13-1499

IN THE

Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

—v.—

THE FLORIDA BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, JUSTICE AT STAKE, CAMPAIGN LEGAL CENTER, DEMOS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., COMMON CAUSE AND CENTER FOR MEDIA AND DEMOCRACY IN SUPPORT OF RESPONDENT

WENDY WEISER
ALICIA L. BANNON
MATTHEW MENENDEZ
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas,
12th Floor
New York, NY 10013
(646) 292-8358

RANDOLPH S. SHERMAN
Counsel of Record
ROBERT M. GRASS
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
randolph.sherman@
kayescholer.com

Counsel for Amici Curiae

(*Counsel continued on inside cover*)

Elizabeth Kennedy
Brenda Wright
Demos
220 Fifth Avenue
New York, NY 10001
(212) 633-1405

Hayley Gorenberg
Eric Lesh
Lambda Legal Defense and
Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

J. Gerald Hebert
Megan P. McAllen
Catherine Hinckley Kelley
Campaign Legal Center
215 E Street NE
Washington, D.C. 20002
(202) 736-2200

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

CANONS, RULES, STATUTES AND ETHICS OPINIONS

OTHER AUTHORITIES

Page(s)

Page(s)

INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Brennan Center for Justice at NYU School of Law is a non-profit, nonpartisan public policy and law institute that recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system and works to protect them from the undue influence of partisan politics.[2]

Amicus curiae Justice at Stake is a non-profit, nonpartisan national partnership of more than fifty organizations that focuses exclusively on keeping courts fair and impartial through public education, litigation and reform.

Amicus curiae the Campaign Legal Center is a non-profit, nonpartisan organization that represents the public interest in administrative and legal proceedings to promote the enforcement of governmental ethics, campaign finance and election laws.

Amicus curiae Common Cause is a non-profit, nonpartisan citizens' organization with

---

[1] Under Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] This brief does not purport to convey the position of NYU School of Law.

approximately 400,000 members and supporters nationwide. Common Cause has long been concerned with the growing problem of money and its undue influence in our political process, including in judicial elections. The organization has publicly advocated for appropriate campaign finance and judicial ethics rules to protect fair and impartial justice in our courts.

Amicus curiae the Center for Media and Democracy is a national, nonpartisan, non-profit watchdog group based in Madison, Wisconsin that promotes corporate and government accountability through research and public education.

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and people living with HIV. In 2005, Lambda Legal established a Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities and to encourage people across the nation to take action to support judicial independence and judicial diversity. The communities Lambda Legal represents depend upon a fair and impartial judiciary to enforce their constitutional and other rights.

Amicus curiae Demos is a non-profit, nonpartisan public policy center whose mission is to ensure that we all have an equal say in our democracy and an equal chance in our economy. Demos pursues this mission through litigation,

research, advocacy and policy development. Judicial independence and integrity are indispensable to Demos' missions and goals.

Each *amicus* has an interest in this case because of its exceptional importance in protecting the reality and appearance of judicial impartiality.

SUMMARY OF ARGUMENT

Judicial integrity is a "state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). To protect this interest, it is vital that states maintain both the appearance and reality of judicial fairness and impartiality.

Judges play a unique role in our tripartite system of government. They are constitutionally obliged to apply the law to the facts when hearing cases, without favor or regard to the interests of their supporters. For this reason, judicial candidates are in a fundamentally different position than candidates for political office. Politicians are representatives of the people and must be responsive to the popular will. Judges, on the other hand, must uphold the rule of law without regard to the interests of the voters.

While fundraising is a frequent aspect of judicial elections, personal solicitation of contributions by judges and judicial candidates poses a unique — and severe — threat to judicial impartiality and its appearance. Personal solicitation "closely links the quid — avoiding the

judge's future disfavor — to the quo — the contribution." *Siefert v. Alexander*, 608 F.3d 974, 989 (7th Cir. 2010). It therefore raises the specter that judges, either consciously or unconsciously, may favor campaign contributors and disfavor non-contributors in the adjudication of their cases. Florida's Canon 7C(1), which bars personal solicitation of contributions by judicial candidates while allowing candidates to fundraise via a separate committee, is a reasonable and targeted response to this threat. Fla. Code of Jud. Conduct, Canon 7C(1).

Personal solicitation threatens judicial integrity in two key ways. First, it negatively affects the appearance and reality of judicial impartiality for lawyers and potential litigants — both those who are personally solicited and those who are not. When judicial candidates solicit campaign contributions themselves, it can create a reasonable perception that judges are seeking funds in return for favorable treatment, or, at least, that the solicitation will result in conscious or unconscious judicial bias in favor of contributors and against those who refuse to contribute. At the same time, those who are not solicited, but who know that a judge before whom they are appearing may have personally sought a contribution from their adversary, may reasonably feel that they are at a disadvantage in the courtroom.

