to the credulous." *Ibid.*; see also *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52-53 (1994) (underinclusiveness significantly "diminish[es] the credibility of the government's rationale for restricting speech").

To begin with, the restriction cannot be justified based on the interest in preventing *quid pro quo* corruption. The State has the very same interest with respect to other elected officials but limits its prohibition on contribution solicitation to judicial candidates. That fact alone demonstrates that the prohibition is not necessary to protect that state interest.

The same conclusion applies with respect to the state interest in preventing judicial bias. Canon 7C(1) is significantly underinclusive in three separate ways—and therefore confirms the absence of any compelling interest justifying the speech regulation.

First, Canon 7C(1) does not prohibit judicial candidates from learning who has contributed and who has not—and it is the *knowledge* of who does and does not contribute, not the identity of the individual making the solicitation, that introduces the potential for bias.

The canon expressly permits judicial candidates' campaign committees to solicit campaign contributions. Committee members may, in turn, tell the candidate who gave generously and who balked in response to those requests. See Judicial Ethics Opinion 77-22, 1978 WL 420332 (Fla. Jud. Eth. Adv. Comm. 1978); Judicial Ethics Advisory Comm., An Aid to Understanding Canon 7, at 15-16 (July 19, 2006), available at http://perma.cc/J5AN-95D9. And nothing prevents candidates from reviewing the committee's public reports of campaign contributions. In fact, judicial candidates may even serve as the treasurers of their own campaign committees, making clear that there is no obstacle to review by the candidate of all of the donations made to the

campaign. See Fla. Stat. § 106.021(1)(c); An Aid to Understanding Canon 7, at 14.

If prevention of the potential for bias is the goal, it makes no difference whether a candidate personally requests a donation from a supporter or instead instructs her campaign manager to do it for her. Either way—so long as the candidate learns of the outcome of the request—the potential for bias is present.

Respondent argued below that solicitations made personally by candidates for judicial office create the *appearance* of partiality. Am. Answer Br. 8 ("The purpose of [the solicitation ban] is to * * * maintain the public's confidence in an impartial judiciary."). The claim is that recipients of personal requests for money may feel unduly pressured to make a donation for fear of upsetting the candidate and falling into disfavor. As we explain below (see pages 22-23, *infra*), that argument, even if correct, could not justify application of the regulation to the mass mailing and Internet solicitation at issue here.

In any event, a potential donor who knows the candidate will learn whether a donation was given or refused will feel precisely the same pressures. That is all the more true because, once candidates are made aware of donations given, they are free to send personal thank-you messages. See Judicial Ethics Opinion 92-02 (Fla. Jud. Eth. Adv. Comm. 1992), available at http://perma.cc/7QEU-C9UJ (thank-you letters permitted but cannot be on official letterhead); Judicial Ethics Opinion 77-22 (thank-you letters must be "in good taste").

Canon 7C(1) thus "prevent[s] a candidate from sending a signed mass mailing to every voter in the district but permit[s] the candidate's best friend to

ask for a donation directly from an attorney who frequently practices before the court," and to report back to the candidate with the results of the request. *Carey*, 614 F.3d at 205. "[I]f impartiality or absence of corruption is the concern, what is the point of prohibiting judges from personally asking for solicitations or signing letters, if they are free to know who contributes and who balks at their committee's request?" *Wolfson* v. *Concannon*, 750 F.3d 1145, 1157-1158 (9th Cir.), reh'g en banc granted, 768 F.3d 999 (9th Cir. 2014).

Second, Canon 7C(1) permits judicial candidates to solicit a variety of other types of support. They can ask individuals to serve on their campaign committees—a significant position, given the important role the committee plays in soliciting contributions and endorsements. Because Florida law excludes volunteer services from its definition of a "contribution" (Fla. Stat. § 106.011(5)(d)), they can ask individuals to "volunteer to work on [the] campaign" (*McCutcheon*, 134 S. Ct. at 1441). And they can ask nonlawyers publicly to "urge others to vote for [the] candidate." *Ibid.*

A candidate's request for these commitments of personal time raises all the same risks as personal requests for money. Canon 7C(1) thus "leaves appreciable damage" to judicial impartiality "unprohibited." *White I*, 536 U.S. at 780 (quoting *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in judgment)).

Third, Florida law also permits a judicial candidate to learn the identities of those individuals or groups making independent expenditures in connection with her election. These expenditures can be significant. *Caperton* v. *A.T. Massey Coal Co.*, 556

U.S. 868 (2009), involved a donor who gave only $1,000 directly to a West Virginia justice's campaign committee but spent an additional $2.5 million through an independent political action committee. *Id.* at 873.[7]

The fact that a candidate may learn who is behind such significant expenditures undermines the claim that the State has a compelling interest in preventing the candidate from soliciting contributions, particularly because contributions are capped at $1,000 for the office sought by petitioner. Fla. Stat. § 106.08(1)(a)(2).

