No. 11-17634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,

Plaintiff-Appellant,

v.

GUSTAVO ARAGON, JR., in his official capacity as member of the Arizona Commission on Judicial Conduct; ROGER BARTON, in his official capacity as member of the Arizona Commission on Judicial Conduct; COLLEEN CONCANNON, in her official capacity as member of the Arizona Commission on Judicial Conduct; LOUIS FRANK DOMINGUEZ, in his official capacity as member of the Arizona Commission on Judicial Conduct; PETER J. ECKERSTROM, in his official capacity as member of the Arizona Commission on Judicial Conduct; GEORGE H. FOSTER, in his official capacity as a member of the Arizona Commission on Judicial Conduct; ANNA MARY GLAAB, in her official capacity as member of the Arizona Commission on Judicial Conduct; S' LEE HINSHAW, in his official capacity as member of the Arizona Commission on Judicial Conduct; DAVID STEVENS, in his official capacity as member of the Arizona Commission on Judicial

On appeal from the United States District Court for the District of Arizona

No. 08-CV 08064-PCT-FJM

DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

Conduct; J. TYRELL TABER, in his official capacity as member of the Arizona Commission on Judicial Conduct; LAWRENCE F. WINTHROP, in his official capacity as member of the Arizona Commission on Judicial Conduct; MARET VESSELLA, Chief Bar Counsel of the State Bar of Arizona,

Defendants-Appellees.[1]

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[1] Defendants-Appellees have filed a Motion to Substitute the Correct Public Officials and to Amend the Caption. This caption is the proposed amended caption.

STATEMENT

Defendants-Appellees, the members of the Arizona Commission on Judicial Conduct ("Commission") and Arizona Chief Bar Counsel ("Bar Counsel") (collectively the "Arizona Defendants") petition under Federal Rule of Appellate Procedure 35(b) for rehearing en banc of the panel's opinion, *Wolfson v. Concannon*, No. 11-17634 (May 9, 2014). (Addendum 1.) The Opinion threatens to create a chaotic judicial election season where sitting judges bound by one set of rules must compete against candidates who are unfettered by the same rules. Arizona promulgated these conduct rules to further its compelling interest in an impartial judiciary and the appearance of an impartial judiciary and thus, the determination of the validity of the rules involves questions of exceptional importance. The Opinion conflicts with decisions of other United States Courts of Appeal that have upheld the validity of similar judicial conduct provisions. Finally, although recognizing Arizona's compelling interest in an impartial judiciary and the appearance of an impartial judiciary, the Opinion gives no guidance as to how to cure what it concludes to be insufficiently tailored judicial conduct rules.

ISSUE PRESENTED FOR REHEARING

The Arizona Code of Judicial Conduct prohibits judicial candidates from making speeches on behalf of political candidates, from issuing public

endorsements of political candidates, from soliciting funds for another candidate or political organization, from actively taking part in another's political campaign, and from personally soliciting campaign contributions for the judicial candidate's own campaign (collectively, "the Rules"). Should this Court grant rehearing en banc because the panel's Opinion finding that the Rules violate the First Amendment as applied to non-incumbent judicial candidates conflicts with decisions of other circuit courts of appeal that have upheld similar provisions?

FACTUAL AND PROCEDURAL HISTORY

Mr. Randolph Wolfson, then a candidate for the superior court of Arizona in Mohave County, Arizona, brought this action against the Commission and Bar Counsel in 2008, alleging that certain provisions of Arizona Supreme Court Rule 81 (the "Code of Judicial Conduct" or the "Code") violated the First Amendment. *Wolfson v. Brammer*, No. CV-08-8064-PHX-FJM, 2009 WL 102951 (D. Ariz. Jan. 15, 2009). The district court dismissed the case as moot because Wolfson lost the 2008 election and stated that he had no intention in participating in the next election. *Id.* at *3. This Court reversed the district court's dismissal because Wolfson represented that he desired to participate in future elections and remanded his claims against the five provisions of the Code. *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010).

The five provisions of the Code that Wolfson challenged on remand provide as follows:

> (A) A judge or judicial candidate shall not do any of the following:
> . . . .
> (2) make speeches on behalf of a political organization or another candidate for political office;
>
> (3) publicly endorse or oppose another candidate for political office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, ...
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4.

Rule 4.1 of the Code ("the Rules") (Addendum 2).

The district court evaluated the merits of Wolfson's claims that the Rules violate the First Amendment on their face and as applied to Wolfson. *Wolfson v. Brammer*, 822 F. Supp. 925 (D. Ariz. 2011). The court relied on the balancing test articulated in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), and *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), and upheld the validity of the Rules. *Id.* at 929-32. The court found that "the State's compelling interest in protecting the due process rights of litigants and ensuring the real and perceived impartiality of the

judiciary outweigh[ed] the candidate's interest in participating in the political campaigns of other candidates" and in personally soliciting campaign funds. *Id.* at 931-32.

A divided panel of this Court reversed. Judge Paez rejected the *Siefert/ Bauer* test, without deciding whether it appropriately applied to sitting judges, because he concluded that the public-employee-speech doctrine that the Seventh Circuit relied on in *Siefert* and *Bauer* did not apply to Wolfson who was not a sitting judge but was a judicial candidate. Opinion 11-12. Judge Paez also rejected the application of *Buckley v. Valeo*'s[2] less rigorous scrutiny to Arizona's ban on personal solicitation or acceptance of campaign contributions because the ban did not limit contributions. *Id.* at 15. Finding each of the challenged provisions were content- and speaker-based restrictions on political speech, Judge Paez determined that strict scrutiny applied to the Rules. *Id.* at 13.

Judge Paez recognized that Arizona has a compelling interest "in an uncorrupt judiciary that appears to be and is impartial to the parties who appear before its judges" and "in maintaining public confidence in the judiciary." *Id.* However, Judge Paez did not find that either Arizona's provision prohibiting judicial candidates and judges from personally soliciting campaign funds or Arizona's provisions prohibiting judicial candidates and judges from making

[2] *Buckley v. Valeo*, 424 U.S. 1 (1976).

speeches on behalf of political candidates, from issuing public endorsements of political candidates, or from soliciting campaign contributions for another candidate or political organization were sufficiently tailored to further Arizona's compelling interests. *Id.* at 22-29.

Recognizing the importance of insulating judges from the political process, Judge Berzon wrote a separate concurrence to assure readers that the principles the majority applied in the Opinion would not "be used in future litigation to challenge the constitutionality of restrictions on the political behavior of sitting judges." Opinion at 30. Judge Berzon commented as follows concerning the public-employee-speech doctrine adopted in *Siefert*: "And, without prejudging whether we should adopt the *Siefert* analysis for restrictions on political activity by sitting judges on behalf of political causes or the candidacies of others, I suggest that the analogy to the *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] line of cases has much to commend it." Opinion at 35-36 (Berzon, J., concurring). Judge Berzon also noted that even if the court determined that the restrictions on sitting judges were subject to strict scrutiny, "the state interest supporting such a restriction would be far stronger than the one we hold inadequate to justify the restrictions on judicial candidate Wolfson's speech today." *Id.* at 36.

Judge Tallman concurred in part and dissented in part. Opinion at 45. He agreed that strict scrutiny applied to the Rules' restrictions on non-incumbent

judicial candidates and "that Rules 4.1(a)(5) (campaigning for others) and 4.1(a)(6) (personal solicitation) are unconstitutional as applied to those candidates." *Id.* Judge Tallman dissented from the majority's conclusion that "Rules 4.1(a) (2) (giving speeches on behalf of others), (3) (endorsing others), and (4) (soliciting money for others)" are unconstitutional because he concluded that those rules "are narrowly tailored to serve the state's compelling interest in maintaining judicial impartiality and its appearance—the hallmark of government's third branch." *Id.* Judge Tallman also noted that the Eighth Circuit had upheld provisions similar to these three Arizona provisions in *Wersal v. Sexton*, 674 F.3d 1010, 1024-25 (8th 2012) (en banc), *cert. denied*, 133 S. Ct. 209 (2012). Opinion at 45 (Tallman, J., concurring in part and dissenting in part).

ARGUMENT

I. The Panel Erroneously Rejected the *Siefert/Bauer* Test.

The panel unanimously rejected the *Siefert/Bauer* balancing test to determine the validity of the Rules when applied to non-judge judicial candidates. Because the Seventh Circuit applied the balancing test to challenges by judicial candidates and judges to judicial conduct provisions similar to Arizona's Rules, the panel's decision directly conflicts with the Seventh Circuit's decision. *See Bauer*, 620 F.3d at 710 (upholding Indiana's prohibition on judges' and judicial candidates' personal solicitation of campaign funds for their own campaigns and

for another candidate or political organization);[3] *id.* at 710-11 (upholding Indiana's ban on judges and judicial candidates making speeches on behalf of a political organization or publicly endorsing or opposing a candidate for public office);[4] *Siefert*, 608 F.3d at 978-79 (upholding Wisconsin's judicial conduct provision that prohibits judges or judicial candidates from participating in the activities of a candidate for partisan office).[5] The panel's rejection of *Buckley*'s less rigorous scrutiny to Arizona's personal solicitation ban also conflicts with *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 145-46 (3d Cir. 1991).

The panel rejected the *Siefert/Bauer* balancing test because Wolfson is a non-judge candidate and there is a "meaningful distinction in how the Rules actually apply to judges versus non-judge candidates," which caused the panel to refrain from deciding the correct level of scrutiny to apply to sitting judges' First

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[3] Indiana's rules prohibiting fundraising are similar to Arizona Rules 4.1(A)(4) (prohibiting solicitation of funds for another political candidate or organization) and 4.1(A)(6) (prohibiting personal solicitation of funds for own campaign).

[4] Indiana's rules prohibiting speeches and endorsements of political organizations and candidates are similar to Arizona Rules 4.1(A)(2) (prohibiting speeches on behalf of a political organization or another candidate) and 4.1(A)(3) (prohibiting public endorsement for or opposition to another candidate).

[5] Wisconsin's rule prohibiting political participation is similar to Arizona Rule 4.1(A)(5) (prohibiting active participation in political campaign's other than one's own campaign).

Amendment challenges to the Rules. Opinion at 11-12. The panel noted that "no Supreme Court authority extend[ed] the limited First Amendment protection for employee speech to a private citizen who is not currently a government employee." (citing *Republican Party of Minn. v. White* (*White I*), 536 U.S, 765, 796 (2010) (Kennedy, J., concurring)). But the parties in *White I* did not dispute that strict scrutiny applied, *id.* at 774, and Supreme Court authority does recognize that applicants for government employment may have less First Amendment protection than private citizens, *National Aeronautics & Space Administration v. Nelson*, 131 S. Ct. 746, 757-58 (2011).

In *Nelson*, the Supreme Court reversed this Court, holding that requiring federal contract employees to undergo a standard background investigation did not violate their right to informational privacy. *Id.* at 756-57. In reaching this conclusion, the Court recognized that because the background investigations arise in the government's capacity as employer, the government is entitled to greater leeway than when it is dealing with citizens at large. *Id.* at 757-58 (relying on *Connick v. Myer*, 461 U.S. 138, 143 (1983) and other cases). The Court concluded that "[r]easonable investigations of *applicants* and employees aid the Government in ensuring the security of its facilities and in employing a competent, reliable workforce." *Id.* at 758 (emphasis added).

Here, Arizona argued that it had a compelling interest in protecting the integrity of the judiciary, in developing fair-minded, impartial judges, and in avoiding even the appearance of corruption in judicial elections. Commission Br. at 5. By rejecting the balancing test to determine the validity of the Rules' application to non-judge candidates for the limited time that they are candidates, the panel failed to recognize that when a candidate seeks election for a judicial position, it is akin to applying to work for the government. Arizona should be permitted greater leeway to regulate non-judge judicial candidates than it has to regulate citizens at large.[6] Expecting sitting judges who are bound by the Rules' restrictions to run against candidates who are completely unfettered by the same restrictions will certainly undermine Arizona's interest in protecting the integrity and appearance of the integrity of the judiciary and in developing impartial judges.

The panel also determined that Arizona's personal solicitation ban was not a campaign finance regulation and therefore was not governed by the closely-drawn-scrutiny framework of *Buckley*. In so holding, the panel's decision conflicts with

[6] Although similar restrictions may not be constitutional as applied to other elected officials, the majority in *White I* explicitly stated that it "neither assert[ed] nor imp[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S at 783. Thus, the Court recognized that States have a compelling interest in protecting the due process rights of litigants by preserving an impartial judiciary—i.e., "the lack of bias for or against either *party* to the proceeding." *Id.* at 775. The Court has long recognized a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

the Seventh Circuit's decisions in *Siefert*, 608 F.3d at 988, and *Bauer*, 620 F.3d at 710, and the Third Circuit's decision in *Stretton*, 944 F.2d at 145-46. Although *Stretton* was decided before *White I*, the Third Circuit's analysis in upholding Pennsylvania's solicitation ban is similar to the analysis in *Siefert*, 608 F.3d at 988 (citing *Stretton*, 944 F.2d at 145-46) and is not inconsistent with *White I*.

White I addressed a restriction that directly burdened judicial candidates' speech about their qualifications for office. 536 U.S. at 781-82. By categorizing the solicitation bans upheld in *Siefert* and *Bauer* as campaign finance regulations, the Seventh Circuit validly determined that soliciting campaign contributions is not at all like the restriction on speech invalidated in *White I*—it tells the voters nothing about the judicial candidates' views on legal issues. Whether the solicitation ban is a contribution limit, which was the issue *Buckley* addressed, is not the reason for the Seventh Circuit's distinction between a solicitation ban and a ban on announcing one's views on legal issues; rather, the rationale is based on the kind of speech involved. The panel ignored this distinction.

The panel also ignored the Seventh Circuit's rationale for finding *Buckley* relevant—that is, the Supreme Court's recognition of a "compelling state interest in preventing corruption or the appearance of corruption in elections through some campaign finance regulation." *Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 26-27). The court found that "a direct solicitation closely links the quid—avoiding

the judge's future disfavor—to the quo—the contribution" and that "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Id.* at 988-89. The court thus found that the prohibition serves the "anticorruption rationale articulated in *Buckley* and acts to preserve judicial impartiality." *Id.* at 989; *see also Stretton*, 944 F.2d at 145 ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court."); *Wersal*, 674 F.3d at 1032 (characterizing Minnesota's personal solicitation ban as a regulation of judicial campaign financing and noting that "direct personal solicitations by judicial candidates creates a substantial risk of 'quid pro quo' relationships that threaten the compelling state interest of judicial impartiality recognized in *White I.*")[7]

Finally, the panel ignored the practical problem of precise line-drawing with regard to personal solicitation bans. In addressing the judicial candidate's argument that the Wisconsin solicitation ban upheld in *Siefert* allowed some kinds

[7] The Oregon Supreme Court also distinguished the kind of speech involved when judges directly solicit campaign contributions from speech deserving greater protection by comparing it to the commercial speech at issue in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 458 (1978). *In re Fadeley*, 802 P.2d 31, 43 (Or. 1990). The court reasoned that "in the context of in-person solicitation of campaign funds, [there is] a certainty of an appearance of impropriety and a high degree of likelihood of overreaching or undue influence by the requesting judge." *Id.*

of solicitation that Indiana's solicitation ban prohibited, the court in *Bauer* explained that "[i]t is the nature of rules to be broader than necessary in some respects" and that "[l]aws need not contain exceptions for every possible situation." *Bauer*, 620 F.3d at 710; *see also Wersal*, 674 F.3d 1032 (noting that the application of strict scrutiny to Minnesota's solicitation ban "illustrated the 'futility of requiring unattainable precision'") (Loken, J., concurring) (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 785 (8th Cir. 2005) (en banc) (Gibsen, J., dissenting)); *Stretton*, 944 F.2d at 146 (acknowledging that a judicial candidate may learn who has contributed to his or her campaign, but determining that the solicitation prohibition "cannot be faulted because it does not go far enough"); *but see Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 883-84 (Ark. 2007) (upholding Arkansas's prohibition on judicial candidates' personal solicitation of campaign funds under strict scrutiny because it was narrowly tailored to advance the State's compelling interest in a fair and impartial judiciary); *In re Fadeley*, 802 P.2d 31, 44 (Or. 1990) (upholding Oregon's prohibition on a judicial candidate's personal solicitation of campaign contributions under strict scrutiny because "[t]he degree of interference with the First Amendment rights of the judicial candidate is minimal, the state's interest in protecting the integrity of its judiciary is profound, and the means chosen to carry out the state's purpose are the least intrusive possible if there is to be any chance to achieve the desired aim").