Second, personal solicitation adversely impacts the public's perception of judicial impartiality by contributing to the appearance that judges are influenced by campaign contributions. A

recent poll in the thirty-nine states that elect judges found that 63% of respondents would have less confidence in the courts if judicial candidates could personally ask for contributions, whether by mail or email, over the phone, or face to face. Of those who responded that their confidence would be lowered, 81% said that personal solicitation by judicial candidates would lower their confidence in the courts a "great deal." Brennan Center for Justice & Justice at Stake, *Thirty-Nine State Poll* (Dec. 2014), http://www.brennancenter.org/sites/default/files/analysis/Williams-Yulee%20Poll%20Dec%202014.pdf (poll results), http://www.brennancenter.org/sites/default/files/analysis/Williams-Yulee%20Poll%20CROSSTABS.pdf (cross-tabs) ("Brennan Center & Justice at Stake 2014 Poll").

The need for Canon 7C(1) is particularly acute in light of the dramatic rise in judicial campaign fundraising in recent years and the prominent role of lawyers and lobbyists as contributors. Contributions in state supreme court races more than doubled between 2000 and 2009 as compared to the previous decade, putting new pressures on judges to fundraise and on would-be contributors to give money. James Sample, Adam Skaggs, Jonathan Blitzer & Linda Casey, *The New Politics of Judicial Elections 2000-2009: Decade of Change* 8 (Charles Hall ed., Aug. 2010) *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf ("*The New Politics of Judicial Elections 2000-2009*"). Lawyers and lobbyists have been the largest source of contributions, comprising nearly 30% of total contributions in state supreme court races from

2000 to 2012. *See Follow the Money*, Nat'l Institute on Money in State Politics ("NIMSP") (2013), http://www.followthemoney.org/show-me?y=2012,2011,2010,2009,2008,2007,2006,2005,2004,2003,2002,2001,2000&f-core=1&c-r-ot=J#[{1|gro=d-ccg ("NIMSP Lawyers & Lobbyists"). Polls suggest that 95% of the public believes campaign contributions impact judicial decisions — and that nearly half of state court judges agree. *See* Justice at Stake & Brennan Center for Justice, *National Poll* 3 (Oct. 2013), http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf (95% of respondents in national poll believed contributions to judicial elections have at least a little influence on judicial decisions) ("2013 National Poll"); Justice at Stake, *State Judges Frequency Questionnaire* 5 (Nov. 2001–Jan. 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf (46% of surveyed state supreme, appellate, and lower court judges believed campaign contributions have at least a little influence on judicial decisions) ("Justice at Stake Frequency Questionnaire").

Florida's Canon 7C(1) is a tailored response to these concerns, targeting the most significant opportunity for inappropriate pressure on litigants and lawyers, and the greatest threat to the public's perception of judicial impartiality: the personal request for a contribution by judicial candidates themselves. Significantly, Florida's Canon 7C(1) does not prohibit fundraising — it simply requires that candidates utilize a committee to solicit contributions. Such committees, which can be

staffed by volunteers, are widely utilized in states around the country and have not created a meaningful hurdle to fundraising. Moreover, prohibiting personal solicitation in no way inhibits judicial candidates from communicating about their fitness for office or speaking on issues of public concern.

In short, Canon 7C(1) furthers a compelling state interest without encroaching on core First Amendment freedoms and, accordingly, should be upheld.

ARGUMENT

I. CANON 7C(1) PROTECTS FLORIDA'S VITAL INTEREST IN MAINTAINING THE REALITY AND APPEARANCE OF JUDICIAL IMPARTIALITY AND PRESERVING PUBLIC CONFIDENCE IN THE EVENHANDED ADMINISTRATION OF JUSTICE

Canon 7C(1) advances Florida's compelling interest in preserving the integrity of its judiciary by targeting conduct that poses a grave danger to the reality and appearance of judicial impartiality.

Prohibiting personal solicitation responds to the public perception that judges may ask for contributions in return for favorable treatment, or, at least, that personal solicitation will result in judges consciously or unconsciously favoring those who contribute and disfavoring those who decline or who are not solicited. These concerns have become heightened as the contributions pouring

into judicial elections have skyrocketed in recent years, putting public confidence in the judiciary at increasingly serious risk.

A. An Impartial Judiciary Serves a Crucial and Unique Role in Our Democratic System

The integrity of our judicial system is essential to the rule of law. Since our nation's founding, it has been fundamental to our system of government that "[j]udges are sworn 'to do equal right and justice to all men, to the best of their judgment and abilities, according to law.'" *Pollard v. Shaffer*, 1 U.S. 210, 213 (Pa. 1787) (citation omitted). To comply with their oaths, judges necessarily must administer justice impartially. The duty to administer justice without bias or favor is unique to the judicial branch and is in marked contrast to the duties of the political branches.

Judges play a different role in our democracy than politicians. Those elected to legislative and executive office are expected to be responsive to their constituents' concerns and to advocate for and to seek policy outcomes consistent with the desires of those they represent. This Court has stated that it is "a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

In contrast, a judge must apply the law to the facts of each case and reach a just result. The failure to do so would constitute a violation of the

judge's oath to administer equal justice under the law. As Chief Justice Roberts testified at his confirmation hearing: "Judges are not politicians. They cannot promise to do certain things in exchange for votes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 379 (2005). Likewise, Justice Scalia has noted:

> Surely the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense — but not in the ordinary sense. As the captions of the pleadings in some States still display, it is the prosecutor who represents "the People"; the judge represents the Law — which often requires him to rule against the People.