Fourth, rules like Canon 7C(1) have troubling implications for the fairness of judicial elections. Most notably, such rules favor "incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey*, 614 F.3d at 204. The fact that the regulation stacks the deck in favor of incumbents and other well-connected lawyers—like other campaign regulations considered by this Court[8]—further undermines the claim that it serves a compelling interest.

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[7] Independent expenditures on state supreme court campaigns totaled $24.1 million in the 2011-2012 election cycle. Alicia Bannon et al., *The New Politics of Judicial Elections 2011-12*, Brennan Ctr. for Justice, 4 (Oct. 2013), http://perma.cc/8FN9-YQH2. More than $3.3 million was spent on Florida's Supreme Court retention elections alone. *Id.* at 6.

[8] See, *e.g.*, *Randall* v. *Sorrell*, 548 U.S. 230, 248-49 (2006); *McConnell*, 540 U.S. at 306-307 (Kennedy, J., concurring in part and dissenting in part); see also *id.* at 249-250, 260-263 (Scalia, J., concurring in part and dissenting in part).

3. Canon 7C(1) is impermissibly over-inclusive because there are less restrictive means of furthering the asserted state interests.

A content-based speech restriction "must be the least restrictive means of achieving [the] compelling state interest" that it is alleged to support. *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2530 (2014) (citing *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). Thus, "[w]hen a plausible, less restrictive alternative is offered," the State must "prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Grp.*, 529 U.S. at 816.

Although "[a] complete ban" on a category of speech is not per se invalid, it will survive strict scrutiny "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). The State therefore must show that *every* form of personal solicitation endangers its interests in preserving impartiality and preventing corruption. That it cannot do.

Canon 7C(1) broadly prohibits *all* personal solicitations of campaign donations. There are no exceptions to this rule: it applies to signed mass mailings like the one petitioner sent in this case, as it does to one-on-one exchanges over dinner at a fundraising event.

Solicitations conveyed through mass mailings or a request posted on a website create no serious risk of either the reality or appearance of judicial bias or *quid pro quo* corruption. "No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Carey*,

614 F.3d at 205. In fact, a mass mailing may not generate any contributions at all, as was the case with petitioner's mailing here. Hearing Tr. 47-48 (Apr. 13, 2012). It is impossible to see how an ineffective solicitation that generates no responses, taken alone, could impugn the integrity of the judiciary.

The same conclusion applies to speeches to large gatherings. There is no serious possibility that "a speech requesting donations from a large gathering [would have] a coercive effect on reasonable attendees." *Carey*, 614 F.3d at 205. It is simply implausible to think that an attendee at a large rally could in fact curry improper favor (or appear to do so) by making a donation in response to a general request by the candidate during her speech. Canon 7C(1) thus burdens substantially more speech than necessary to achieve the particular interests the State has asserted.

Moreover, the State can pursue its asserted interests through means much less restrictive of protected speech. Recusal provides an important, and effective, protection against bias and the appearance of bias. Florida Canon of Judicial Conduct 3E(1), for example, provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Fla. Code of Jud. Conduct, Canon 3E(1)-(1)(a). Similarly, Florida law allows parties to disqualify judges by filing affidavits stating that they fear they will not receive a fair hearing "on account of the prejudice of the judge * * * against the applicant or in favor of the adverse party." Fla. Stat. § 38.10.

Recusal rules like these prevent judges from presiding over matters in which their impartiality might plausibly be questioned, without intruding on the First Amendment rights of judicial candidates in conducting their campaigns. See Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 614 (2004) ("[T]he proper response to judicial campaign speech that could threaten [judicial bias] may be to allow the speech and then, if a case arises in which a judge's former campaign speech poses a problem, to assign that case to another judge.").

In contrast to the alternative of recusal, Canon 7C(1) does little to address any risk of bias that may result from judicial fundraising. The same risk follows from donations solicited by campaign committees and disclosed to candidates, as well as from candidates' personal solicitations of donations of time—all of which are unchecked by Canon 7C(1). Indeed, the canon arguably creates a false sense of separation between the candidate and contributions that has little basis in reality—and may therefore prevent the application of more effective remedies, such as recusal, when there is a real risk of bias.

Moreover, any burdens associated with recusal are not insurmountable and therefore provide no basis for imposing an across-the-board restriction on campaign speech at the core of the First Amendment. "If it is said that [recusals] are less efficient and convenient than" personal solicitation bans, "the answer is that considerations of this sort do not empower a [State] to abridge freedom of speech." *Schaumburg*, 444 U.S. at 639 (quoting *Schneider* v. *State*, 308 U.S. 147, 164 (1939)). The *Caperton* Court concluded that

any difficulty in effectuating recusal could not excuse a violation of the Due Process Clause; neither should it permit an abridgement of free speech.