Because the panel incorrectly applied strict scrutiny to determine the validity of the Rules, this Court should grant rehearing en banc.

II. The Panel Erroneously Held that the "Political Activities" Rules Do Not Survive Strict Scrutiny.

The majority held that Rules 4.1(A)(2)-(5) (the "political activities" Rules) were not "sufficiently narrowly tailored to further the state's interest in an impartial judiciary" as applied to non-judge candidates. Opinion at 25. These Rules prohibit judges and judicial candidates from "speechifying for another candidate or organization, endorsing or opposing another candidate, fundraising for another candidate or organization, or actively taking part in any political campaign other than his or her own." *Id.* The majority acknowledged that its decision invalidating the speechifying, endorsement, and fundraising prohibitions conflicts with the Eighth Circuit's decision in *Wersal*, 674 F.3d at 1024, 1025. *Id* at 25-26. For the reasons articulated in *Wersal* and Judge Tallman's dissenting opinion, the majority erred and this Court should grant rehearing en banc.

Minnesota's Code of Judicial Conduct prohibits a judge or judicial candidate from publicly endorsing or opposing another candidate for public office. *Wersal*, 674 F.3d at 1024. The en banc plurality concluded that Minnesota's endorsement clause served "the compelling interests of preserving impartiality and avoiding the

appearance of impropriety." *Id.* at 1025.[8] The court reasoned that "[w]hen a judge or judicial candidate endorses another candidate, it creates a risk of partiality toward the endorsed party and his or her supporters, as well as a risk of partiality against other candidates opposing the endorsed party." *Id.* The court found that because "[t]he endorsement clause is directly aimed at this speech about parties," the clause "prevents potential litigants in a case from the risk of having an unfair trial" and "serves the State's interest in avoiding the appearance of impropriety." *Id.*

The *Wersal* plurality concluded that the endorsement clause was not overinclusive because "'it restrict[s] speech for or against particular *parties*'" and not "'for or against particular *issues*.'" *Id.* at 1026 (quoting *White I*, 536 U.S. at 776). Because the endorsement clause only prohibits "a direct expression of bias in favor of or against potential parties to a case," the court explained that "the clause targets precisely that speech which most likely implicates Minnesota's compelling interests." *Id.* And the court concluded that recusal was not a workable less restrictive alternative because "candidates and judges would be free to endorse individuals who would become frequent litigants in future cases such as county sheriffs and prosecutors." *Id.* at 1027-28. Further, the court found that

[8] Judges Loken and Wollman filed a concurring opinion, finding that Minnesota's endorsement clause was narrowly tailored to further the compelling state interest in the appearance and the reality of a politically independent judiciary. *Id.* at 1035.

recusal would not address "Minnesota's separate interest in avoiding the appearance of impropriety." *Id.* at 1028.

Reaching the opposite conclusion, the majority in this case held that Arizona's speechifying, endorsement, and fundraising clauses (which like Minnesota's endorsement clause prohibit direct expression of bias for or against parties who may be litigants in a case) are not narrowly tailored. Opinion at 26. The majority found the clauses "underinclusive because they only address speech that occurs beginning the day after a non-judge candidate has filed his intention to run for judicial office." *Id.* But as Judge Tallman stated, the majority's timing argument cannot be the law because it would render invalid "any restriction (a) that is subject to strict scrutiny and (b) that starts to apply to people only after some triggering event." Opinion at 45 (Tallman, J., dissenting in part). Judge Tallman also criticized the majority's timing argument because "[a]ny actual alternative [means of furthering the State's interest] will suffer from the timing problem the majority identifies." *Id.* at 46.

The majority also concluded that the Arizona Defendants "failed to show why the less restrictive remedy of recusal of a successful candidate from any case in which he or she was involved in a party's campaign or gave an endorsement is an unworkable alternative." Opinion at 27. Judge Tallman correctly concludes that recusal would be impractical in Arizona's smaller counties and no solution in

counties which have only one superior court judge. Opinion at 46 (Tallman, J., dissenting in part). Apache, Graham, Greenlee, and La Paz Counties have only one superior court judge. http://www.azcourts.gov/3013annualreport/JudiciaryOrganizationalChart.aspx (last visited June 4, 2014)[9] "If that one judge campaigns for someone who is then elected sheriff or district attorney, an outside judge would be necessary in every criminal case and in all civil cases where the district attorney is its lawyer." Opinion at 46. (Tallman, J., dissenting in part). In addition, recusal is an unacceptable alternative because it does not address Arizona's interest in avoiding the appearance of impropriety.

The majority's decision conflicts with *Wersal* and state court decisions upholding the validity of prohibitions similar to the Arizona political activities Rules. *Wersal*, 674 F.3d at 1024-25; *In re Vincent*, 172 P.3d 605, 609 (N.M. 2007) (concluding that New Mexico's prohibition against judges or judicial candidates publicly endorsing or opposing a candidate for political office was "narrowly tailored to serve the State's compelling interest in a judiciary that is both impartial in fact and in appearance"); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003) (holding that New York's rules prohibiting judges and judicial candidates from participating in political activities were "narrowly constructed to address the

[9] Gila and Santa Cruz Counties have only two superior court judges. *Id.*

interests at stake, including the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary"). This Court should grant rehearing en banc.

CONCLUSION

The Court should grant Arizona Defendants' Petition for Rehearing en Banc.

Respectfully submitted this 6th day of June, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 40-1(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40-1(a)(7)(B) because it contains 3,762 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 6th day of June, 2014.

s/ Paula S. Bickett
Paula S. Bickett
Chief Counsel, Civil Appeals

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

/s Marlena Soto
Marlena Soto

#3834678

ADDENDUM 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,
Plaintiff-Appellant,

v.

COLLEEN CONCANNON, in her official capacity as member of the Arizona Commission on Judicial Conduct; LOUIS FRANK DOMINGUEZ, in his official capacity as member of the Arizona Commission on Judicial Conduct; PETER J. ECKERSTROM, in his official capacity as member of the Arizona Commission on Judicial Conduct; GEORGE H. FOSTER, in his official capacity as member of the Arizona Commission on Judicial Conduct; SHERRY L. GEISLER, in her official capacity as member of the Arizona Commission on Judicial Conduct; MICHAEL O. MILLER, in his official capacity as member of the Arizona Commission on Judicial Conduct; ANGELA H. SIFUENTES, in her official capacity as secretary of the Arizona Commission on Judicial Conduct; CATHERINE M. STEWART, in her official capacity as member of the Arizona Commission on Judicial

No. 11-17634

D.C. No.
3:08-cv-08064-
FJM

OPINION

Conduct; J. TYRELL TABER, in his official capacity as member of the Arizona Commission on Judicial Conduct; LAWRENCE F. WINTHROP, in his official capacity as member of the Arizona Commission on Judicial Conduct; MARET VESSELLA, Chief Bar Counsel of the State Bar of Arizona,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
July 11, 2013—San Francisco, California

Filed May 9, 2014

Before: Richard A. Paez, Marsha S. Berzon, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez;
Concurrence by Judge Berzon;
Dissent by Judge Tallman

SUMMARY*

Civil Rights

The panel reversed the district court's grant of summary judgment in favor of Arizona state officials and remanded an action brought by an unsuccessful candidate for judicial office in Mohave County, Arizona, who alleged that several provisions of the Arizona Code of Judicial Conduct, restricting judicial candidate speech, violated the First Amendment.

The panel emphasized that its analysis of the challenged provisions was based on plaintiff's status as a non-judge candidate. Applying strict scrutiny, the panel held that the Code's solicitation clause, Rule 4.1(A)(6), was unconstitutional as applied to non-judge judicial candidates because it restricted speech that presented little to no risk of corruption or bias towards future litigants and was not narrowly tailored to serve those state interests. The panel held that the political activities clauses of the Code, Rules 4.1(A)(2)–(5), were not sufficiently narrowly tailored to serve the state's interest in an impartial judiciary, and were thus unconstitutional restrictions on the political speech of non-judge candidates.

Concurring, Judge Berzon stated that the panel's opinion addressed the constitutionality of certain provisions of the Arizona Code of Judicial Conduct *only* as they apply to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

judicial candidates who, like plaintiff, had not yet ascended to the bench.

Dissenting in part, Judge Tallman stated that Rules 4.1(a)(2) (giving speeches on behalf of others), (3) (endorsing others), and (4) (soliciting money for others), were constitutional because they were narrowly tailored to serve the state's compelling interest in maintaining judicial impartiality and its appearance.

COUNSEL

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OPINION

PAEZ, Circuit Judge:

A state sets itself on a collision course with the First Amendment when it chooses to popularly elect its judges but restricts a candidate's campaign speech. The conflict arises from the fundamental tension between the ideal of apolitical judicial independence and the critical nature of unfettered speech in the electoral political process. Here we must decide whether several provisions in the Arizona Code of Judicial Conduct restricting judicial candidate speech run afoul of First Amendment protections. Because we are concerned with content-based restrictions on electioneering-related speech, those protections are at their apex. Arizona, like every other state, has a compelling interest in the reality and appearance of an impartial judiciary, but speech restrictions must be narrowly tailored to serve that interest. We hold that several provisions of the Arizona Code of Judicial Conduct unconstitutionally restrict the speech of non-judge candidates because the restrictions are not sufficiently narrowly tailored to survive strict scrutiny. Accordingly, we reverse the district court's grant of summary judgment in favor of Defendants.

I.

Arizona counties with fewer than 250,000 people popularly elect local judicial officers. *See* Ariz. Const. art.

VI, §§ 12, 40.[1] The Arizona Code of Judicial Conduct[2] (the "Code") regulates the conduct of judges campaigning for retention and judicial candidates campaigning for office. The Code provides for discipline if a candidate is elected as a judge, but lawyers who are unsuccessful in their candidacy may also be subject to discipline under the Arizona Rules of Professional Conduct.[3] *See* Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 8.2 (2003).

Plaintiff Randolph Wolfson was an unsuccessful candidate for judicial office in Mohave County, Arizona in 2006 and 2008. *Wolfson I*, 616 F.3d at 1052–53. He intends to run in a future election. *Id*. at 1054–55. As a candidate, Wolfson wished to conduct a number of activities he believed to be prohibited by the Code, but refrained from doing so, fearing professional discipline.[4] He brought this action

[1] Arizona Supreme Court and appellate court judges and judicial officers in counties with a population greater than 250,000 (and smaller counties that vote to do so) use a system of merit selection with retention elections. Ariz. Const. art. VI, §§ 37, 38, 40.

[2] Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009). After Wolfson filed his complaint, the Code was revised, effective September 1, 2009. The revision to the Code recodified and renumbered the Rules, but did not alter the substance of the challenged Rules at issue in this appeal. *See Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010) (*Wolfson I*).

[3] "An unsuccessful judicial candidate who is a lawyer and violates this code may be subject to discipline under applicable court rules governing lawyers." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Canon 4, cmt. 2 (2009).

[4] Wolfson alleges that he wanted personally to solicit campaign contributions at live appearances and speaking engagements, and by making phone calls and signing his name to letters seeking donations.

challenging the facial and as-applied constitutionality of certain provisions of the Code, seeking declaratory and injunctive relief. Defending this appeal are the members of the Arizona Commission on Judicial Conduct (the "Commission") and Arizona Chief Bar Counsel ("State Bar Counsel"), collectively the "Arizona defendants."[5]

Wolfson challenges five clauses of Rule 4.1 of the Code (the "Rules"):

> (A) A judge or judicial candidate shall not do any of the following:
>
> . . . .
>
> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions

Wolfson I, 616 F.3d at 1052. He also alleges that he wanted to endorse other candidates for office and support their election campaigns. *Id.*

[5] Wolfson voluntarily dismissed all claims against a third defendant, the Arizona Supreme Court Disciplinary Commission. *Wolfson v. Brammer*, 822 F. Supp. 2d 925, 926–27 (D. Ariz. 2011) (*Wolfson II*).

> in excess of fifty percent of the cumulative total permitted by law . . . .
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 . . . .[6]

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009).

This is the second time that this case is before us. We previously held in *Wolfson I* that Wolfson's challenges to these clauses (hereinafter the "solicitation" clause (6) and "political activities" clauses, (2)–(5)) were justiciable and remanded them to the district court to consider them on the merits. *Wolfson I*, 616 F.3d at 1054–62, 1066–67. With respect to his challenge to a now-defunct "pledges and promises" clause, we held that Wolfson lacked standing to challenge it insofar as it applied to the speech of judges. *Id.* at 1064. "Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group." *Id.*

On remand, ruling on cross-motions for summary judgment, the district court applied a balancing test articulated by the Seventh Circuit in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), and *Bauer v. Shepard*, 620 F.3d

[6] Arizona's Code closely tracks the American Bar Association's Model Code of Judicial Conduct, Rule 4.1 (2011).

704 (7th Cir. 2010), and upheld the constitutionality of the five challenged Code provisions. *Wolfson II*, 822 F. Supp. 2d at 929–30. The balancing test from *Siefert/Bauer* "derives from the line of Supreme Court cases upholding the limited power of governments to restrict their employees' political speech in order to promote the efficiency and integrity of government services." *Id.* at 929. The district court held that this standard "strikes an appropriate balance between the weaker First Amendment rights at stake and the stronger State interests in regulating the way it chooses its judges," apparently because the speech at issue was not "core speech" deserving of strict scrutiny but "behavior short of true speech." *Id.* at 929–30.

The district court proceeded to balance the interests of the state against the interests of a judicial candidate. With respect to the political activities restrictions (the campaigning and endorsement clauses), the district court held that "[e]ndorsements, making speeches, and soliciting funds on behalf of other candidates is not . . . core political speech." *Id.* at 931. The district court distinguished between announcing one's own political views or qualifications—speech protected by *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (*White I*)—and the type of speech prohibited by the Rules, which only "advance[s] other candidates' political aspirations, or . . . garner[s] votes by way of political coattails." *Wolfson II*, 822 F. Supp. 2d at 931–32. Moreover, although the district court recognized that its review was "limited to the constitutionality of the Rules as applied to judicial candidates who are not also sitting judges," *id.* at 928, it nonetheless

> reject[ed] the suggestion that judicial candidates ought to enjoy greater freedom to

> engage in partisan politics than sitting judges. An asymmetrical electoral process for judges is unworkable. Fundamental fairness requires a level playing field among judicial contenders. Candidates for judicial office must abide by the same rules imposed on the judges they hope to become.

Id. at 932. The district court assumed the constitutional validity of the Rules restricting political activities as applied to sitting judges, holding that "the *Pickering* line of cases [upholding the government's power to restrict employees' political speech to promote efficiency and integrity of government services] remains relevant to restrictions on the speech of sitting judges." *Id.* The court concluded that Rules 4.1(A)(2)–(5) appropriately balanced the state's interest in "protecting the due process rights of litigants and ensuring the real and perceived impartiality of the judiciary" against a candidate's interest in "participating in the political campaigns of other candidates" and upheld the political activities clauses as constitutional. *Id.*

As for the solicitation clause (Rule 4.1(A)(6)) prohibiting a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee," the district court held that it was constitutional as applied to non-judge candidates because it struck "a constitutional balance" between the state's interest in the appearance and actuality of an impartial judiciary and a candidate's need for funds. *Id.* at 931. The district court found that all forms of personal solicitation, whether in-person or via signed mass mailings, created "the same risk of coercion and bias." *Id.* Wolfson timely appealed.

II.

A.

We review de novo an order granting summary judgment on the constitutionality of a statute. *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997).

B.

Wolfson seeks to invalidate the challenged Rules on their face, including as to sitting judges campaigning for retention or reelection. In *Wolfson I*, however, we held that "Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group." 616 F.3d at 1064. Nonetheless, although we reject the Arizona defendants' argument, which the district court adopted, that the balancing test applicable to government employee speech cases also applies to sitting judges and thus fairly extends to non-judge candidates campaigning for office, we must establish the scope of our review of the challenged Rules.