Chisom v. Roemer, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting).

This critical difference between the judicial and political branches bears "on the strength of the state's interest" in regulating judicial campaigns. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (holding that Illinois's "announce clause" regulating judicial elections violated the First Amendment). It is a difference that Petitioner eschews. When judicial campaign conduct implicates the integrity of the judicial

system, a state's interest in regulation is at its apex.

B. The Appearance of Judicial Impartiality and Public Confidence in the Evenhanded Administration of Justice Are Bedrock Principles of Due Process

Petitioner concedes that Florida has a compelling interest in the reality of an impartial judiciary. *See* Pet. Br. at 14-15. But Petitioner questions whether Florida has as compelling an interest in the *appearance* of judicial impartiality. *See id.* at 15-16; *see also* Br. for the Thomas Jefferson Ctr. for the Protection of Free Expression as *Amicus Curiae* at 3-4. There is no authority supporting such a dichotomy. On the contrary, this Court repeatedly has emphasized that the appearance of an impartial judiciary is a critical component of due process in which the state has a compelling interest.

It is well-settled that "the *appearance* as well as the actuality of fairness, impartiality and orderliness [are] the *essentials of due process*." *In re Gault*, 387 U.S. 1, 26 (1967) (emphasis added). Indeed, for litigants, "the *appearance of evenhanded justice* . . . is *at the core of due process*." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (emphasis added); *accord Offut v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). This is particularly so because actual bias rests on a mental state that can be difficult to prove. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009).

The appearance of an impartial judiciary is also compelling because it "'generat[es] the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him," and thereby preserves public confidence in the judiciary. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). Indeed, "[t]he legitimacy of the Judicial Branch ultimately depends on its *reputation* for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

As Justice Kennedy aptly put it in *White*, "[t]he 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.*" 536 U.S. at 793 (Kennedy, J., concurring) (emphasis added). It follows, as the Court held in *Caperton*, that "'public confidence in the fairness and integrity of the nation's elected judges' . . . is a vital state interest." 556 U.S. at 889.[3]

---

[3] This Court has also stressed the importance of the government's interest in the appearance of an impartial judiciary and in preserving public confidence in the judiciary in numerous other cases. *See Liteky v. United States*, 510 U.S. 540, 548 (1994) (in assessing recusal, "what matters is not the reality of bias or prejudice but its appearance"); *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) ("A State may also properly protect the judicial process from being misjudged in (continued...)

Petitioner raises the specter that the state's compelling interest in the appearance of judicial impartiality could support "all manner of restrictions . . . on speech by campaign committees, lawyers, law firms, contributors, solicitors, endorsers, supporters, opponents, the press and others too numerous to mention." Pet. Br. at 16 (citation omitted). But none of the parade of horribles imagined by Petitioner involves the threat to the appearance of judicial impartiality raised when judicial candidates personally solicit campaign contributions. In the event a state sought to regulate speech in any of the ways conjured by Petitioner, the regulation would have to pass muster under the same standard applicable here — whether it is appropriately tailored to advance a compelling state interest. As shown below, Florida's Canon 7C(1) satisfies that standard.

---

the minds of the public."). The Court similarly has held with respect to the regulation of campaign contributions that "the Government's interest in preventing *quid pro quo* corruption *or its appearance* . . . may properly be labeled 'compelling.'" *McCutcheon*, 134 S. Ct. at 1445 (emphasis added); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2841 (2011) ("Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest.").

C. Canon 7C(1) Is Targeted to Protect Florida's Compelling Interest in the Reality and Appearance of an Impartial Judiciary

While fundraising is a frequent aspect of judicial elections, personal solicitation of contributions by judges and judicial candidates poses a particular threat to the reality and appearance of an impartial judiciary. This is especially true in recent years as fundraising in judicial elections has surged dramatically. Canon 7C(1) is a reasonable and targeted response to this threat.

1. Personal Solicitation Negatively Affects the Reality and Appearance of Judicial Impartiality

The personal solicitation of campaign contributions by judicial candidates, whether in person, over the phone, or by mail or email, compromises the reality and appearance of judicial impartiality in at least two ways. First, it negatively affects the perception of lawyers and potential litigants — both those who are personally solicited and those who are not — as to the fairness of the judicial system. Second, it adversely impacts the public's perception of judicial impartiality.

a. Impact on Lawyers and Potential Litigants

The personal involvement of a judge in requesting contributions may reasonably undermine the confidence of lawyers and potential litigants in the fairness of the judicial branch,

adding to the perception that contributors enjoy an advantage in court.