Contribution limits furnish yet another less restrictive means of avoiding bias and corruption (or the appearance of either) resulting from judicial campaign fundraising. Under Florida law, individuals and political committees may not donate more than $3,000 to a state supreme court candidate or $1,000 to a county court, circuit court, or district court of appeals candidate in a single election. Fla. Stat. § 106.08(1)(a). Florida's "selection of [these] base limit[s] indicates its belief that contributions of [those] amount[s] or less do not create a cognizable risk of corruption" or partiality. *McCutcheon*, 134 S. Ct. at 1452. Unlike a blanket ban on personal solicitations, these sorts of "contribution limits * * * entail only a marginal restriction upon the contributor's ability to engage in free communication." *McConnell*, 540 U.S. at 134-135 (internal quotation marks and brackets omitted) (quoting *Buckley*, 424 U.S. at 19); see also *id*. at 136 ("contribution restrictions" impose "limited burdens * * * on First Amendment freedoms"). They also are more effective, because they also protect against any risk of bias and corruption that follows from requests made by a candidate's committee on the candidate's behalf.

The fundamental purpose of the narrow-tailoring requirement is "to ensure that speech is restricted no further than necessary to achieve the [State's asserted] goal, for it is important to assure that legitimate speech is not chilled or punished." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). Otherwise, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights

through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

That impermissible outcome is what Canon 7C(1) guarantees. Apart from unnecessarily suppressing speech in the plainest of ways, the canon encourages candidates for judicial office to censor themselves in communications of every sort for fear that what they say may be taken as a solicitation of financial support. For example, the Kentucky Ethics Commission has interpreted Kentucky's personal solicitation ban as covering any communication in which a candidate may happen to make her "wants or desires" for campaign contributions "known," regardless whether the communication is a "personal appeal" or something as impersonal as a generic campaign "advertisement." Judicial Ethics Opinion JE-42, 1983 WL 872765 (Eth. Comm. Ky. Jud. 1983).

Some prospective candidates may even be discouraged from running for judicial office at all. See *Republican Party of Minn.* v. *White*, 416 F.3d 738, 746 (8th Cir. 2005) (en banc) (*White II*) ("Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race."). Against this backdrop, Canon 7C(1) is not narrowly tailored to achieve a compelling state interest.

* * * * *

A final point bears emphasis. The experience in other States that choose judges through election provides strong evidence that contribution solicitation bans like Canon 7C(1) do not meaningfully advance the State's interest in judicial impartiality.

Ten States that elect judges do not regulate the solicitation of donations by judicial candidates.[9] Among those other States that elect judges and *do* restrict personal solicitations, four make exceptions to their solicitation bans for mass mailings,[10] and three make exceptions for speeches to more than 20 or 25 people.[11]

There is no evidence that judges in these States lack impartiality or that their citizens lack sufficient confidence in their judicial systems. Respondent cannot "explain what makes [Florida's] system so peculiar" that it "has determined that such [a categorical personal solicitation] ban is necessary." *Eu*, 489 U.S. at 226.

That is not to say that the interests at stake here are unimportant or unworthy. But "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process * * * the First Amendment rights that attach to their roles." *White I*, 536 U.S. at

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[9] See Ala. Canons of Jud. Ethics, Canon 7(B)(4)(a) ("strongly discourag[ing]" personal solicitation) ; Cal. Code of Jud. Ethics, Canon 5(A) (Advisory Comm. Commentary); Ga. Code of Jud. Conduct, Canon 7(B)(2); Kan. Code of Jud. Conduct, Rule 4.4(A); Md. Code of Jud. Conduct, Canon 4.4(a), cmt. 2; Mont. Code of Jud. Conduct, Rule 4.4, cmt. 1; Nev. Code of Jud. Conduct, Rule 4.4, cmt. 1; N.M. Code of Jud. Conduct, Rule 21-402(C)(1); N.C. Code of Jud. Conduct, Canon 7(B)(4); Tex. Code of Jud. Conduct, Canon 4(D)(1).

[10] See Minn. Code of Jud. Conduct, Canon 4.2(B)(3); Mo. Code of Jud. Conduct, Canon 4.2(B); N.D. Code of Jud. Conduct, Rule 4.6; Ohio Code of Jud. Conduct, Rule 4.4(A)(2).

[11] Minn. Code of Jud. Conduct, Canon 4.2(B)(3) (20 people); N.D. Code of Jud. Conduct, Rule 4.6 (25 people); Ohio Code of Jud. Conduct, Rule 4.4(A)(1) (20 people).

788 (quoting *Renne* v. *Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). The Florida Supreme Court's contrary conclusion rests on the "notion that the special context of electioneering justifies an *abridgment* of the right to speak," which "sets [this Court's] First Amendment jurisprudence on its head." *Id.* at 781.

4. At a minimum, Canon 7C(1) is unconstitutional as applied to petitioner.

Even if, contrary to our submission, these flaws do not render Canon 7C(1) unconstitutional on its face, the Court should hold the regulation unconstitutional as applied to petitioner in this case.

Given the general weakness of the State's compelling interest, as demonstrated by the underinclusiveness of its rule, and the particular absence of any justification for applying the solicitation prohibition to a mass mailing and website posting, the disciplinary sanctions imposed on petitioner for engaging only in written speech to a broad audience clearly violate the First Amendment.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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[12] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.