We decline to adopt the district court's approach because such reasoning requires a series of unnecessary constitutional decisions.[7] Rather, our analysis of the challenged Rules is

[7] We find no Supreme Court authority extending the limited First Amendment protection for public employee speech to judicial candidate speech, and we decline to answer the hypothetical question of whether sitting judges are sufficiently similar to rank-and-file government employees to warrant such application. *See, e.g.*, *White I*, 536 U.S at 796 (Kennedy, J., concurring). We also find no Supreme Court authority extending the limited First Amendment protection for employee speech to a private citizen who is not currently a government employee but merely seeks to become one. *Id.* ("Petitioner Gregory Wersal was not a sitting

based on Wolfson's status as a non-judge candidate. While the Rules apply to judges whether or not a judge is actively campaigning for retention or reelection, they only apply to non-judge candidates during an election campaign for judicial office.[8] There is a meaningful distinction in how the Rules actually apply to judges versus non-judge candidates that may warrant distinct levels of scrutiny. Regulated non-judge speech only takes place during a campaign. As noted above, political speech is subject to the highest degree of First Amendment protection. Because Wolfson's desired speech would only take place in the context of a political campaign for judicial office, we do not decide whether the restrictions as applied to judges—whether campaigning or not—fit into the "narrow class of speech restrictions" that may be constitutionally permissible if "based on an interest in allowing governmental entities to perform their functions." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010).

We are not persuaded that "fundamental fairness," *see Wolfson II*, 822 F. Supp. 2d at 929, warrants making an advisory decision about the constitutional speech rights of judges who are not presently before us and whose rights

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judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner."). Nor do we take a position on a question explicitly unresolved by the Supreme Court in *White I*: whether the First Amendment "requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783 (majority opinion).

[8] "When a person becomes a judicial candidate, this canon becomes applicable to his or her conduct." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Canon 4, cmt. 2 (2009).

Wolfson cannot assert, *Wolfson I*, 616 F.3d at 1064. Under strict scrutiny, *see* Part III.A, the proponents of a speech regulation must establish a compelling state interest served by the regulation. Neither the Commission nor the State Bar Counsel has argued that Arizona has a compelling state interest in applying the same election regulations to incumbent sitting judges as to candidates who are not sitting judges—only that such an equal application is principled, logical, and fair.

Our decision to limit our review to non-judge candidates is ultimately based on judicial restraint. We need not decide today what restrictions on judges' speech are constitutionally justified by the interest in allowing the judiciary to function optimally, nor are we squarely presented with that question. We neither "'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). The only constitutional question we address is whether the challenged Rules violate the First Amendment rights of non-judge candidates.

III.

A.

Strict scrutiny applies to this First Amendment challenge. The regulations in question are content- and speaker-based restrictions on political speech, which receives the most stringent First Amendment protection. *Republican Party of Minn. v. White*, 416 F.3d 738, 748–49 (8th Cir. 2005) (*White*

II); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (internal quotation marks omitted)). We recently applied strict scrutiny to another state statute regulating judicial elections because it was, "on its face, a content-based restriction on political speech and association [which] thereby threaten[ed] to abridge a fundamental right." *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 746 (9th Cir. 2012) (holding unconstitutional a ban on political party endorsement of judicial candidates).

Content-based restrictions on speech receive strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Here, the Rules at issue

> censor speech based on content in the most basic of ways: They prevent candidates from speaking about some subjects [who they endorse or on whose behalf they can speak if that person is running for office or if the entity is a political party] . . . ; and they prevent candidates from asking for support in some ways (campaign funds) but not in others (a vote, yard signs).

Carey v. Wolnitzek, 614 F.3d 189, 198–99 (6th Cir. 2010). The canons do not address any of the "categorical carve-outs" of proscribable speech. *See id.* at 199. Nor are they the types of regulations to which the Supreme Court has applied a less rigorous standard of review, such as time, place and manner restrictions, commercial speech, or expressive conduct. *Id.*

Every sister circuit except the Seventh that has considered similar regulations since *White I* has applied strict scrutiny as the standard of review. *See Wersal v. Sexton*, 674 F.3d 1010, 1019 (8th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 209 (2012); *Carey*, 614 F.3d at 198–99; *White II*, 416 F.3d at 749, 764–65; *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). We are not persuaded by the Seventh Circuit's approach, which the Arizona defendants urge us to adopt by asking us to affirm the district court.

The Seventh Circuit treated the solicitation ban in *Siefert* as a "campaign finance regulation" and applied the "closely drawn scrutiny" framework of *Buckley v. Valeo*, 608 F.3d at 988 (citing 424 U.S. 1 (1976) (per curiam)). The court treated the solicitation ban like a restriction on a campaign contribution—though by default, because the solicitation ban was *not* an expenditure restriction. *Id.* Contrary to the Arizona defendants' argument, the solicitation clause at issue here is not a restriction on a campaign contribution within the meaning of *Buckley*, 424 U.S. at 26–27. Arizona's solicitation ban does nothing at all to limit *contributions* to a judicial candidate's campaign—either in amount or from certain persons or groups. Contribution restrictions, like those at issue in *Buckley*, restrict the speech of potential contributors. 424 U.S. at 21–22. The Rule at issue here restricts only the solicitation for the contributions—the speech of the candidate.[9] Indeed, *Buckley* says nothing at all

[9] *See also Carey*, 614 F.3d at 200 ("[T]his argument [that the solicitation clause is akin to a restriction on political donation subject to less rigorous scrutiny] gives analogy a bad name. The solicitation clause does not set a contribution limit, as in *McConnell* and similar cases. It flatly prohibits *speech*, not donations, based on the topic (solicitation of a contribution) and speaker (a judge or judicial candidate)—precisely the kind of content-

about solicitation, other than to note that candidates will ask for contributions. *Buckley*'s framework is inapposite here.[10]

Considering a rule prohibiting a judge or judicial candidate from making endorsements or speaking on behalf of a partisan candidate or platform, the Seventh Circuit applied "a balancing approach" derived from a line of cases determining the speech rights of government employees. *Siefert*, 608 F.3d at 983–87. As noted in Part II.B, here we consider only the speech rights of Wolfson as a private citizen and judicial candidate—not yet, and perhaps never, a government employee. "[Wolfson] [i]s not a sitting judge but a challenger; he ha[s] not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner." *See White I*, 536 U.S at 796 (Kennedy, J., concurring). For the reasons discussed above, we decline to extend the rationale from the employee-speech

based regulations that traditionally warrant strict scrutiny." (internal citation omitted) (emphasis in original)).

[10] Nor are we persuaded by the Commission defendants' argument that the rules prohibiting solicitation "do not involve core political speech," and that "[w]hen a candidate says 'give me money,' he adds nothing to the full and fair expression of ideas that the First Amendment protects." This is a content-based distinction of pure speech that is not excepted from full First Amendment protection. *See, e.g.*, *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992) ("It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment."); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629 (1980) ("[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (observing that the First Amendment protects speech "in the form of a solicitation to pay or contribute money"). This argument is wholly without merit.

cases to apply a lower level of scrutiny to the restrictions on Wolfson's First Amendment rights during a judicial campaign.

The Seventh Circuit also reasoned that a balancing approach was appropriate because endorsements are "a different form of speech" outside of "core" political speech thus having "limited communicative value," and when judges make endorsements they are "speaking as judges, and trading on the prestige of their office to advance other political ends." *Siefert*, 608 F.3d at 983, 984, 986.[11] We do not hold the same view of endorsements by non-judge candidates. In *Sanders County*, we held that endorsements of judicial candidates are no different from other types of political speech: "Thus, political speech—including the endorsement of candidates for office—is at the core of speech protected by the First Amendment." 698 F.3d at 745. Similarly, endorsements by candidates for office is also political speech protected by the First Amendment. Moreover, endorsements made by a non-judge candidate cannot trade on the prestige of an office that candidate does not yet hold.

We share the Seventh Circuit's concerns about protecting litigants' due process rights, which we recognize as a compelling state interest. That court reasoned that because "restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause," states could regulate even political speech by judges if the regulations served the state's interest in protecting litigants' constitutional right to due process. *Siefert*, 608 F.3d at 984. We agree that due

[11] In this vein, the Commission defendants argue that endorsements have "limited communicative value" other than the desire to be a political powerbroker.

process concerns are paramount, but this concern does not justify a categorically lower level of constitutional scrutiny for political speech by judicial candidates. Applying strict scrutiny, we can adequately assess whether regulations on a judicial candidate's political speech are narrowly tailored to serve the state's compelling interest in protecting litigants' due process rights. Narrow tailoring is most appropriate. Although we could scarcely imagine a more compelling state interest, we also recognize that "due process" concerns arise not in the ether, but "only . . . in the context of judicial proceedings." *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 613 (2004).[12] We are mindful of the fact that we should endeavor to protect litigants from even the "*potential* for due process violations" or the "*probability* of unfairness." *See White I*, 536 U.S. at 815–16 (Ginsburg, J., dissenting) (emphasis added) (internal quotation marks omitted). The potential for and probability of a problem that in actuality arises only in real cases does not, however, translate into a generalized concern about the appearance or reality of an impartial judiciary warranting a lower level of scrutiny. Indeed, the Eighth Circuit identified the flaw in this argument.

> It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges

[12] "Even if a judicial candidate campaigned solely on the basis of his hatred and vindictiveness toward Joe Smith and the candidate were elected, no due process problem would be presented if Joe Smith were never involved in litigation or other proceedings before that judge." *Id.*

> and prospective judges in election years and non-election years to say and do things that will enhance their chances of being elected.

Weaver, 309 F.3d at 1320; *accord White I*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").[13] Moreover, there is an equally compelling state interest in the free flow of information during a political campaign. "Deciding the relevance of candidate speech is the right of the voters, not the State." *White I*, 536 U.S. at 794 (Kennedy, J., concurring). Whether and to what extent a judicial candidate chooses to engage in activities such as endorsing and making speeches on behalf of other candidates, fundraising for or taking part in other political campaigns, or asking for contributions is information that the electorate can use to decide whether he or she is qualified to hold judicial office. "The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents. By making this choice, the states, by definition, are turning judges into politicians." Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 Ind. L. Rev. 735, 736

[13] *See also Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (en banc) (Reinhardt, J., concurring), *vacated on other grounds*, 501 U.S. 312 (1991) ("The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. . . . Whether a judicial candidate wishes to make his views known on those issues during the electoral process is another matter. So is the question whether it is proper for him to do so. But those are all problems inherent in California's decision to conduct judicial elections. If California wishes to elect its judges, it must allow free speech to prevail in the election process.").

(2002). Along with knowing a candidate's views on legal or political issues, voters have a right to know *how* political their potential judge might be.[14] To the extent states wish to avoid a politicized judiciary, they can choose to do so by not electing judges.

B.

Under strict scrutiny, the Arizona defendants have the burden to prove that the challenged Rules further a compelling interest and are narrowly tailored to achieve that interest. *Citizens United*, 558 U.S. at 340. First we consider Arizona's state interests. Then, we analyze whether the solicitation clause (Rule 4.1(A)(6)) and the political activities clauses (Rules 4.1(A)(2)–(5)) are narrowly tailored to serve those interests.

1.

Every court to consider the issue has affirmed that states have a compelling interest in the appearance and actuality of an impartial judiciary. *See, e.g.*, *White I*, 536 U.S. at 775–76. The meaning of "impartiality" is lack of bias for or against either *party* to a case. *Id.* at 775. This definition accords with the idea that due process violations arise only in case-specific

[14] *See, e.g.*, Michael R. Dimino, *Pay No Attention To That Man Behind The Robe: Elections, The First Amendment, and Judges As Politicians*, 21 Yale L. & Pol'y Rev. 301, 356 (2003) ("[S]tates that have rejected the federal model of judicial independence have necessarily accepted (if not celebrated) that some level of electoral accountability will play a part in their judges' decisions. Accordingly, because there is nothing 'corrupt' about the functioning of democracy, limiting speech so as to conceal the part that electoral politics does play in judicial decisions cannot be constitutionally justified.").

contexts. The Supreme Court has also recognized that states have a compelling interest in preventing corruption or the appearance of corruption through campaign finance regulations. *Buckley*, 424 U.S. at 26–27; *see also Citizens United*, 558 U.S. at 357. Thus, we recognize that Arizona has a compelling interest in an uncorrupt judiciary that appears to be and is impartial to the parties who appear before its judges.

The Arizona defendants also argue for two other compelling interests that we do not find persuasive. First, the Commission defendants argue that "the State has a compelling interest in preventing candidates (who will after all be the next judges if and when elected) from trampling on the interests of impartiality and public confidence." This argument is, essentially, that states have a compelling interest in regulating candidates' speech; we do not find an interest in regulating speech per se to be compelling. We do agree, however, that states have a compelling interest in maintaining public confidence in the judiciary. In a similar vein, State Bar Counsel argues that Arizona has a compelling interest in avoiding "judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges." But, as explained above, any imperilment of public confidence has its roots in the very nature of judicial elections, and not in the speech of candidates who must participate in those elections to become judges. *See White I*, 536 U.S. at 792 (O'Connor, J., concurring).[15] If a judicial candidate wishes to engage in politicking to achieve a seat on

[15] The reality is that the Rules do not "change the circumstances or pressures that cause the candidates to want to make [prohibited] statements," and that "[j]udicial campaign speech codes are therefore much more about maintaining appearances by hiding reality than about changing reality." Friedland, 104 Colum. L. Rev. at 612.

the bench, keeping the public ignorant of that fact may conceal valuable information about how well that candidate may uphold the office of an ideally impartial, apolitical adjudicator.

Second, the Commission defendants argue that Arizona has a compelling interest in "preventing judges and judicial candidates from using the prestige of their office or potential office for purposes not related to their judicial duties." We are not persuaded by this argument as applied to non-judge candidates, who cannot abuse the prestige of an office they do not yet and may never hold.

2.

The solicitation clause prohibits a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4." Rule 4.1(A)(6).[16] The Code defines "personally solicit" as "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, "Terminology" (2009). We hold that Rule

[16] Wolfson argues that Rule 4.1(A)(4) is also a restriction on solicitation, because he wishes to solicit contributions to his own campaign committee, which he considers to be a "political organization." But the Code explicitly carves out a judicial candidate's campaign committee from the definition of "political organization." *See* Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, "Terminology" (2009). Therefore, we analyze Rule 4.1(A)(4) alongside (A)(2)–(3) and (5), because it prohibits a judicial candidate from soliciting funds on behalf of or donating to a specific political organization or candidate—classic political campaigning activities.

4.1(A)(6) is unconstitutional as applied to non-judge judicial candidates because it restricts speech that presents little to no risk of corruption or bias towards future litigants and is not narrowly tailored to serve those state interests.

Arizona's sweeping definition of "personally solicit" encompasses methods not likely to impinge on even the appearance of impartiality. The Sixth Circuit recently invalidated a similar clause in Kentucky that also extended beyond one-on-one, in-person solicitations to group solicitations, telephone calls, and letters. *Carey*, 614 F.3d at 204. We agree with our sister court's cogent analysis of this issue. "[I]ndirect methods of solicitation [such as speeches to large groups and signed mass mailings] present little or no risk of undue pressure or the appearance of a quid pro quo." *Id.* at 205. The clauses are also underinclusive: a personal solicitation by a campaign committee member who may be the candidate's best friend or close professional associate (such as a law practice partner) is likely to have a greater risk for "coercion and undue appearance" than a signed mass mailing or request during a speech to a large group. *Id*. Moreover, the Code does not prohibit a candidate's campaign committee from disclosing to the candidate the names of contributors and solicited non-contributors.

> That omission suggests that the only interest at play is the impolitic interpersonal dynamics of the candidate's request for money, not the more corrosive reality of who gives and how much. If the purported risk addressed by the clause is that the judge or candidate will treat donors and non-donors differently, it is knowing who contributed and who balked that

> makes the difference, not who asked for the contribution.