With respect to those who are solicited, "[a]llowing 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." *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 882 (Ark. 2007). Personal solicitation can create the reasonable perception that judicial candidates are offering favorable treatment in exchange for contributions. At the very least, a reasonable lawyer or litigant may fear that the result in her case is influenced, consciously or unconsciously, by her response to the personal solicitation. *See* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379-80 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their prospects in court). Importantly, personal solicitation raises greater concerns than other forms of fundraising because of the direct intercession of a judge or judicial candidate. Thus, "the perceived coerciveness of direct solicitations is closely related to their potential impact on impartiality" because "[a] direct solicitation closely links the quid — avoiding the judge's future disfavor — to the quo — the contribution." *Siefert*, 608 F.3d at 989.

Personal solicitation also compromises the confidence of those who are not solicited. Many groups of court users are unlikely to be personally

solicited by judicial candidates, such as out of state litigants and lawyers and the indigent. Those who are not solicited may reasonably fear that decisions in their cases are influenced by communications between the judge and their opponents that entail a request for a campaign contribution. For these litigants and lawyers, the personal involvement of the judge in campaign fundraising will magnify concerns that they are at a disadvantage.

b. Public Confidence

Even more pernicious is the negative impact that personal solicitation has on the public's confidence in the impartial administration of justice. Personal solicitation fosters the public perception that justice is for sale — that personal solicitation by a judicial candidate is an offer to favor one party over the other in exchange for a campaign contribution. The solicited individual's greater access to the judge and opportunity for ingratiation can also lead to a more general perception of bias in the courtroom. The "appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Siefert*, 608 F.3d at 989-90. As the Oregon Supreme Court has explained:

> A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety

> and, to that extent, preserves the judiciary's reputation for integrity.

In re Fadeley, 802 P.2d 31, 40 (Or. 1990); *accord Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010) (finding personal solicitation creates the "potential for actual or perceived mutual back scratching").

A recent poll confirms the serious threat to public confidence posed by personal solicitation. In a poll of registered voters in the thirty-nine states that elect judges, 63% of respondents indicated that it would lower their confidence in the courts if judicial candidates could ask for contributions personally — by mail or email, over the phone, or face to face. Brennan Center & Justice at Stake 2014 Poll. Of this group, 81% said that personal solicitation would lower their confidence a "great deal." *Id.*

2. The Explosion of Campaign Fundraising in Judicial Elections Exacerbates the Threat to Judicial Integrity from Personal Solicitation

Florida's Canon 7C(1) is particularly crucial now, as campaign spending has skyrocketed in judicial elections across the country. Allowing judges to personally solicit campaign contributions magnifies the widely-held concern that fundraising adversely impacts the fair administration of justice.

As Justice O'Connor noted in 2002 in *White*, "campaigning for a judicial post today can require substantial funds." 536 U.S. at 789 (O'Connor, J., concurring). In the ensuing decade, the amount of

money raised for judicial campaigns has grown dramatically. For example, looking solely at the state supreme court level, direct campaign fundraising more than doubled from the period 1990-1999 to 2000-2009, jumping from approximately $83 million to nearly $207 million. *See The New Politics of Judicial Elections 2000-2009*, at 8. In 2011-2012 alone, supreme court candidates in twenty-three states raised more than $30.5 million to support their campaigns, including three candidates in retention elections in Florida who collectively raised more than $1.5 million. Alicia Bannon, Eric Velasco, Linda Casey & Lianna Reagan, *The New Politics of Judicial Elections 2011-12: How New Waves of Special Interest Spending Raised the Stakes for Fair Courts* 6 (Laurie Kinney & Peter Hardin eds., Oct. 2013), *available at* http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf ("*The New Politics of Judicial Elections 2011-2012*"). That is more than a three-fold increase since 1991-1992, when the total amount raised by all state supreme court candidates was just over $9.5 million. *See The New Politics of Judicial Elections 2000-2009*, at 5.

The increase in judicial campaign fundraising is particularly troubling given that campaign contributors are most frequently lawyers and law firms who appear before these judges. As the Third Circuit has observed:

> It is no secret that aside from family and close personal friends of the candidate (rarely affluent, or

> necessarily enthusiastic sources) judicial campaigns must focus their solicitations for funds on members of the bar. This leads to the unseemly situation in which judges preside over cases in which the parties are represented by counsel who have contributed in varying amounts to the judicial campaigns.

Stretton v. Disciplinary Bd. of the Supreme Court of Pa., 944 F.2d 137, 145 (3d Cir. 1991).[4]

Indeed, between 2000 and 2012, lawyers and lobbyists contributed nearly $3 million to campaigns for Florida's Circuit Court, Florida's trial level court, amounting to nearly 38% of all contributions to those campaigns. The contributions by lawyers and lobbyists constituted by far the highest percentage of campaign contributions by any group other than self-funding by candidates. The next highest coded group, "finance, insurance, and real estate," spent just over $300,000, constituting approximately 4% of

---

[4] *Accord Siefert*, 608 F.3d at 990 ("It 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."); *In re Fadeley*, 802 P.2d at 41 ("The persons most actively interested in judicial races, and the persons who are the most consistent contributors to judicial campaigns, are lawyers and potential litigants. The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate.").

total contributions. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/ show-me?s=FL&y=2012,2011,2010,2009,2008,2007,2006, 2005,2004,2003,2002,2001,2000&f-core=1&c-r-ot =D#[{1 | gro=d-ccg ("NIMSP Florida Contributors").[5] During the same period, lawyers and lobbyists contributed nearly $76 million to state supreme court campaigns nationwide, constituting nearly 30% of total contributions. Again, lawyers and lobbyists contributed a greater percentage of funds than any other group of contributors, in this case including the candidates themselves. *See* NIMSP Lawyers & Lobbyists.