Id.[17] The lack of narrow tailoring is obvious here: if 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? *Wersal* teaches that the in-person "'ask' is precisely the speech [a state] must regulate to maintain its interest in impartiality and the appearance of impartiality" because of the greater risk of a quid pro quo. 674 F.3d at 1029–31. Indeed, we agree with State Bar Counsel's argument that "the very act of asking for money, personally, creates the impression that judge (and justice) may be for sale." But the clause here sweeps more broadly. It is not necessary "to decide today whether a State *could* enact a narrowly tailored solicitation clause—say, one focused on one-on-one solicitations or solicitations from individuals with cases pending before the court—only that this clause does not do so narrowly." *Carey*, 614 F.3d at 206 (emphasis in original).[18]

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[17] The lack of a non-disclosure-to-the-candidate requirement in Arizona's Code presents the opposite situation of that in *White II*, where appellants challenged the fact that they could not solicit from large groups or via signed appeal letters. The Eighth Circuit found that the *prohibition* on disclosing to a candidate who contributed and who rebuffed meant the clause was "barely tailored at all to serve [the end of impartiality as to parties in a particular case]" or an interest in "open-mindedness." 416 F.3d at 765–66.

[18] Indeed, the Eighth Circuit upheld the Minnesota solicitation clause even under strict scrutiny precisely because the challenged clause only prohibited direct, in-person solicitation, while the rest of Minnesota's Code of Judicial Conduct permitted solicitation of groups and of a judge's intimates. *Wersal*, 674 F.3d at 1028–29. That court distinguished the

The solicitation clause is invalid as applied to non-judge candidates.

3.

We analyze Rules 4.1(A)(2)–(5) as the "political activities" clauses. Judicial candidates are prohibited from speechifying for another candidate or organization, endorsing or opposing another candidate, fundraising for another candidate or organization, or actively taking part in any political campaign other than his or her own. These clauses are also not sufficiently narrowly tailored to serve the state's interest in an impartial judiciary, and are thus unconstitutional restrictions on political speech of non-judge candidates for judicial office.

Rules 4.1(A)(2)–(4)—prohibiting speechifying, endorsements, and fundraising—present the closest question. There is an argument that these rules are sufficiently narrowly tailored to be constitutional because they curtail speech that evidences bias towards a particular (potential) *party* within the scope of *White I*: the candidate or political organization endorsed or spoken of favorably by the judicial candidate. A plurality of the Eighth Circuit, sitting en banc, upheld a nearly identical Minnesota prohibition on a judge or judicial candidate endorsing "another candidate for public office" because such an endorsement "creates a risk of partiality

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outcome from that in *White II*, where an earlier version of the state's Code of Judicial Conduct prohibited group solicitation and banned judges and candidates from signing fund appeal letters. *Id.* at 1029. Direct personal solicitation "gives rise to a greater risk of quid pro quo," *id.*, but the scope of Arizona's solicitation clause is broader than Minnesota's and we must consider all of the affected speech.

towards the endorsed party and his or her supporters." *Wersal*, 674 F.3d at 1024, 1025. The plurality concluded that the clause was narrowly tailored to serve the state's compelling interest in the appearance and reality of an impartial judiciary. *Id.* at 1028.[19]

Nonetheless, we hold that these regulations are underinclusive because they only address speech that occurs beginning the day after a non-judge candidate has filed his intention to run for judicial office.[20] The day before a private citizen becomes a judicial candidate, he or she could have been a major fundraiser or campaign manager for another

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[19] Judge Loken, joined by Judge Wollman, concurred in the result but agreed with the plurality's judgment on the separate ground that the endorsement clause served the distinct compelling state interest in "protecting the political independence of its judiciary." *Id.* at 1033 ("An endorsement links the judicial candidate's political fortunes to a particular person, who may then come to hold office in a coordinate branch of government. This is antithetical to any well considered notion of judicial independence—that we are a 'government of laws, not of men.'") (Loken, J., concurring.).

[20] The *Wersal* plurality concluded that the Minnesota endorsement clause was not underinclusive but only by reference to what it restricted: "endorsements for other *candidate[s]* for public office." *Id.* at 1027 (internal quotation marks omitted) (emphasis added). That plurality noted that a separate clause in Minnesota's Code of Judicial Conduct prevented a judge or judicial candidate from making any statement that would "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," and reasoned that the two clauses read together meant that a judicial candidate was prevented from making any biased statement about a party or potential party, whether or not the target of the speech had become a candidate for public office at the time of the statement. *Id.* We are concerned about the temporal dimension of a non-judge candidate's speech, rather than the candidate status of its target.

elected official, or may have donated large sums of money to another's political campaign, or may have himself been an elected politician. The Supreme Court confronted a similar underinclusive issue in *White I*. There, in explaining why the "announce clause" was underinclusive, the Court said

> In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

White I, 536 U.S. at 779–80. Here too, Rules 4.1(A)(2)–(4) are "woefully underinclusive" because they only address speech made after a candidate has filed his intention to enter the race. *Id.* at 780. Contrary to the dissent, we fail to see why this same concern does not apply here.

Moreover, the Arizona defendants have failed to show why the less restrictive remedy of recusal of a successful candidate from any case in which he or she was involved in a party's political campaign or gave an endorsement is an unworkable alternative. "[B]ecause restricting speech should be the government's tool of last resort, the availability of obvious less-restrictive alternatives renders a speech restriction overinclusive." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013). Here, it seems that if a

candidate indeed becomes a judge, a less restrictive means of addressing the state's concerns would be to require recusal in cases where the new judge's bias against or in favor of a party is clear.[21] Unlike the dissent and the plurality of the Eighth Circuit in *Wersal*, we decline to address hypothetical situations involving potential frequent litigants and single-judge counties. *See* Dissent at 46; *Wersal*, 674 F.3d at 1027–28 (posing the hypothetical that "candidates and judges would be free to endorse individuals who would become frequent litigants in future cases, such as county sheriffs and prosecutors"). The Arizona defendants have not offered any evidence nor argued that these concerns exist, *cf. Siefert*, 608 F.3d at 987, though they bear the burden of demonstrating that the Rules survive strict scrutiny. We decline to speculate on whether such a problem would exist in the Arizona judicial elections affected by these Rules.

We hold Rule 4.1(A)(5), which prohibits a judicial candidate from "actively tak[ing] part in any political campaign other than his or her own campaign for election, reelection, or retention in office" to be unconstitutional because it is overbroad. By its terms, it is not limited to restrictions on participation in political campaigns on behalf of persons who may become *parties* to a suit, but may also include political campaigns on ballot propositions and other *issues*, including political campaigns for ballot propositions that present no risk of impartiality towards future parties.

[21] *See, e.g.*, Friedland, 104 Colum. L. Rev. at 614 ("[T]he proper response to judicial campaign speech that could threaten Fourteenth Amendment due process rights may be to allow the speech and then, if a case arises in which the judge's former campaign speech poses a problem, to assign that case to another judge.").

Thus, Rule 4.1(A)(5) unconstitutionally prohibits protected speech about legal issues. *White I*, 536 U.S. at 776–78.

IV.

For these reasons, we reverse the district court's grant of summary judgment to the Arizona defendants. We hold that strict scrutiny applies and that the challenged portions of the Arizona Code of Judicial conduct unconstitutionally restrict the speech of non-judge judicial candidates. We remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BERZON, Circuit Judge, concurring:

Sitting for judicial election while judging cases, Justice Otto Kaus famously quipped, is like "brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub." Joseph R. Grodin, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* 177 (1989) (quoting Kaus). Kaus would know. He sat on the California Supreme Court from 1981 to 1985, Gerald T. McLaughlin, *Memorial Dedication to Otto Kaus*, 30 Loy. L.A. L. Rev. 923, 923 (1997), having narrowly won a retention election in 1982 and retiring from the court soon before the 1986 vote that would unseat three of his former colleagues, Stephen R. Barnett,

Otto and the Court, 30 Loy. L.A. L. Rev. 943, 947 & n.19 (1997).[1]

Kaus' point about the psychology of judging applies outside the context of judicial elections, for the temptation to engage in overt political behavior affects judges generally. And so I write separately to identify, and hopefully to tame, the "crocodile" stalking today's majority opinion: the prospect that the principles we apply now will be used in future litigation to challenge the constitutionality of restrictions on the political behavior of sitting judges. The opinion studiously — and designedly — does not address that issue. But it is worth explaining why, in my view, the considerations pertinent to evaluating the complex of constitutional issues raised by such restrictions are quite different than those the majority opinion applies today.

I.

Today's opinion addresses the constitutionality of certain provisions of the Arizona Code of Judicial Conduct ("Code") *only* as they apply to judicial candidates who, like Wolfson, have not yet ascended to the bench. It does not decide those provisions' constitutionality as they apply to elected judges

[1] Justices of the California Supreme Court and Judges of the California Court of Appeal are nominated by the Governor, confirmed by the Commission on Judicial Appointments, and then subject to voter approval in a retention election at the time of the next gubernatorial election and, thereafter, at the end of each 12-year term. *See* Cal. Const. art. 6, § 16(d); Cal. Elec. Code § 9083. Judges of the California Superior Court usually sit for general election every six years, Cal. Const. art. 6, § 16(b), unless an incumbent is not unopposed, Cal. Elec. Code § 8203, or a county adopts by majority popular vote the retention-election system applicable to appellate judges, Cal. Elec. Code § 8220.

who, like Kaus, have already taken their oaths of office. Still less does it decide the constitutionality of restrictions on the political activity of judges who, like us on the federal bench, "hold their Offices during good Behaviour," U.S. Const. art. III, § 1, and never sit for election. In the name of prudence and constitutional avoidance, the majority's opinion rightly reserves judgment on the constitutionality of restricting the speech of sitting judges, an issue neither properly before us nor necessary to the resolution of this case.

I emphasize the limited scope of today's decision for fear that future litigants might otherwise seek to obscure it, despite the repeated admonishments in the opinion. Of the five Code provisions we strike today, only one — the solicitation ban — directly relates to a judicial candidate's *own* campaign for office.[2] The remainder prohibit a would-be judge's efforts to advance the political fortunes of other candidates or causes, through speeches, endorsements, fundraising, financial support, or other campaign assistance.[3]

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[2] The full text of the provision is as follows:

> (A) A judge or judicial candidate shall not . . . .
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4 . . . .

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009), Rule 4.1(A)(6).

[3] The full text of the provision is as follows:

> (A) A judge or judicial candidate shall not do any of the following:

As these proscriptions bear little direct relation to judicial candidates' personal political fortunes, a casual reader might be forgiven for assuming that they are just as constitutionally offensive as applied outside the election context, to sitting judges, whether or not they reached the bench via election.

In my view, that is not so, for at least two reasons: The analytic framework applicable to political restrictions on sitting judges may well differ from the one we apply today. And the compelling state interest that could well justify such restrictions differs from the one emphasized in the majority opinion. I address each difference in turn.

> . . . .
>
> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law . . . .
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office . . . .

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct (2009), Rule 4.1(A)(2)–(5).

II.

In applying strict scrutiny to a judicial candidate who is not now a judge, today's majority opinion rightly rejects the Seventh Circuit's approach, which applies to political restrictions on elected sitting judges a balancing test derived from the Supreme Court's cases on public employee speech. *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). Although such a tempered standard has no application to a candidate who has not yet taken his oath of judicial office, whether it would be appropriately applied to political restrictions governing sitting judges is quite a different manner.

The Constitution permits the government to prohibit its employees from speaking about matters of public concern where the government's interest "in promoting the efficiency of the public services it performs through its employees" outweighs the First Amendment interest in speech. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968). The *Pickering* balancing test seeks "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006). And that test recognizes that "there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010).

Republican Party of Minnesota v. White, 536 U.S. 765 (2002), did not decide whether the public employee speech cases would justify restrictions on *judges*' active support for

political causes or the candidacies of others. Justice Kennedy, who was a member of the five-justice majority, wrote a separate concurrence, explaining this limitation: "Whether the rationale of *Pickering*[, 391 U.S. 563], and *Connick v. Myers*, 461 U.S. 138 (1983), could be extended to allow a general speech restriction on sitting judges — regardless of whether they are campaigning — in order to promote the efficient administration of justice, is not an issue raised here." *White*, 536 U.S. at 796 (Kennedy, J., concurring).

In *Siefert*, 608 F.3d at 985, the Seventh Circuit extended the public employee speech cases to a provision of the Wisconsin Code of Judicial Conduct prohibiting an elected sitting judge from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms," *id.* at 978–79. It reasoned that the government's authority as an employer, "its duty to promote the efficiency of the public services it performs," and the imperative that "the work of the judiciary conform[] with the due process requirements of the Constitution" justified a less rigorous balancing test for restrictions on elected sitting judges' participation in the political campaigns or candidacies of others. *Id.* at 985. In a subsequent decision, the Seventh Circuit extended this balancing test to provisions of the Indiana Code of Judicial Conduct prohibiting elected judges from leading or holding office in political organizations or making speeches on behalf of such organizations. *Bauer*, 620 F.3d at 710–11.

The core rationale of the public employee speech cases, on which *Siefert* and *Bauer* relied, does not apply to the case presently before us. Wolfson has never been an employee of Arizona, let alone a judge. Indeed, he may never become one. While the public employee speech cases do not rest

solely on the now-antiquated principle that the government can condition employment on the waiver of First Amendment rights, *see Myers*, 461 U.S. at 143–44, the nature of government employment is a necessary component of their reasoning. *Pickering* recognized as much, commenting that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. The public employee speech cases thus recognize the "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (alteration in original) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). Critically, the balancing test the *Pickering* line of cases articulates does not apply to governmental restrictions on the speech of those, like judicial candidates, *not* employed by the government. We could not abandon that determinative distinction without dangerously expanding the scope of constitutionally permissible regulation of speech.

But our refusal to apply to a judicial candidate not yet a state employee a balancing test derived from the public employee speech cases says nothing whatever about the applicability of such a test to individuals who have already taken their oaths of judicial office and already receive wages from the state. That question remains unanswered. Resolving the First Amendment challenge of a sitting judge to similar restrictions on his speech will require answering it. And, without prejudging whether we should adopt the *Siefert* analysis for restrictions on political activity by sitting judges on behalf of political causes or the candidacies of others, I

suggest that the analogy to the *Pickering* line of cases has much to commend it.

III.

Even if we determined that restrictions on the political activity of sitting judges *were* subject to strict scrutiny, the state interest supporting such a restriction would be far stronger than the one we hold inadequate to justify the restrictions on judicial candidate Wolfson's speech today.

The Supreme Court has recognized as a "vital state interest" the interest in maintaining those "safeguard[s] against judicial campaign abuses that threaten to imperil *public confidence* in the fairness and integrity of the nation's elected judges." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (emphasis added) (internal quotation marks and citation omitted). Preserving public confidence includes maintaining the *perception* of judicial propriety. In other words, "'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). "[T]he appearance of evenhanded justice . . . is at the core of due process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

The majority opinion, taking its cue from Supreme Court cases on judicial elections, focuses its strict scrutiny analysis on the interest in preserving the actuality and appearance of judicial impartiality. The case law's emphasis on impartiality derives from the obligations imposed by the due process clause, particularly "the proposition that an impartial judge is essential to due process." *White*, 536 U.S. at 776. This compelling interest in preserving the appearance of

impartiality is both weighty and narrow: weighty, because it rises to the level of a constitutional obligation, requiring a judge to recuse himself from a particular case in the name of due process, *Caperton*, 556 U.S. at 886–87; and narrow, because it refers only to "lack of bias for or against either *party* to the proceeding," *White*, 536 U.S. at 775–76 (emphasis in original). Given this narrow focus on the parties appearing before a judge in an actual proceeding, the less-restrictive remedy of mandatory recusal is available to a state seeking to protect, as it must, the due process rights of litigants appearing in its courts.

But I would define the state's interest in preserving public confidence in its judiciary more broadly, as reaching beyond the process due specific litigants in particular cases. Maintaining public trust in the judiciary as an institution driven by legal principles rather than political concerns is a structural imperative. The rule of law depends upon it.

The fundamental importance of this structural imperative has been recognized from the founding of the nation. As Alexander Hamilton emphasized in *The Federalist No. 78*, the courts possess "neither FORCE nor WILL, but merely judgment . . . ." *Id.* at 433 (Clinton Rossiter ed., 1961). Deprived of those alternative sources of power, the authority of the judiciary instead "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the . . . law means and to declare what it demands." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992); *see also White*, 536 U.S. at 793 (Kennedy, J., concurring) ("The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments."). It is the courts' perceived legitimacy as institutions grounded in

established legal principles, not partisanship, "that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer*, 620 F.3d at 712. Loss of judicial legitimacy thus corrodes the rule of law, "sap[ping] the foundations of public and private confidence, and . . . introduc[ing] in its stead universal distrust and distress." *The Federalist No. 78*, at 438. In this sense, "[t]he rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *NY State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

This nation's political history demonstrates the disastrous effects of the perceived politicization of the courts. Charges that King George "ha[d] obstructed the Administration of Justice" and "ha[d] made judges dependent on his Will alone . . . ." were among the founding generation's justifications for the 1776 revolution. *The Declaration of Independence* para. 11 (U.S. 1776). Similar concerns apply outside the context of a monarchy: Where the judiciary is drawn into the political intrigues of its coordinate branches, the public might well "fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity." *The Federalist No. 81*, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[4] And where the

[4] This quotation appears in an explanation of why the Supreme Court is "composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain . . . ." *Id.* at 451. But the dangers of perceived partisanship apply at least as much to judges independently chosen but participating publicly in the selection of legislative or executive policies and decisionmakers.

politicization of the judiciary brings it into alliance with the politicians who staff the other two branches of government, the public may no longer consider "the courts of justice . . . as the bulwark of a limited Constitution against legislative encroachments," *The Federalist No. 78*, at 437, or executive excesses. In short, when sitting judges support the campaigns of nonjudicial candidates — via endorsements, speeches, money, or other means — the public may begin to see them not as neutral arbiters of a limited system of governance, but as participants in the larger game of politics.[5]

The defendants here express precisely this concern — that if sitting judges may support the campaigns of others, the public will perceive them as masters of the political game, powerbrokers "trading on the prestige of their office to advance other political ends . . . ." *Siefert*, 608 F.3d at 984; *see also* Model Code of Judicial Conduct R. 4.1, cmt.4 (2011) (justifying prohibitions on endorsements and speeches on behalf of other candidates as "prevent[ing sitting judges] from abusing the prestige of judicial office to advance the interests of others"). The opposite fear is equally justified: Today's powerbroker is tomorrow's pawn, as the political winds shift and the next election cycle approaches. The endorsing judge entwines his fate with whomever he endorses and earns the enmity of his favored politician's opponents.

[5] I leave aside whether sitting judges may endorse or support other candidates for *judicial* office. Such support does not implicate the powerful state interest in the appearance of judicial independence from the political branches I discuss in the text. Moreover, a sitting judge's endorsement of a judicial candidate is a singularly effective mode of voter education. Few observers are as qualified as sitting judges to evaluate the competencies of those who would join their ranks. The concerns and analyses in this concurring opinion are therefore limited to judicial participation in issue, legislative, and executive elections.

"This kind of *personal* affiliation between a member of the judiciary and a member of the political branches raises the specter — readily perceived by the general public — that the judge's future rulings will be influenced by this political dependency." *Wersal v. Sexton*, 674 F.3d 1010, 1034 (8th Cir. 2012) (Loken, J., concurring in the judgment) (emphasis in original).

In his concurrence in *Wersal*, Judge Loken concluded that there is a "compelling state interest . . . in protecting the political independence of its judiciary." *Id.* at 1033. I have no reason at this juncture to come to rest on that question. Instead, I emphasize that, at the very least, there is a powerful state interest in preventing sitting judges from playing the part of political powerbroker and creating the publicly visible interdependence that corrodes confidence in judicial autonomy. Assessing whether that interest qualifies as "compelling," in the lexicon of First Amendment doctrine, awaits a properly presented case — particularly as the issue will never arise if we first determine that the *Pickering* balancing test, rather than strict scrutiny, applies to speech restrictions on sitting judges.

Almost certainly, a state does not forfeit *this* powerful interest in judicial autonomy by selecting its judges via popular election. It was in the context of a state prohibition against judicial candidates expressing their personal views on disputed legal and political issues during their *own* campaigns that the Supreme Court has explained that "'the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If 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*, 536 U.S. at 788 (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). But that observation does not seem to extend to prohibitions on campaigning on behalf of issue elections or for nonjudicial candidates. The Supreme Court's case law on the political behavior of government employees has "carefully distinguishe[d] between [proscribable] partisan political activities and mere expressions of views," which are constitutionally protected. *Biller v. U.S. Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir. 1988) (citing *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 554–56 (1973), and *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 98–99 (1947)); *Siefert*, 608 F.3d at 984; *see also Citizens United*, 558 U.S. at 341 (citing *Letter Carriers* in support of the proposition that the Supreme Court has often "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, . . . based on an interest in allowing governmental entities to perform their functions").[6] Indeed, prohibitions on supporting the campaigns of others complement, rather than contradict, the decision to select judges via popular election: By adopting such restrictions alongside judicial elections, states harness the "legitimizing power of the democratic process" while avoiding worrisome interdependence between judges and politicians from the remaining two branches.

[6] It is true that an elected judge's support of another candidate or cause signals something about his views, which might be marginally useful to voters assessing their options at the polls. *See Siefert*, 608 F.3d at 994–95 (Rovner, J., dissenting) ("We are, after all, often judged by the company we keep."). But so long as an elected judge may articulate his personal views of legal and political issues in support of his own campaign, attentive voters have a far more direct means with which to form an opinion about competing judicial candidates.

Nor should we forget that our own federal scheme supplements its structural protections for judicial autonomy with direct prohibitions on politicking. Structurally, our Constitution endows judges with life tenure and prohibits the diminution of their salaries. U.S. Const. art. III, § 1. Such protections seek to encourage "that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty," *The Federalist No. 78*, at 437, and help "preserve[] the independence of the Federal Judiciary," *White*, 536 U.S. at 795 (Kennedy, J., concurring). In addition to those structural safeguards the federal judiciary has adopted a code of ethics that regulates directly the behavior of federal judges, including restrictions on supporting the political causes and candidacies of others.[7] Our ethical code

[7] The full text of the relevant canon provides:

> (A) A judge should not:
>
> (1) act as a leader or hold any office in a political organization;
>
> (2) make speeches for a political organization or candidate, or publicly endorse a candidate for public office; or
>
> (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
>
> (B) A judge should resign the judicial office if a judge becomes a candidate in a primary or general election for any office.

is independent of the structural safeguards that insulate us from the political branches, and it performs a slightly different function. I see no reason why a state cannot adopt the one without the other, except with regard to a judicial candidate's personal campaign for judicial office in states where judicial elections are held.

Critically, the state interest in preserving an autonomous judiciary is powerful only insofar as it applies to sitting judges; it has no application to judicial candidates who, like Wolfson, have not yet reached the bench. The spectacle of sitting judges aiding partisan allies in their political struggles corrodes the public repute of the judiciary in a way that the participation of a mere candidate never can. Indeed, the interest in an independent judiciary does not come into existence until a judge assumes office; the politicking of lay people cannot damage the reputation of a body whose ranks they have not yet joined. Individuals who run for judicial office may themselves be officers of political parties or holders of nonjudicial political office when they decide to run for a judgeship. That politicians can become judges is no secret. But that is different from allowing judges to remain or become politicians while still on the bench. Moreover, as the majority opinion explains, a layman who has not yet assumed office has no prestige derived from the office he has not yet attained to lend his political brethren. Essentially,

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> (C) A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

Administrative Office of U.S. Courts, *Code of Judicial Conduct for United States Judges*, Canon 5 (2011).

ascending to the bench is like taking the veil, and that veil does not descend until the oath of office is sworn.

Meanwhile, to the extent *White* sought to preserve voters' access to "relevant information" and to prevent "state-imposed voter ignorance" about the candidates sitting for election, 536 U.S. at 782, 788 (internal quotation marks omitted), such concerns are weaker for already seated judges. Such judges already possess a record of decisions that interested voters can analyze to inform themselves about the desirability of competing judicial candidates; under *White*, they are free to campaign for their own reelection by drawing attention to their records on the bench. By contrast, lay people, like Wolfson, who have not yet sat on the bench lack any such judicial record, making their campaign speech — including endorsements — relatively more valuable for what it reveals about how they might perform in office.

* * *

In sum, the principles applicable to the constitutionality of political restrictions on sitting judges diverge dramatically from those we apply to today's challenge to restrictions on a judicial candidate not now a judge. The standard of review may well differ. And the powerful interests supporting such restrictions differ, too. I need not address, as the issue is not before us, whether the particular restrictions we review today would be constitutional as applied to sitting judges. But I am quite sure that the analysis required to resolve that question will receive scant support from our decision in this case.

TALLMAN, Circuit Judge, dissenting in part:

I agree with the majority that strict scrutiny—not *Seifert*—is the appropriate standard. I agree that we should limit our decision to non-incumbent judicial candidates. And I agree that Rules 4.1(a)(5) (campaigning for others) and 4.1(a)(6) (personal solicitation) are unconstitutional as applied to those candidates. I concur in the majority opinion only on those points. I part company with my colleagues as to Rules 4.1(a)(2) (giving speeches on behalf of others), (3) (endorsing others), and (4) (soliciting money for others). These three rules are constitutional because they are narrowly tailored to serve the state's compelling interest in maintaining judicial impartiality and its appearance—the hallmark of government's third branch.

My colleagues acknowledge that these three rules "present the closest question," and that the Eighth Circuit upheld similar ones. *Wersal*, 674 F.3d at 1024–25. Nonetheless, the majority concludes that they are not narrowly tailored for two reasons: timing and recusal. The timing argument is that the rules are underinclusive because "they only address speech that occurs beginning the day after a non-judge candidate has filed his intention to run for judicial office." The recusal argument is that the rules are more restrictive than recusal, i.e., requiring judges who have campaigned for others to recuse themselves when those others show up as litigants. I dissent because I do not find these reasons persuasive.

The majority's timing argument is clever but impractical. Its breadth alone suggests this. The argument would cut down any restriction (a) that is subject to strict scrutiny and (b) that starts to apply to people only after some triggering

event. If the restriction's enactment counts as a triggering event, and I don't see why it wouldn't, then strict scrutiny would always be fatal. That cannot be the law.

Moreover, the argument doesn't actually answer the question, which is whether there are less restrictive ways to preserve judicial impartiality and its appearance. Having no rules is, of course, less restrictive. But it isn't an alternative means of furthering the interest at stake here. Any actual alternative will suffer from the timing problem the majority identifies. So the timing argument tells us nothing about which alternative is the least restrictive; it only identifies a problem that all conceivable alternatives share.

The majority's recusal argument, like the timing argument, is too impractical in my view. In Arizona, only very small counties elect judges. And some small counties may well have only one superior court judge. If that one judge campaigns for someone who is then elected sheriff or district attorney, an outside judge would be necessary in every criminal case and in all civil cases involving the county where the district attorney is its lawyer. Constant recusal is no solution.

That's what the Eighth Circuit held in *Wersal*, after it considered this obvious problem. 674 F.3d at 1027–28. The majority, on the other hand, recognizes the problem, but then sidesteps it, claiming that the state failed to raise it and that dealing with it would require us to speculate. I disagree. There's no need to speculate about something so self-evident. And it's hard to fault the state for failing to dwell on the obvious.

In sum, I don't buy the timing or recusal arguments. And without them, there's nothing that prevents us from declaring that these three rules are the least restrictive means at Arizona's disposal for furthering their compelling interest in maintaining judicial impartiality and its appearance. Simply affixing the label of strict scrutiny and then declaring that unspecified less restrictive means are required gives no guidance as to what rules pass constitutional muster. And it encourages an elective free-for-all that undermines respect for the third branch of government. Because my colleagues disagree, I respectfully dissent.

ADDENDUM 2

Arizona Revised Statutes Annotated
Rules of the Supreme Court of Arizona (Refs & Annos)
VII. Judicial Ethics (Refs & Annos)
Rule 81. Arizona Code of Judicial Conduct (Refs & Annos)
Canon 4. A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary

17A A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 4.1

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General

Currentness

(A) A judge or a judicial candidate shall not do any of the following:

(1) act as a leader in, or hold an office in, a political organization;

(2) make speeches on behalf of a political organization or another candidate for public office;

(3) publicly endorse or oppose another candidate for any public office;

(4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law. See, e.g., A.R.S. § 16-905.

(5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;

(6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;

(7) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others, except as provided by law;

(8) use court staff, facilities, or other court resources in a campaign for judicial office;

(9) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or

(10) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

(C) Except as prohibited by this code, a judge may:

(1) engage in activities, including political activities, to improve the law, the legal system and the administration of justice; and

(2) purchase tickets for political dinners or other similar functions, but attendance at any such functions shall be restricted so as not to constitute a public endorsement of a candidate or cause otherwise prohibited by these rules.

Credits
Added June 2, 2009, effective Sept. 1, 2009. Amended effective Nov. 24, 2009.

Editors' Notes

COMMENT

General Considerations

1. Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.

2. When a person becomes a judicial candidate, this canon becomes applicable to his or her conduct. A successful judicial candidate is subject to discipline under the code for violation of any of the rules set forth in Canon 4, even if the candidate was not a judge during the period of candidacy. An unsuccessful judicial candidate who is a lawyer and violates this code may be subject to discipline under applicable court rules governing lawyers.

Participation in Political Activities

3. Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations. Examples of such leadership roles include precinct committeemen and delegates or alternates to political conventions. Such positions would be inconsistent with an independent and impartial judiciary.

4. Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. Paragraph (A)(3) does not prohibit a judge or judicial candidate from making recommendations in complying with Rule 1.3 and the related comments. These rules do not prohibit candidates from campaigning on their own behalf or opposing candidates for the same judicial office for which they are running.

5. Paragraph (A)(3) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

6. A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

7. Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no “family exception” to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take and should urge members of their families to take reasonable steps to avoid any implication that the judge or judicial candidate endorses any family member's candidacy or other political activity.

8. Judges and judicial candidates retain the right to participate in the political process as voters in all elections. For purposes of this canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate and is not prohibited by paragraphs (A)(2) or (A)(3).

Statements and Comments Made During a Campaign for Judicial Office

9. Subject to paragraph (A)(9), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is permissible for someone else, including another judge, to respond if the allegations relate to a pending case.

10. Paragraph (A)(9) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

11. Paragraph (A)(9) must be read in conjunction with Rule 2.10, which allows judges to make public statements in the course of their official duties.

Pledges, Promises, or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office

12. The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

13. Paragraph (A)(10) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

14. The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

15. A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system or advocating for more funds to improve the physical plant and amenities of the courthouse.

16. Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(10) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(10), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

Notes of Decisions (10)

17A A. R. S. Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 4.1, AZ ST S CT RULE 81 CJC Rule 4.1
Current with amendments received through 1/1/14

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Docket No. 11-17634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,

Plaintiff – Appellant

v.

COLLEEN CONCANNON; GUSTAVO ARAGON, JR..; ROGER BARTON; LOUIS FRANK DOMINGUEZ; PETER J. ECKERSTROM; GEORGE H. FOSTER; ANNA MARY GLAAB; S' LEE HINSHAW; DAVID STEVENS; J. TYRELL TABER; LAWRENCE F. WINTHROP; and MARET VESSELLA,

Defendants – Appellees

Appeal from a decision of the United States District Court
for Arizona, No. 08-CV-08064 Honorable Frederick J. Martone

RESPONSE OPPOSING PETITION FOR EN BANC REHEARING

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On June 6, 2014, Appellee members of the Arizona Commission on Judicial Conduct and State Bar Counsel (hereinafter "the Commission") filed their *Petition for Rehearing En Banc*. (Doc. 51.) On June 10, 2014, Appellant Randolph Wolfson was directed to file a response. (Doc. 52.) Mr. Wolfson now timely responds.