Survey data demonstrates that these contributions impact the public's confidence in the judiciary. In a 2013 poll, 95% of respondents indicated that they believe contributions to judicial elections have at least a little impact on judicial decisions. 2013 National Poll, at 3. In the same survey, 70% of respondents indicated that it is a "very serious" problem when a judicial candidate receives campaign contributions from an individual, lawyer, business or interest group with a case on which the judicial candidate may have to rule, while an additional 20% thought it was a "somewhat serious" problem. *Id.* Only 1% of respondents thought it was "no problem." *Id.*

---

[5] A group of contributors described as "uncoded/unitemized," contributed approximately $350,000, constituting 5% of total contributions. *See* NIMSP Florida Contributors.

Nor is this concern unreasonable. In a 2002 survey of state supreme, appellate and lower court judges, nearly half of the respondents indicated that they believe campaign contributions have at least a little influence on judicial decisions. Justice at Stake Frequency Questionnaire, at 5.

In the current climate, Florida's interest in prohibiting personal solicitation by judicial candidates is more compelling than ever.

II. CANON 7C(1) IS A REASONABLE REGULATION TAILORED TO FLORIDA'S COMPELLING INTEREST IN JUDICIAL INTEGRITY

Florida's Canon 7C(1) is a reasonable and modest regulation, tailored to address the specific and severe threat to the integrity of the judiciary that stems from the personal solicitation of campaign contributions. For this reason, while there is a strong basis to conclude that strict scrutiny is not the appropriate legal standard for this case, *see* Resp't. Br. at 11 n.1, Canon 7C(1) should be upheld even if strict scrutiny applies.

A. Florida's Canon Burdens No More Speech Than Necessary

Florida's prohibition against personal solicitation is tailored to protect the state's compelling interest in both the reality and appearance of an impartial judiciary. As discussed *supra* Point I, Canon 7C(1) targets the most troubling form of solicitation, personal solicitation by judicial candidates. It thus protects against a

significant risk of inappropriate pressure on litigants and lawyers, and any further erosion of public confidence in judicial impartiality. Canon 7C(1) is a tailored regulation because it addresses this harm while imposing only a minor restriction on the manner in which judicial candidates can raise funds, without barring fundraising or limiting candidates' ability to inform the public about their qualifications for office.

Canon 7C(1) represents only a modest restriction on judicial fundraising because candidates can still raise funds through a campaign committee, which can be staffed by volunteers. The Canon requires only that the campaign committee, rather than the candidate, make "the ask" for campaign contributions. Similar committees are widely utilized in states across the country and have been effective mechanisms for raising funds. Indeed, of the thirty-nine states that choose judges through elections, the vast majority, thirty, have rules that require judicial candidates to use campaign committees to solicit funds under at least some circumstances.[6] These committees have not

[6] For the list of states prohibiting personal solicitation, see Cert. Pet. at 12. In addition, at least eight of the nine states that elect judges without a personal solicitation rule permit the use of campaign committees. *See* Ala. Canons of Jud. Ethics, Canon 7.B(4)(a); Cal. Code of Jud. Ethics, Canon 5B(2); Ga. Code of Jud. Conduct, Canon 7B(2) Commentary; Kan. Code of Jud. Conduct, Canon 4, Rule 4.4(B)(1); Md. Code of Jud. Conduct § 4 Rule 4.4(d)(1); Mont. Code of Jud. Conduct, Canon 4, Rule 4.4; Nev. Code of Jud. Conduct, Canon 4, Rule 4.2B(1); N.C. Code of Jud. Conduct, Canon 7B(4).

been a bar to effective fundraising. In 2012, eight of the ten states in which supreme court candidates raised more than $1 million had a prohibition against personal solicitation. *See The New Politics of Judicial Elections 2011-2012*, at 6 (Florida, Illinois, Louisiana, Michigan, Mississippi, Ohio, Washington and West Virginia).

Nor does Canon 7C(1) advantage incumbent judges. *See* Pet. Br. at 21. In 2012, in the states that prohibit at least some forms of personal solicitation, nine of the top twenty fundraisers for state supreme court seats were non-incumbent judicial candidates. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/show-me?s=AK,AZ,AR,CO,FL,ID,IL,IN,IA,KY,LA,MI,MN,MS,MO,NE,NM,NY,ND,OH,OK,OR,PA,SD,TN,UT,WA,WV,WI,WY&y=2012&f-core=1&c-r-ot=J#[{1|gro=c-t-id. In 2008, twelve of the top twenty fundraisers were non-incumbents. *See Follow the Money*, NIMSP (2013), http://www.followthemoney.org/show-me?s=AK,AZ,AR,CO,FL,ID,IL,IN,IA,KY,LA,MI,MN,MS,MO,NE,NM,NY,ND,OH,OK,OR,PA,SD,TN,UT,WA,WV,WI,WY&y=2008&f-core=1&c-r-ot=J#[{1|gro=c-t-id.