Argument

For rehearing en banc to be warranted, the petitioning party must demonstrate that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or that "the proceeding involves a question of exceptional importance." F.R.A.P. 35(a). An example of a question of exceptional importance is that "it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." *Id.* at 35(b)(1)(B); *see also* Ninth Cir. Rule 35-1 (appropriate grounds for en banc rehearing exists "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity . . . "). It is on this ground that the Commission and amici[1] rely.

[1]While amici secured consent from the parties to file their briefs supporting rehearing en banc, they did not seek permission from this Court. Presumably, such permission is necessary given that Mr. Wolfson himself as a party is not permitted to respond without order of this Court. *See* F.R.A.P. 35(e). Indeed, permission

(Comm. Pet. at 1; Brennan Br. at 10-11; CCJ Br. at 3.)

I. The Panel's Decision Does Not Create a Circuit Split.

As a general matter, amici Brennan Center and Conference of Chief Justices ("CCJ") argue for en banc rehearing because the panel decision affects various states within the Ninth Circuit and will be relied on as precedent. (Brennan Br. at 12-14; CCJ Br. at 6-7.) Under such a rationale, *all* Ninth Circuit panel decisions would warrant en banc review, since all decisions the Ninth Circuit issues govern the states within this Circuit and provide precedent on which parties can rely. Indeed, the Seventh Circuit cases the Commission and amici suggest should govern this case demonstrate this precise point. *Bauer v. Shepard*, 620 F.3d 704, 709-13 (7th Cir. 2010) relied on *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) and applied the rationale from the Wisconsin-based decision to the Indiana-based one. Notably, despite this inevitable use of *Siefert*, en banc review in *Siefert* was denied. 619 F.3d 776 (7th Cir. 2010). This argument fails to support en banc review.

More specifically, the Commission and amici assert that the Panel's "deeply fractured" decision creates, even exacerbates, a circuit split on how judicial canon

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from this Court would likely have also provided further guidance to amici, who have offered briefs that exceed the page limits permitted to either the Commission or Mr. Wolfson as parties. *Id.* at 35(b)(2). (*See En Banc Response Order*, Doc. 52 (providing Mr. Wolfson with a deadline as well a page length for his response). Nonetheless, because this Court may still wish to consider their briefs, Mr. Wolfson's response addresses arguments made both by the Commission and amici.

challenges should be reviewed and ruled on. (Comm. Pet. at 1; Brennan Br. at 14; CCJ Br. at 8.) However, the panel decision has no impact on a circuit split that already existed and indeed, through judicial restraint, softens that split by offering a narrow ruling.

A. A Majority of Circuits Employ Strict Scrutiny Analysis.

As the Commission concedes, the Panel's supposedly "deeply fractured" decision unanimously agrees that the challenged judicial canons are subject to strict scrutiny review. (Comm. Pet. at 4-5.) This agreement is in harmony with the U.S. Supreme Court and nearly all circuits that have reviewed judicial canons.

In *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002) ("*White I*"), the United States Supreme Court reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues and applied strict scrutiny to it, recognizing that the clause "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774.

In reviewing Minnesota's announce clause, the *White I* court affirmatively cited *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), which had applied strict scrutiny to strike Illinois' announce clause. The *Buckley* court acknowledged a conflict with the Third Circuit in *Stretton v. Pennsylvania,* 944

F.2d 137 (3d Cir. 1991), which had upheld Pennsylvania's announce clause, while also applying strict scrutiny to it. *Id.* at 141, 146. While *White I* resolved the conflict by effectively overruling the *Stretton* case and upholding the Seventh Circuit *Buckley* case, both the Third and Seventh Circuit applied strict scrutiny to the judicial campaign speech restrictions before them.

On remand from the *White I* decision, the Eighth Circuit in *Republican Party of Minnesota v. White*, 416 F.3d 738 (2005) ("*White II*") applied strict scrutiny. The en banc *White II* court reviewed numerous other judicial campaign speech canons, including Minnesota's personal solicitation clause, which stated: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." *Id.* at 746. Adopting the *White I* rationale, that court recognized judicial campaign canons are inherent content-based and applied strict scrutiny. 416 F.3d at 749, 763-64. Under strict scrutiny review, the canons were held unconstitutional because they failed to protect litigants from purported partiality concerns. *Id.* at 754, 765-66.

In *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit reviewed challenges to various Georgia judicial campaign canons, including its personal solicitation clause, which precluded judicial candidates from "themselves solicit[ing] campaign funds, or solicit[ing] publicly stated support." *Id.* at 1315. Like the *White II* court, the *Weaver* court applied strict scrutiny, *id.* at 1319, and

found that the challenged canons failed to serve any compelling interest in judicial impartiality. *Id.* at 1322, 1323.

Notwithstanding *White I* and the unanimous application of strict scrutiny among the Third, Seventh, Eighth, and Eleventh circuits, the Seventh Circuit determined that different standards of review ought to apply. In finding the personal solicitation clause constitutional, the *Siefert* court employed "closely drawn" scrutiny, relying on *Buckley v. Valeo*'s application of "less rigorous 'closely drawn' scrutiny" to campaign contribution limits. *Siefert,* 608 F.3d at 988 (*quoting Buckley,* 424 U.S. at 25); *Bauer,* 620 F.3d at 710 (adopting *Siefert*'s analysis for Indiana's personal solicitation clause). And in finding the endorsement clause constitutional, the Seventh Circuit employed a balancing test applicable to restrictions on political speech by government employees. *Siefert,* 608 F.3d at 984; *Bauer,* 620 F.3d at 710-11 (applying *Siefert*'s endorsement analysis to Indiana's partisan activities clauses).

That same year, after the *Siefert* decision was issued but before *Bauer*, the Sixth Circuit issued its judicial canon ruling in *Carey v. Wolnitizek,* 615 F.3d 189 (6th Cir. 2010).[2] Reviewing a challenge to a commits clause, a party affiliation clause, and a personal solicitation clause, the court rejected the Seventh Circuit's

[2]Both the Commission and amici fail either to mention or meaningfully discuss this decision.

less rigorous scrutiny review to hold that "[s]trict scrutiny applies to all three aspects of this First Amendment challenge. *White,* for one, suggests as much." *Id.* at 198. The court, joining the rest of its sister circuits, noted that "[n]ot one of the Justices, not even one of the four dissenters, objected to the application of strict scrutiny," and that, if it did not broadly apply to all judicial campaign speech, "it is difficult to understand why the Court exercised its discretion in reviewing *White*, given that virtually the entire analysis is premised on the applicability of strict scrutiny and given that the outcome of the case under a lower level of scrutiny is far from clear." *Id.* at 198. Recognizing the content-based nature of the challenged clauses, *id.* at 198-99, the Sixth Circuit went on to find the partisan affiliation and personal solicitation clauses facially unconstitutional, remanding to the district court for further consideration of ambiguities in the scope of the commits clause. *Id.* at 209.

Most recently, addressing a judicial canon challenge a second time, the Eighth Circuit in *Wersal v. Sexton*, No. 09-1578, 2012 WL 996921 (8th Cir. Mar. 27, 2012), reviewed en banc a challenge to Minnesota's new, revised personal solicitation clause and its endorsement clause and applied strict scrutiny. The resulting opinion has four analyses. Five judges joined the "Bye plurality". Two judges formed the "Loken concurrence." Two judges joined the "Beam dissent." And 5 judges (including the 2 from the Beam dissent) signed onto the "Colloton

opinion." Yet despite the fractured nature of the decision, the entire en banc court agreed that strict scrutiny was applicable. *Wersal v. Sexton,* 674 F.3d 1010, 1040 (8th Cir. 2012) (Beam dissent) ("Appellees and the plurality and concurrence correctly concede that 'strict scrutiny' must be applied to each interest and regulation contested in this dispute.").

The Bye plurality reasoned that "[b]ecause the challenged clauses are content-based restrictions on political speech, we examine Wersal's challenges under strict scrutiny," citing *White I* and *Carey*. *Wersal,* 674 F.3d at 1019. The Loken concurrence analyzed both clauses under strict scrutiny. *Id.* at 1032. The Beam dissent concluded that "[i]t is abundantly clear that the restrictions at issue in this dispute collectively limit Wersal's political speech and his right to associate with others who share common political beliefs and aims. Thus, such restrictions may be validated only if they address a compelling state interest and then only after being subjected to narrow tailoring as defined by well established judicial precedent." *Id.* at 1040. And the Colloton opinion reviewed both clauses with the assumption that strict scrutiny, not per se unconstitutionality, was the applicable standard. *Id.* at 1057. The Eighth Circuit continues to apply strict scrutiny.

So *Siefert* and *Bauer,* which the Commission and amici suggest the panel decision conflicts with, are themselves outliers that represent a departure from a larger established body of law among the circuits in this area. As Seventh Circuit

Judge Rover observed in dissent:

> When the Supreme Court evaluated the First Amendment rights of judges and judicial candidates in the seminal case of *Republican Party v. White*, 536 U.S. 765, 774-75, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), it did so through the lens of strict scrutiny (as did those justices writing in dissent). Every circuit court to follow has done the same. . . . Our decision in *Siefert* departs from the path carved by the Supreme Court and makes us an outlier among our sister circuits.

Siefert, 619 F.3d at 776. This Panel's decision neither creates not contributes to this departure, following all other circuits instead.

Moreover, the Panel's decision to rule on narrow grounds—that the judicial canons are unconstitutional as applied to non-judge judicial candidates—mitigates any conflict with the Seventh Circuit. Both *Siefert* and *Bauer*'s analysis is focused in large part on concerns about the judge-plaintiffs that had brought those cases. *See Bauer,* 620 F.3d at 709 (finding the non-judge judicial candidate's claims unripe). So the Seventh Circuit's decision to apply a different level of scrutiny is tied to the effects of allowing a judge, rather than judicial candidates at large, to engage in various partisan conduct during her campaign. *See, e.g., Siefert,* 608 F.3d at 985 ("So, as in *Pickering,* we have to find the balance between the state's interest and the judge's.").

Here, the Panel was presented with a non-judge judicial candidate as a party. So it, too, unanimously decided to let the factual circumstances of the case govern its analysis, expressly setting aside for another day any analysis on how the

challenged provisions might hold up to a constitutional challenge by an incumbent judicial candidate. (*See Opinion*, Doc. 44-1, at 30 (Berzon, J., concurring) ("Today's opinion addresses the constitutionality of certain provisions of the Arizona Code of Judicial Conduct ("Code") *only* as they apply to judicial candidates who, like Wolfson, have not yet ascended to the bench. It does not decide those provisions' constitutionality as they apply to elected judges . . . ") Mr. Wolfson asserted an as-applied as well as facial challenge, and so the Panel ruled in his favor on that narrower ground.

The panel decision applies the standard of review employed by nearly all circuits that have considered judicial canons, and was cast in the narrowest of terms to mitigate conflict with the Seventh. It creates no conflict with other circuits.

B. The Outcome of the Panel Decision Creates No Meaningful Conflict.

The Panel's unanimous decision to strike down the personal solicitation clause and the majority's decision to strike down other partisan activities clauses does not create a conflict with the Eighth Circuit's *Wersal* decision, as the Commission and amici argue. (Comm. Pet. at 13-16; CCJ Br. at 8-10.)

1. Striking the Personal Solicitation Clause Creates No Conflict.

In *Wersal,* although 7 of 12 judges found the personal solicitation clause constitutional, a majority rationale was not adopted. The Loken concurrence

indicated it would uphold it because it served a compelling interest not in impartiality but in judicial independence. *Wersal v. Sexton*, 674 F.3d 1010, 1033 (8th Cir. 2012), and the Bye plurality focused its analysis almost exclusively on a separate compelling interest it determined exists of preserving the appearance of impartiality, *id.* at 1021-22. But 7 of 12 judges—the Loken concurrence, the Beam dissent, and the Colloton opinion—expressly reject the "appearance of impartiality" interest as compelling. *See id.* at 1033; *id.* at 1043; *id.* at 1059. Without a majority adopting any one rationale, it offers little guidance to the Panel and hardly represents a meaningful conflict worth en banc review.

Moreover, the Bye plurality affirmed the decision in *White II* that the original personal solicitation clause is unconstitutional, emphasizing the distinction between the personal solicitation clause at issue in *White II*, which was a broad, unrestricted ban on personal solicitations, with the one at issue in *Wersal*, which attempted to be narrowly tailored by allowing solicitations in certain contexts. *Id.* at 1029-30. Of the two Eighth Circuit decisions, *White II* is most applicable here, as it addressed an unfettered ban on personal solicitations like the personal solicitation clauses before the Court here, and found its lack of tailoring rendered it unconstitutional. *White II*, 416 F.3d at 766; *see also Weaver,* 309 F.3d at 1322; *Carey*, 614 F.3d at 207. So the panel decision striking down the personal

solicitation clause creates no conflict.[3]

2. Striking Down The Endorsement Clause And the Campaigning Prohibition Does Not Create A Meaningful Conflict.

As with the personal solicitation clause, 5 of the 12 judges in *Wersal* (the Bean dissent and the Colloton opinion) held that the endorsement clause was unconstitutional because it did not serve a compelling interest in impartiality. *Wersal*, 674 F.3d 1051-53; *id.* at 1057-58. The Loken concurrence held that it was constitutional because it served a compelling interest in judicial independence, *id.* at 1033, grounds 7 judges rejected. *Id.* at 1023-24 (Bye plurality); *id.* at 1043 (Beam dissent). And the Bye plurality found the clause was narrowly tailored to preserve impartiality and the separate interest in the appearance of impartiality, *id.* at 1025, grounds 7 judges also rejected. *See id.* at 1033 (Loken concurrence); *id.* at

[3]In an effort to bolster the supposed conflict created by the panel decision, the Commission and amici look to the pre-*White I Stretton* decision, as well as a number of state cases upholding restrictions on personal solicitation of contributions by judicial candidates. (Comm. Pet. at 12; CCJ Br. at 11 n.9.) *See Simes v. Arkansas Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876 (Ark. 2007); *In re Dunleavy*, 838 A.2d 349 (Me. 2003); *In re Fadeley*, 802 P.2d 31 (Or. 1990). Because they were decided before *White I*, *Stretton* and *Fadeley* are of limited relevance. *Dunleavy* was based on the fact that judges in the challenged system were appointed rather than elected, and so is inapplicable. *Dunleavy*, 838 A.2d at 349. And *Stretton* and *Simes* relied on an interest—protecting potential donors from feeling pressure to contribute, which is not a compelling reason for prohibiting political speech. *Carey v. Wolnitzek*, 2006 WL 2916814 at *18 (E.D. Ky. Oct. 10, 2006) (holding that "there is no compelling state interest in prohibiting speech that makes it easier for potential donors to 'just say no.'").

1043 (Beam dissent); *id.* at 1059 (Colloton opinion). As with the personal solicitation clause, to argue that the Panel decision to strike down the endorsement clause and other partisan activities clauses conflicts with *Wersal* is a bit disingenuous. Given *Wersal*'s fractured rationales, it is no surprise that the Panel looked beyond the decision to resolve this matter. A conflict with *Wersal*—which is likely unavoidable regardless of outcome—should not form the basis for granting en banc review here.

Moreover, like the personal solicitation clauses considered in *White II, Weaver,* and *Carey*, the endorsement clause is a sweeping ban. It bans all endorsements, not just those of sheriffs and other local officers that appear regularly in their courts. *See Wersal,* 674 F.3d at 1058 (Colloton opinion).[4] And the

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[4]To bolster their arguments in support of the endorsement clause, the Commission and amici cite state supreme court cases *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003), and *In the Matter of William A. Vincent, Jr.*, 172 P.3d 605 (N.M. 2007), two state court decisions that have upheld endorsement bans against constitutional challenge. (Comm. Pet. at 16; CCJ Br. at 10 n. 8.) These decisions, however, are of dubious value.

Raab involved a state disciplinary action against a judge who had called prospective voters and, without using his name or identifying himself as a judge, had urged them to support a particular legislative candidate. *Raab,* 793 N.E. 2d at 1288. It is directly contrary to *White II*, in that it upheld against First Amendment challenge a ban on political party membership, whereas *White II* found such bans to be unconstitutional. *Compare Raab*, 793 N.E.2d at 1288 n.2 *with White II*, 416 F.3d at 762. And in seeking to limit *White I* to the facts of that case, the decision is contrary to the consensus view among the circuits that *White I* has application beyond the announce clause.