These states' experiences demonstrate that judicial candidates — both incumbents and non-incumbents — can raise adequate campaign funds in states with rules prohibiting personal solicitation. Moreover, to the extent that Canon 7C(1) removes "the most effective means for raising money," it "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.

Canon 7C(1) is also narrow with respect to the kind of speech it restricts. Unlike the canon at issue in *White*, in which the Court struck down a rule prohibiting judicial candidates from stating their views on disputed legal or political issues, Canon 7C(1) does not restrict "speech about the qualifications of candidates for public office," which is "at the core of our First Amendment freedoms." 536 U.S. at 768, 774 (citation omitted). To the contrary, judicial candidates remain free to express their views on important issues, describe their values, or otherwise discuss any matter bearing on their qualifications for public office. The only restriction on candidates' speech is the fundraising "ask."

Florida has thus addressed a significant threat to public confidence in the fairness and integrity of its elected judges through a narrow rule that allows candidates to raise campaign funds, provides only minor limitations on fundraising activities and ensures that voters can be informed of candidates' qualifications for judicial office. Canon 7C(1) is accordingly well tailored to the compelling interest at stake. *See Stretton*, 944 F.2d at 146 (finding that Pennsylvania's prohibition against personal solicitations by judicial candidates is narrowly tailored to further the compelling state interest in the appearance of an impartial judiciary where judicial candidates have "alternative, less objectionable means for raising campaign funds"); *Simes*, 247 S.W.3d at 883 (emphasizing that Arkansas' prohibition against

personal solicitations by judicial candidates "seeks to insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns"); *In re Fadeley*, 802 P.2d at 40 (holding that despite prohibition against personal solicitation by judicial candidates, "the candidate is not seriously impaired either in the ability to solicit and receive funds — a committee is permitted to do that — or in the ability otherwise to communicate the candidate's position on any issues the candidate is entitled to address — something the candidate himself or herself may do, as long as the message does not include a request for funds").

B. Canon 7C(1) Targets a Particularly Pernicious Aspect of Judicial Campaign Fundraising

In challenging the constitutionality of Canon 7C(1), Petitioner points to four aspects of judicial campaign conduct that Florida has declined to regulate. None provides a basis for concluding that Canon 7C(1) is insufficiently tailored.

First, the fact that Florida has not seen fit to prohibit personal solicitation by candidates for political office does not render the Canon unacceptably narrow. *See* Pet. Br. at 18. There are crucial differences between the judicial and political branches, and judicial elections therefore have additional compelling state interests at play. *See supra* Point I.A. By personally soliciting campaign funds, judicial candidates create the appearance of giving preference to their supporters

— an appearance that raises due process concerns not present with political candidates.

Indeed, a number of rules in addition to Canon 7C(1) regulate contact and speech between judges and potential court participants, without applying to political officeholders. For example, judges are subject to rules against *ex parte* communications. Fla. Code of Jud. Conduct, Canon 3B(7). Ethical codes also impose other campaign restrictions on candidates for judicial office, such as prohibitions against promising to rule in a particular way, Fla. Code of Jud. Conduct, Canon 7A(3)(e)(i), or restrictions on the form that thank you notes to contributors can take, *see* Judicial Ethics Opinion 92-02 (Fla. Jud. Ethics Advisory Comm. 1992), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet2/92-02.html (judicial candidates may not draft thank you notes to contributors on judicial stationary).

Second, the fact that judicial candidates can learn the identities of their contributors through their campaign committees also does not render Canon 7C(1) insufficiently tailored. *See* Pet. Br. at 18-20. The risk and appearance of bias are greater when judicial candidates can personally ask for contributions than when a committee solicits funds and subsequently informs candidates of the identities of persons who have already made contributions. Personal solicitation more directly and immediately links the request for money with the expectation of future favor or disfavor in a case. *See Siefert*, 608 F.3d at 989-90.

Thus, the prohibition against personal solicitation is designed to "draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate." *Stretton*, 944 F.2d at 146. The American Bar Association's commentary to its 1973 model rule prohibiting personal solicitation reflects the special concern about the act of solicitation itself, noting that the purpose of requiring judicial candidates to use a campaign committee is "to insulate the candidate to some extent and thereby reduce the danger of the appearance of a lack of impartiality toward those persons who financially support him, or refuse to support him . . . ." E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 98 (1973).

Third, the fact that Florida allows judicial candidates to ask individuals to serve on their campaign committees and to ask non-lawyers to urge others to vote for them, *see* Pet. Br. at 20, is likewise consistent with Florida's compelling interest in barring direct solicitation. Florida's exclusion of volunteer services from its definition of a contribution, Fla. Stat. § 106.011(5)(d), corresponds with this Court's jurisprudential distinction between the regulation of campaign contributions and of volunteer activities. This Court has consistently upheld laws that limit campaign contributions to guard against corruption, but allow individuals to volunteer for campaigns as a core exercise of political speech. *See Buckley v. Valeo,* 424 U.S. 1, 28 (1976) (per curiam) (explaining that contribution limits focus on preventing corruption "while leaving persons free to engage in independent political expression,

to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"); *see also McCutcheon*, 134 S. Ct. at 1441.

Finally, Petitioner contends that Florida's Canon is too narrow because it allows judicial candidates to learn the identities of individuals or groups making independent expenditures in connection with their campaigns. *See* Pet. Br. at. 20-21. Like volunteer activities, independent expenditures are treated differently than campaign contributions as a matter of law. This Court held in *McCutcheon* that "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." 134 S. Ct. at 1452. The fact that Florida's rule does not cover independent expenditures is consistent with current jurisprudence. Indeed, as discussed above, knowing the identities of contributors does not create the same risk that the direct "ask" by a judicial candidate will be perceived as an offer to favor the lawyer or potential litigant who responds with a contribution.

C. Other Regulations Are Inadequate to Protect the Interest at Stake in Barring Personal Solicitation

Canon 7C(1) is also well-tailored because no other regulatory mechanism is adequate to address the interests it protects. Contrary to Petitioner's assertion, neither judicial recusal nor contribution

limits for judicial elections is a less restrictive alternative to Canon 7C(1). *See* Pet. Br. at 23-25. Indeed, while recusal and contribution limits protect due process and public confidence in the judiciary, their limitations demonstrate the importance of evaluating Canon 7C(1) as part of a set of interlocking regulations that work together to protect the integrity of the judiciary.

Recusal alone is inadequate to remedy the harm created by personal solicitation. Recusal has a narrow purpose: it is designed to remove a judge who may be or may appear to be biased in a particular case. As such, it is ill-suited to address system-wide conduct that threatens judicial impartiality, such as the personal solicitation of contributions. Recusal also has a number of practical limitations that render it insufficient to protect against the harm caused by personal solicitation.

First, because recusal motions frequently require judges to assess their own biases, recusal rules are often under-enforced. As this Court has explained, a judge may not be able to articulate, or even be conscious of, all the factors that might influence her decision-making. *See Caperton*, 556 U.S. at 883; *see also* James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice 20 (2008) ("*Fair Courts: Setting Recusal Standards*"). Indeed, a judge may "simply misread[] or misapprehend[] the real motives at work in deciding the case." *Caperton*, 556 U.S. at 883; *see also*, Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification*

Disputes and Should Reshape Recusal Reform, 32 St. Louis U. Pub. L. Rev. 235, 251 (2013) ("Since we tend to consistently and unconsciously downplay our own biases while exaggerating biases in others — this difference in perspective will lead to systemic errors in applying the current substantive standards for disqualification."); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 Geo. J. Legal Ethics 441, 479 (2006) ("[J]udges may convince themselves they can rule fairly, unaware that the currents of bias often run deep."); Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. Rev. 943, 945 (2011) ("'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.'") (citation omitted).[7]

---

[7] The difficulty in self-assessment is compounded by the fact that in many states an impartial decision-maker never reviews recusal motions. *See* Sparling, 19 Geo. J. Legal Ethics at 480; *see also Fair Courts: Setting Recusal Standards*, at 20 ("The fact that judges in many jurisdictions decide on their own recusal challenges with little or no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law — and for good reason."). Additionally, while judicial recusal is an important tool to protect due process, as Chief Justice Roberts emphasized in dissent in *Caperton*, recusal in the context of judicial campaign spending raises thorny issues of administration. *Caperton*, 556 U.S. at 893-98 (Roberts, C.J., dissenting). In contrast, Canon 7C(1) is a clear, bright-line rule.

Second, recusal motions are likely underused by litigants because they are generally perceived to be risky. Litigants are often reluctant to make such a motion for fear that were it not to succeed, it could offend the presiding judge while adding to litigation expenses. *See Fair Courts: Setting Recusal Standards*, at 20.

Finally, using recusal as the principal response to the threat caused by personal solicitation would hinder courts' ability to efficiently dispose of cases. As discussed *supra* Point I.C, lawyers and lobbyists are the most significant contributors to judicial campaigns. Should states rely on recusal rules as the sole remedy for the many potential sources of bias introduced through personal solicitation, judges may be required to recuse themselves in a large number of cases. Widespread recusal could lead to significant litigation delays and increased expense, particularly in small jurisdictions with few judges. Indeed, requiring elected judges to routinely decline to sit interferes with the duty they are democratically elected to perform — a far greater burden than shifting personal solicitation for campaign funds to a committee selected by the candidate.