Likewise, *Vincent* held that *White I* did not apply to bans on endorsements

other partisan activities clauses ban involvement on ballot initiative campaigns—speech Mr. Wolfson desires to engage in. Supporting a ballot initiative is but one way to announce views on an disputed issue, is speech that is protected under *White I*, and does not implicate bias for or against a party in a proceeding as working on another candidate's campaign might. This is a substantial overreach, again akin to that found in *White II*, *Weaver,* and *Carey*. So when reviewed under the most applicable Eighth Circuit precedent—*White II*—as well as other circuit precedent, the panel decision establishes no meaningful conflict. *See White II*, 416 F.3d at 766; *Weaver,* 309 F.3d at 1322; *Carey*, 614 F.3d at 207. En banc review is not warranted.

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because *White* "examined the free speech rights of a judicial candidate involved in his own election, whereas this case involves the free speech rights of a sitting judge to endorse another's political candidacy." *Id.* Like *Raab*, this case is contrary to the consensus view that *White I* has broader application than the announce clause.

Conclusion

Because the panel decision creates no circuit splits that threaten national uniformity, en banc review is not warranted. The Commission's *Petition for Rehearing En Banc* should be denied.

Date: June 26, 2014

Respectfully Submitted,

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Certificate of Service

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Docket No. 11-17634

In the

United States Court of Appeals

For the

Ninth Circuit

RANDOLPH WOLFSON,

Plaintiff-Appellant,

v.

COLLEEN CONCANNON, in Her Official Capacity as Member of the Arizona Commission on Judicial Conduct, LOUIS FRANK DOMINGUEZ, in His Official Capacity as Member of the Arizona Commission on Judicial Conduct, PETER J. ECKERSTROM, in his Official Capacity as Member of the Arizona Commission on Judicial Conduct, GEORGE H. FOSTER, in His Official Capacity as Member of the Arizona Commission on Judicial Conduct, SHERRY L. GEISLER, in Her Official Capacity as Member of the Arizona Commission on Judicial Conduct, MICHAEL O. MILLER, in His Official Capacity as Member of the Arizona Commission on Judicial Conduct, ANGELA H. SIFUENTES, in Her Official Capacity as Secretary of the Arizona Commission on Judicial Conduct, CATHERINE M. STEWART, in Her Official Capacity as Member of the Arizona Commission on Judicial Conduct, J. TYRELL TABER, in His Official Capacity as Member of the Arizona Commission on Judicial Conduct, and LAWRENCE F. WINTHROP, in His Official Capacity as Member of Arizona Commission on Judicial Conduct,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona (Prescott)
No. 3:08-CV-08064-FJM · Honorable Frederick J. Martone

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Introduction

This Court has permitted the parties and amici to file supplemental briefs for en banc consideration of the impact of the recent United States Supreme Court decision *Yulee v. Florida Bar,* 135 S. Ct. 1656 (2015) on this litigation. (Doc. 77.) In *Yulee,* the Court reviewed Florida's personal solicitation clause and, applying strict scrutiny, found that the clause was narrowly tailored to serve Florida's compelling state interest in preserving public confidence in the integrity of the judiciary. *Yulee*, 135 S. Ct. at 1673. This brief reviews the impact of *Yulee*'s analytical framework on Plaintiff-Appellant Wolfson's judicial speech challenges.

Argument

I. The District Court Erred In Applying Less Than Strict Scrutiny To Judicial Candidate Speech Regulations.

The *Yulee* decision makes clear that strict scrutiny applies to judicial candidate speech regulations: "we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665 (2015). Seven of the nine justices used strict scrutiny in their analysis, with four finding the personal solicitation clause constitutional under such review, *id.* at 1673, and three dissented to argue they would find the personal solicitation clause unconstitutional under such review, *id.* at 1676, 1685. Only Justices

Ginsburg and Breyer would not apply strict scrutiny. Justice Ginsburg reasoned that campaign finance decisions have been directed towards electing representatives, not judges, and that States should have greater latitude in regulating judicial elections. *Id.* at 1673-74. And Justice Breyer stated that he views scrutiny standards as simply guidelines. *Id.* at 1673.

Here, too, strict scrutiny applies. Like Florida's personal solicitation clause, the three categories of judicial speech regulation Mr. Wolfson challenges—the personal solicitation clauses, the endorsement clause, and the campaigning prohibition—involve "speech about public issues and the qualifications of candidates for elected office" or are "intertwined with informative and perhaps persuasive speech," and so they "command[ ] the highest level of First Amendment protection." *Id.* at 1665. Defendants-Appellees (hereinafter "the Commission") bears the burden of demonstrating that these clauses are narrowly tailored to a compelling interest. *Id.* at 1665. The District Court erred in applying a balancing test, (*see* R. 95 at 6), and intermediate scrutiny, (*see id.*).

II. The District Court Did Not Properly Analyze Arizona's Compelling Interest in Preserving Public Confidence in the Integrity of the Judiciary.

In arriving at its conclusion to uphold Florida's personal solicitation clause, the *Yulee* court recognized two compelling interests that might justify the clause.

Preliminarily, it reaffirmed *Republican Party of Minnesota v. White,* 536

U.S. 765 (2002), which recognized a compelling state interest in preserving judicial impartiality, that is, preventing bias for or against a party. *White*, 536 U.S. at 776-77. All nine justices throughout the *Yulee* decision reinforce *White*'s continued relevance in the judicial speech context, with the five-justice majority recognizing that "judicial candidates have a First Amendment right to speak in support of their campaigns," *Yulee*, 135 S. Ct. at 1673, four of those five agreeing that judicial regulations must "leave judicial candidates free to discuss any issue with any person at any time," *id.* at 1670, and all dissenters objecting because such freedom to speak is at issue even with the personal solicitation clause. *See id.* at 1676 (Scalia, J., dissenting); *id.* at 1683 (Kennedy, J., dissenting); *id.* at 1865 (Alito, J., dissenting).

Even the *Yulee* court's distinction that judges are not politicians, *id.* at 1667, is in keeping with *White.* While judges are politicians in the sense that they are an active part of government and are elected officials, they are different because their role is not that of representing constituents but of impartially applying the law. *Id.* at 1667. *White*'s very recognition of a state interest unique to the judiciary—impartiality—acknowledges this. *See also White*, 536 U.S. at 783 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."). The *Yulee* decision thus leaves *White* intact, standing for the proposition that while judicial regulations may

not prohibit judicial candidates from announcing their views under *White*, they may restrict other judicial speech if they are narrowly tailored to a compelling interest. *Yulee,* 135 S. Ct. at 1770; *see, e.g., White*, 536 U.S. at 812 ("All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results.").

In reviewing Florida's asserted state interests, the *Yulee* court recognized an additional compelling state interest not considered in *White*: that of "preserving public confidence in the integrity of the judiciary." *Id.* at 1666. This interest, asserted by the Florida Bar, is defined in Florida's Code of Judicial Conduct:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.

Fla. Code Judicial Conduct Canon 1, Commentary (2014), *available at* http://www.floridasupremecourt.org/decisions/ethics/canon1.shtml. The *Yulee* court used this regulatory framework to analyze Florida's personal solicitation clause, holding that "[a] State may assure its people that judges will apply the law without fear or favor," *Yulee,* 135 S. Ct. at 1661, and that "Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors,"

id. at 1666.

Arizona has articulated a similar interest in its Code of Judicial Conduct: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Ariz. Code Judicial Conduct Rule 1.2 (2014), *available at* http://www.azcourts.gov/portals/137/rules/Arizona%20Code %20of%20Judicial%20Conduct.pdf.[1] But the Arizona Code states a different scope to this interest, stating that "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety," *id.*, Comment 1, and establishing a test for such an appearance:

> The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Id., Comment 5.

While this definition echoes nearly verbatim the ABA Model Code of Judicial Conduct, *see* ABA Model Code of Judicial Conduct Rule 1.2 & Comment (2011), *available at* http://www.americanbar.org/groups/professional_ responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1

[1]The Code defines "integrity" to mean "probity, fairness, honesty, uprightness, and soundness of character." Ariz. Code Jud. Cond., Definitions (2014), *available at* http://www.azcourts.gov/portals/137/rules/Arizona%20Code%20of %20Judicial% 20Conduct.pdf, at 3.

_2promotingconfidenceinthejudiciary.html, Arizona's Commentary additionally makes explicit that:

> [a]n appearance of impropriety does not exist merely because a judge has previously rendered a decision on a similar issue, has a general opinion about a legal matter that relates to the case before him or her, or may have personal views that are not in harmony with the views or objectives of either party.

Ariz. Code Judicial Conduct Rule 1.2, Comment 5. This additional commentary reconciles Arizona's public confidence concerns with *White*, ensuring that the former will never be understood to trample on the right to announce views on issues that is recognized in the latter. But it also ascribes a different meaning to Arizona's interest in preserving public confidence in the integrity of the judiciary than was considered in Florida. Rather than concern about "fear or favors," Arizona is concerned about judicial honesty, impartiality, temperament, and fitness. *Id.*

The District Court did not properly analyze whether the judicial speech provisions here challenged serve a public confidence interest as defined in Arizona's Judicial Code. (*See* R. 95 at 8 (discussing "fairness of [the] judiciary"); *id.* at 9 (discussing "misusing the prestige of the[] office").) The court recognized the public confidence interest, (*id.*), but did not consider how it was defined in Arizona's Judicial Code. While it may well be that "[t] he concept of public confidence in judicial integrity does not easily reduce to precise definition," *Yulee*,

135 S. Ct. at 1667, Arizona's Judicial Code offers significant guidance. The district court failed to consider such guidance. (*See* R. 95 at 8) (discussing fairness, coercion, and bias.)

Arizona's impartiality interest is already addressed in *White* and therefore addressed in Mr. Wolfson's opening and reply briefs. (*See* Doc. 4, 22.) So the remainder of this brief will focus on Arizona's remaining concerns of judicial honesty, temperament and fitness as they relate to the personal solicitation clauses, the endorsement clause, and the campaigning prohibition.

III. The District Court Erred In Finding The Personal Solicitation Clauses, the Endorsement Clause, and the Campaigning Prohibition Constitutional.

A. The Personal Solicitation Clauses Are Not Narrowly Tailored to Preserve Public Confidence in the Integrity of the Judiciary.

Arizona's personal solicitation clauses prohibit judicial candidates from "solicit[ing] funds for or pay[ing] an assessment to a political organization or candidate," Ariz. Code Judicial Conduct Rule 4.1(A)(4), and from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee authorized by Rule 4.4," *id.* at Rule 4.1(A)(6). Because the clauses reach speech that "commands the highest level of First Amendment protection," the personal solicitation clauses are subject to strict scrutiny. *Yulee*, 135 S. Ct. at 1665.

Yulee upheld Florida's personal solicitation clause because it was narrowly

tailored to serve the compelling state interest of preserving public confidence in the integrity of the judiciary, an interest defined in Florida's Code of Judicial Conduct as a concern about a judge's ability to rule without fear or favor.[2] *Yulee*, 135 S. Ct. at 1671; *see* Fla. Code Judicial Conduct Canon 1, Commentary (2014), *available at* http://www.florida supremecourt.org/decisions/ethics/canon1.shtml. Arizona does not define its public confidence concerns the same way. If it did, *Yulee* would resolve the constitutionality of the personal solicitation clauses, compelling a holding of constitutionality. But it is Arizona's Rules, not Florida's, that govern this Court's analysis. Under Arizona's Rules, the Commission must show that the personal solicitation clauses are narrowly tailored to ensure the speech in question does not "create in reasonable minds a perception that the judge . . . engaged in [] conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." *Id.*, Comment 5. The Commission cannot meet its burden.

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[2]The *Yulee* court conflates asking for a contribution and receiving one and in this way arrives at its conclusion that the potential for favor has been created. *See, e.g., Yulee*, 135 S. Ct. at 1667 ("That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting."). *See also id.* at 1678 (Scalia, J., dissenting) ("this case is not about whether Yulee has the right to receive campaign contributions. It is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive"). This "favor" appears to mirror the corruption concerns used to justify contribution limits insofar as the concern is addressed towards influencing the recipient. Under *Citizens United v. FEC,* 558 U.S. 310 (2010), only quid pro quo corruption—not mere influence—is a compelling state interest. *Id.* at 345.

Personal solicitations cannot be reasonably perceived to negatively impact a judge's honesty, temperament, or fitness for office. A judge's ability to be truthful does not turn on whether she has personally solicited for her campaign or not. The receipt or expenditure of funds, if large enough, might be enough to create the appearance of partiality warranting recusal in extraordinary contexts, *see Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009), but simply asking for contributions does not undermine the ability of a judge to be honest or fit for office, exhibit a non-judicial temperament, or even undercut the perceived integrity of the judiciary at large. Indeed, it shows an honest recognition that the people's desire for elected judicial officers necessitates campaigns, which cost money. While the *Yulee* court concluded that personal solicitations exhibit favor by asking for favors, *id.* at 1666, a similar impact on a judge's integrity or perceived honesty does not result from such solicitations.

Because the personal solicitation clauses are not tailored to Arizona's compelling interest in preserving public confidence in the integrity of the judiciary, they are unconstitutional. The District Court improperly upheld them.

B. The Endorsement Clause Is Not Narrowly Tailored to Serve A State Interest in Public Confidence in the Integrity of the Judiciary.

The endorsement clause prohibits judicial candidates from "publicly endors[ing] or oppos[ing] another candidate for any public office; . . ." Ariz. Code

Judicial Conduct Rule 4.4(A)(3). Because, like the personal solicitation clauses, it proscribes "speech about public issues and the qualifications of candidates for elected office" that "commands the highest level of First Amendment protection," the endorsement clause is subject to strict scrutiny. *Yulee*, 135 S. Ct. at 1665. And because the Commission cannot show that the endorsement clause is tailored to serve Arizona's compelling interest in public confidence in the integrity of the judiciary, the endorsement clause is unconstitutional both on its face and as applied to Mr. Wolfson.

1. The Endorsement Clause Fails Strict Scrutiny Facially.

Unlike the personal solicitations considered in *Yulee*, the endorsement of other candidates does not "intuitively" implicate public confidence in the integrity of the judiciary, whether defined in terms of favors or in terms of honesty. *See Yulee*, 135 S. Ct. at 1666 ("The way the Canon advances those interests is intuitive . . ."). An endorsement asks nothing of the candidate endorsed but instead is simply another form of announcing one's views on disputed legal and political issues. *See Wersal v. Sexton*, 674 F.3d 1010, 1057 (8th Cir. 2012) (en banc) (Colloton, J., dissenting) (banning endorsements "eliminates one useful way for a judicial candidate to associate with other candidates for office and to communicate to the voters his or her outlook on the issues of the day."); *see also id.* at 1033 (Loken, J., concurring); *id.* at 1051 (Beam, J., dissenting) ("Endorsing a well-

known candidate is often a highly effective and efficient means of expressing one's own views on issues"). (*See also* Wolfson Decl., R. 22-1, ¶ 8 ("Such an endorsement, however, may be taken as a shorthand for announcing my own views.").) It incurs no judicial favor, suggests no dishonesty, and implies no unfitness for office. So endorsements do not undermine public confidence. The endorsement clause is squarely within the scope of *White* and the protections *White* recognizes for such announced views.

Indeed, Arizona permits judicial candidates to *receive* endorsements, and to make endorsements of non-candidate officials. If a judge's endorsement of another candidate somehow implicates owed favors, dishonesty, and unfitness for judicial office, surely such concerns are at least equally implicated in these other endorsement contexts. Yet they remain wholly unrestricted. This presents an underinclusivity problem:

> Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way.

Yulee, 135 S. Ct. at 1670. The complete failure of the Code to address these other, comparable endorsement contexts suggests that the integrity of the judiciary is not the impetus for the endorsement clause.

The endorsement clause is not tailored to a state interest in preserving public

confidence in the integrity of the judiciary but instead bans speech protected under *White*. It is unconstitutional under the First Amendment.