Contribution limits likewise fall short as a less restrictive alternative to Florida's prohibition against personal solicitation. Regulation of contribution limits is indeed crucial to protecting against corruption or the appearance of corruption. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1441; *Buckley*, 424 U.S. at 26-27. However, contribution limits are not designed to accommodate the state's due

process interest in "'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton*, 556 U.S. at 889 (citation omitted). Under this Court's precedent, determining an appropriate contribution limit requires balancing a number of factors, including the rights of contributors to support the candidates of their choice, the interest in preventing corruption, and the need to secure the electoral process against incumbent self-protection. *See Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006). In light of these multiple considerations in setting contribution limits, there is no reason to think that the balance achieved will be sufficient to address the specific threats to impartiality posed by judicial candidates personally soliciting contributions.

Indeed, there is no evidence that Florida's contribution limits for judicial candidates were ever intended, on their own, to be adequate to protect the state's interest in the appearance and reality of judicial impartiality, especially because they were established against a regulatory backdrop that included other safeguards such as the prohibition against personal solicitation.

D. The Application of Canon 7C(1) to Petitioner's Solicitation Is Tailored to Protect a Compelling Interest and, Regardless, Petitioner's Challenge to Canon 7C(1) Should Be Limited to Its Facts

Petitioner makes much of the fact that the personal solicitation at issue in this case was a mass mailing under Petitioner's signature. Petitioner's mailing may have been less pernicious

to public confidence in judicial impartiality than an in-person, one-on-one exchange, but a statute or regulation is not invalid simply because it prohibits gradations of conduct that all present the same harm but not necessarily to the same degree. *See Buckley*, 424 U.S. at 30 ("[D]istinctions in degree become significant only when they can be said to amount to differences in kind.").

Like all personal solicitations, mass mailings raise heightened concerns about the threat of judicial bias because they reflect the candidate's active participation in seeking contributions. *See supra* Point I.C. In addition, mailings are not less coercive per se than other forms of personal solicitation. For example, a mailing by a judicial candidate that highlights particular cases or categories of cases could cause potential contributors with an interest in those cases, to reasonably conclude they would gain an advantage in court from contributing. Indeed, one virtue of Florida's personal solicitation Canon is that it creates a bright-line rule that is unambiguous for candidates and highly administrable, while imposing only a very modest limitation on campaign activities.

Finally, even if this Court were to conclude that Petitioner's mass mailing was protected by the First Amendment, the sparse facts of this case do not provide the Court with sufficient information to consider the myriad other applications of Canon 7C(1). Before the Court is a very limited set of circumstances in which Petitioner sent a mass mailing that produced no contributions. The record provides, at most, the basis for an as-applied

challenge to the Canon. Not at issue in this case are "one-on-one exchanges over dinner," Pet. Br. at 22, or solicitations from the bench or by telephone, email, Twitter or Facebook (including from chambers).

It is for this reason that the Court should limit the application of the law to the specific facts of Petitioner's case. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 458 (2008) (rejecting a facial challenge based on proffered hypothetical scenarios in the context of a state's ballot party designation initiative and awaiting an as-applied challenge); *Sabri v. United States*, 541 U.S. 600, 609 (2004) (stating that facial challenges are "discouraged" because "they invite judgments on fact-poor records"); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (explaining that the Court "neither want[s] nor need[s] to provide relief to nonparties when a narrower remedy will fully protect litigants"). A facial challenge to Canon 7C(1) would run contrary to the principle of judicial restraint that courts avoid unnecessary adjudication of constitutional issues. *Wash. State Grange*, 552 U.S. at 450 (citing *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). Thus, regardless of its assessment of the specific facts of Petitioner's case, this Court should avoid a broad pronouncement on the constitutionality of Canon 7C(1) and consider Petitioner's challenge as-applied, as suggested by amici in support of Petitioner. *See* Br. of ACLU & ACLU of Florida as *Amici Curiae* at 12-13.

CONCLUSION

Florida has a compelling interest in promoting the appearance and reality of an impartial judiciary. Florida's Canon 7C(1) imposes a minor restriction on judicial candidates by requiring that a campaign committee, rather than the candidate herself, solicit campaign funds. In so doing, the state protects the public's confidence in the judiciary without infringing on a candidate's ability to either discuss her qualifications or raise necessary campaign funds. For these and the reasons set forth above, *amici* respectfully request that this Court uphold the constitutionality of Canon 7C(1) and affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

WENDY WEISER
ALICIA L. BANNON
MATTHEW MENENDEZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8358

RANDOLPH S. SHERMAN
Counsel of Record
ROBERT M. GRASS
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
randolph.sherman@kayescholer.com

Counsel for Amici Curiae

ELIZABETH KENNEDY
BRENDA WRIGHT
DEMOS
220 Fifth Ave.
New York, NY 10001
(212) 633-1405

HAYLEY GORENBERG
ERIC LESH
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street,
19th Floor
New York, NY 10005
(212) 809-8585

J. GERALD HEBERT
MEGAN P. MCALLEN
CATHERINE HINCKLEY KELLEY
CAMPAIGN LEGAL CENTER
215 E Street NE
Washington, D.C. 20002
(202) 736-2200

December 24, 2014