2. The Endorsement Clause Fails Strict Scrutiny As Applied to Mr. Wolfson.

Even if the endorsement clause were facially constitutional, it fails strict scrutiny review under *Yulee* as-applied to Mr. Wolfson. Mr. Wolfson's intentions are to run for the office of Justice of the Peace in Mohave County. (Compl., R. 1, ¶¶ 6, 14; Wolfson Decl., R. 22-1, ¶ 2.) This necessitates a partisan campaign. *See Arizona judicial elections*, Judicial Election Coverage Judgepedia, http://ballotpedia.org/Arizona_ judicial_elections,_2014 (last visited June 12, 2015). By endorsing other Democrat candidates—in 2008, it was a Congressional candidate, (*see* Compl., R. 1, ¶¶ 26, 32; Wolfson Decl., R. 22-1, ¶ 7)—Mr. Wolfson is able to state his views on disputed legal and political issues. Such an endorsement cannot be reasonably perceived as impugning his ability to be honest and fit for office, or even as a favor exchange of some sort, especially since he will recuse himself in the highly unlikely circumstance that his intended endorsee should appear before him. (Wolfson Decl., R. 22-1, ¶ 11.) Such willingness to recuse as a trade-off for expressing his views exhibits a willingness to go beyond what the Constitution requires of him and exhibits an integrity that befits a judge and bolsters public confidence. The public's confidence in the integrity of the

judiciary is not at issue with such an endorsement.

The endorsement clause is unconstitutional as applied to Mr. Wolfson. The District Court erred in upholding the endorsement clause.

C. The Campaigning Prohibition Is Not Narrowly Tailored to Preserve Public Confidence in the Integrity of the Judiciary.

The campaigning prohibition prohibits judicial candidates from "actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office." Ariz. Code Judicial Conduct Rule 4.1(A)(5). Like the endorsement clause, the campaigning prohibition reaches protected political speech that is subject to strict scrutiny. *Yulee*, 135 S Ct. at 1665. And as with the endorsement clause, the Commission cannot meet its burden, both as to Mr. Wolfson's facial and as-applied challenges.

1. The Campaigning Prohibition On Its Face Is Not Narrowly Tailored to Preserve Public Confidence in the Integrity of the Judiciary.

The campaigning prohibition, like the endorsement clause, deprives judicial candidates of yet another means of announcing one's views, not only because it precludes involvement with candidate campaigns but also—and perhaps especially—with ballot initiative campaigns. *See* Ariz. Code Judicial Conduct Rule 4.1(A)(5) (prohibiting all involvement with campaigns other than the judicial candidate's own campaign). Indeed, perhaps even more so than the endorsement

clause, the campaigning prohibition is at the heart of the protections afforded in *White*: the right to announce one's views on disputed political issues. Ballot issue campaigns are the epitome of such announcements. Such announcements do not demonstrate a judicial candidate's actual or apparent dishonesty or unfitness for office (Arizona's Rules expressly preclude that from being the case), nor do they create any expectation that the judge will owe a favor (to whom would such a favor be owed?). The campaigning prohibition is not narrowly tailored to a compelling interest.

In fact, the campaigning prohibition, like the endorsement clause, suffers from underinclusivity. Other candidates are not precluded from participating in a judicial candidate's campaign—an involvement that is more likely to implicate favors due from a judge down the road (though one which has little bearing on a judicial candidate's honesty, temperament, and fitness). The state has neglected a comparable way in which their purported interest is at least equally, if not more greatly, affected. This calls any public confidence interest into serious doubt and prevents the Commission from meeting its burden of demonstrating that the campaigning prohibition serves a compelling state interest on its face.

2. The Campaigning Prohibition Is Not Narrowly Tailored to Preserve Public Confidence in the Integrity of the Judiciary As Applied to Mr. Wolfson.

Even if the campaigning prohibition survives strict scrutiny facially, the

Commission cannot meet its burden of showing it survives such scrutiny as applied to Mr. Wolfson.

Mr. Wolfson desires to speak on issues that govern ballot initiatives. For example, in 2008, he wanted to "advocat[e] in favor of ballot initiative SCR 1042, which would ensure that marriage in Arizona remains between one man and one woman." (Wolfson Decl., R. 22-1, ¶ 6.) But the campaigning prohibition proscribes such involvement.

Such speech, like endorsements, simply amounts to another form of announcing one's views and so is protected under *White*. *See Wersal*, 674 F.3d 1010, 1057 (8th Cir. 2012) (en banc) (Colloton, J., dissenting). Moreover, such an announcement in no way undermines Mr. Wolfson's ability to serve as a honest, well-tempered judge or makes him unfit to serve as a judge—indeed, under Arizona's own test, it cannot. *See* Ariz. Code Judicial Conduct Rule 1.2, Comment 5 ("An appearance of impropriety does not exist merely because a judge . . . has a general opinion about a legal matter that relates to the case before him or her, or may have personal views that are not in harmony with the views or objectives of either party."). And announcing one's personal views through ballot initiative campaigning cannot incur judicial favors, either actual or apparent, because the campaign is about an issue, not the election of an individual. The campaigning

prohibition is unconstitutional as applied to Mr. Wolfson. The District Court improperly upheld it.

Conclusion

Under *Yulee* as well as *White*, the personal solicitation clauses, the endorsement clause, and the campaigning prohibition are all unconstitutional. The District Court erred in holding otherwise, and Mr. Wolfson respectfully asks this Court to reverse the District Court's ruling below.

Dated: June 12, 2015

Respectfully Submitted,

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I hereby certify that this document, including all headings, footnotes and quotations, but excluding the table of contents, table of authorities, and any certificates of counsel, contains 3,542 words, as determined by the word count of the word-processing software used to prepare this document, specifically WordPerfect 12, which is no more than the 7,000 words permitted by this Court. (Doc. 78.)

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Certificate of Service

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,

Plaintiff-Appellant,

v.

COLLEEN CONCANNON; LOUIS FRANK DOMINGUEZ; PETER J. ECKERSTROM; GEORGE H. FOSTER; GUSTAVO ARAGON, Jr.; ROGER BARTON; ANNA MARY GLAAB; S' LEE HINSHAW; DAVID STEVENS; J. TYRELL TABER; LAWRENCE F. WINTHROP; MARET VESSELLA,

Defendants-Appellees.

No. 11-17634

D.C. No. 3:08-cv-08064-FJM, District of Arizona

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SUMMARY OF THE ARGUMENT

After granting rehearing en banc in this appeal, the Court permitted the parties to file simultaneous, supplemental briefs on the impact of *Williams-Yulee v. Florida Bar*, __ U.S. __, 135 S. Ct. 1656 (2015). Order of May 4, 2015. Defendants-Appellees, the members of the Arizona Commission on Judicial Conduct and the Arizona Chief Bar Counsel (collectively, the "Arizona Defendants") submit this Supplemental Brief urging the Court to affirm the district court's decision that upheld the constitutionality of five provisions of the Arizona Code of Judicial Conduct.

In *Williams-Yulee*, 135 U.S. at 1662, the Supreme Court held that the First Amendment permits States to "prohibit judges and judicial candidates from personally soliciting funds for their campaigns." Chief Justice Roberts, writing for the plurality, held that the prohibition on judicial candidates' personal solicitation of campaign funds in Canon 7C(1) of the Florida Code of Judicial Conduct was a content-based restriction that was subject to strict scrutiny. *Id.* at 1665. The majority of the Court then held that Canon 7C(1) "advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech." 135 S. Ct. at 1666.

This appeal involves five clauses of Rule 4.1 of Arizona's Code of Judicial Conduct:

> (A) A judge or judicial candidate shall not do any of the following:
> . . . .
>
> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law. . . .
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office;
>
> (6) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4. . . .

Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct.

There is no meaningful distinction between Arizona's prohibition on judicial candidates' personal solicitation of campaign funds in Rule 4.1(A)(6) of the Code of Judicial Conduct and Canon 7C(1) of Florida's Code of Judicial Conduct. The Court must therefore uphold the constitutionality of Rule 4.1(A)(6) because it is narrowly tailored to serve the State's compelling interest in preserving public confidence in the integrity of the judiciary.

The Court should also uphold the Rules at issue in this appeal that prohibit judicial candidates from making speeches on behalf of political candidates, from publicly endorsing political candidates, from soliciting funds for another candidate or political organization, and from actively taking part in another's political campaign. These Rules meet the Supreme Court's test in *Williams-Yulee*—i.e., they are narrowly tailored to further the State's compelling interest in protecting judicial impartiality and preserving public confidence in the integrity of the judiciary.

ARGUMENT

I. The Court Must Uphold Arizona's Personal Solicitation Ban Under *Williams-Yulee.*

There is no meaningful distinction between Rule 4.1(A)(6) of the Arizona Rules of Judicial Conduct and Canon 7C(1) of the Florida Code of Judicial Conduct. Both provisions prohibit a judge or judicial candidate from personally soliciting campaign funds and allow the candidates to establish a campaign committee to collect and manage campaign funds. *Compare* Rule 4.1(A)(6) of the Arizona Code of Judicial Conduct *with* Canon 7C(1) of the Florida Code of Judicial Conduct. Like Canon 7C(1) of the Florida Code of Judicial Conduct, Arizona's Rule 4.1(A)(6) prohibits judicial candidates from soliciting funds through a mass mailing. *Wolfson v. Concannon*, 750 F.3d 1145, 1157 (9th Cir.

2015). Ms. Williams-Yulee was not a judge but a judicial candidate and Rule 4-8.2(b) of the Rules Regulating the Florida Bar required her to comply with the applicable provisions of the Florida Code of Judicial Conduct. *Williams-Yulee*, 135 S. Ct. at 1663-64. Plaintiff-Appellee Mr. Wolfson was also a non-judge judicial candidate who was bound by the Arizona Code of Judicial Conduct through the Arizona Rules of Professional Conduct. *Wolfson*, 750 F.3d at 1149.

The panel concluded that strict scrutiny applied to the determination of whether Rule 4.1(A)(6) violates the First Amendment and recognized that "Arizona has a compelling interest in an uncorrupt judiciary that appears to be and is impartial to the parties who appear before its judges." *Id.* at 1156. The panel then determined that the rule was not narrowly tailored because it was overinclusive in prohibiting methods of personal solicitation "not likely to impinge on even the appearance of impartiality" and underinclusive in allowing the campaign candidate's campaign committee to disclose "to the candidate the names of contributors and solicited non-contributors." *Id.* at 1157. In rejecting Williams-Yulee's similar arguments, the Supreme Court specifically rejected the panel's reasoning. *Williams-Yulee,* 135 S. Ct. 1671 (holding that "personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary" even if the form of solicitation is an online letter distributed via mass mailing); *id.* at 1669

(holding that "personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees" and therefore that "a State may conclude they present markedly different appearances to the public").

In sum, the panel's conclusion that Rule 4.1(A)(6) is not narrowly tailored is incorrect under the holding in *Williams-Yulee* that Florida's nearly identical Canon 7C(1) is narrowly tailored. This Court must therefore hold that Rule 4.1(A)(6) is constitutional.

II. Arizona's Political Activities Clauses Meet Strict Scrutiny.

Rules 4.1(A)(2)-(5) of the Arizona Code of Judicial Conduct prohibit judicial candidates from "speechifying for another candidate or organization, endorsing or opposing another candidate, fundraising for another candidate or organization, or actively taking part in any political campaign other than his or her own." *Wolfson*, 750 F.3d at 1158 (referring to the rules as the "political activities clauses"). The panel acknowledged that Arizona's political activities clauses furthered a compelling state interest "because they curtail speech that evidences bias towards a particular (potential) *party* within the scope of *White I* [*Republican Party v. White*, 536 U.S. 765 (2002)]: the candidate or political organization endorsed or spoken favorably by the judicial candidate." *Wolfson*, 750 F.3d at 1158. The panel, however, found the political activities clauses "underinclusive because they only address speech that occurs beginning the day after a non judge

candidate has filed his intention to run for judicial office" and faulted the Defendants for not proving that the less restrictive remedy of recusal "is an unworkable alternative." *Id.* at 1159. The panel majority then held that the political activities clauses did not survive strict scrutiny. *Id.* at 1159-60. Because these rules are narrowly tailored to serve the compelling state interest in preserving public confidence in the integrity of the judiciary, this Court should affirm the district court's decision.

A. Arizona's Political Activities Clauses Are Not Fatally Underinclusive.

In upholding Florida's solicitation ban, the Supreme Court recognized that although a content-based regulation of speech may be underinclusive, it may not raise "fatal underinclusivity concerns." *Williams-Yulee*, 135 S. Ct. at 1668. The Court initially pointed out that "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Id.* The Court's analysis of whether the solicitation ban's underinclusivity was fatal is based on the following factors: whether "[t]he solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary"; "applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint"; and "is not riddled with exceptions." *Id.* at 1668-69.

Arizona's political activities clauses aim squarely at the conduct most likely to undermine public confidence in the judiciary. By prohibiting judges and judicial candidates from making speeches for another candidate or political organization, fundraising for another candidate or organization, endorsing or opposing another candidate, or actively participating in another candidate's campaign, the political activities clauses prohibit speech that may favor or oppose or be perceived as favoring or opposing particular parties as opposed to prohibiting speech concerning issues. *See Wersal v. Sexton*, 674 F.3d 1010, 1025 (8th Cir. 2012) (en banc) (plurality opinion) (concluding "that the prohibition on a judicial candidate endorsing other candidates "is directly aimed at . . . speech about parties, as it prevents potential litigants in a case from the risk of having an unfair trial" and furthers the judiciary's appearance of impartiality because "an endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as a political powerbroker"); *id.* at 1035 (Loken, J., concurring) (concluding that "the endorsement clause narrowly addresses the compelling state interest in preventing judicial dependency, while leaving judicial candidates ample freedom to announce their views on issues that may affect their qualifications for judicial office").

Relying on *White I*, 536 U.S. at 779-80, the panel majority determined that the political activities clauses were underinclusive because they did not prohibit judicial candidates' speech that favored or opposed potential parties before they became candidates. *Wolfson*, 750 F.3d at 1159. But *White I* addressed a prohibition on judges' and judicial candidates' speech that was "barely tailored to serve" the interest in impartiality for or against particular parties. 536 U.S. at 776. In contrast, the political activity clauses directly serve the State's interest in judicial impartiality and the public's perception of the integrity of the judiciary.

New York's highest court held that New York's judicial conduct rules that limited political activities were narrowly tailored to serve a compelling interest. *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003). In doing so, the court found that "[t]he political activity rules are carefully designed to alleviate [the risk that litigants and the bar might perceive judges as beholden to a particular political leader or party] by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns." *Id.*

Like New York's judicial conduct rules, Arizona's political activities clauses limit judicial candidates' political activities during the critical time frame when the public's attention is focused on them—"as soon as he or she makes a public

announcement of candidacy, declares or files as a candidate with the election appointment authority, authorizes or, where permitted engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office." Ariz. Rev. Stat. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Terminology (2009). As Judge Tallman noted, the majority's finding of underinclusivity based on timing is impractical and inevitably fatal. *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting in part). It is therefore inconsistent with the analysis in *Williams-Yulee* that recognizes that underinclusivity is not always fatal, 135 S. Ct. at 1668, and acknowledges the "impossibility of perfect tailoring . . . when the State's interest is as intangible as public confidence in the integrity of the judiciary," *id.* at 1671.

The Supreme Court examines underinclusivity because it "can raise 'doubts about whether the government is in fact pursuing the interest it invokes rather than disfavoring a particular speaker or viewpoint.'" *Id.* (quoting *Brown v. Entertainment Merchants Ass'n*, 564 U.S. __, __, 131 S. Ct. 2729, 2740 (2011)). In *Brown*, "California . . . singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movies producers—and [gave] no persuasive reason why." 131 S. Ct. at 2740.

Here, like the solicitation ban in *Williams-Yulee* that applied "evenhandedly to all judges and judicial candidates, regardless of their viewpoint," 135 S. Ct. at

1668, Arizona's political activities clauses apply evenhandedly to all judges and judicial candidates, regardless of their viewpoint. Although Florida's solicitation ban and Arizona's solicitation ban as well as Arizona's political activities clauses treat judges and judicial candidates differently from other political candidates, "States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." *Williams-Yulee*, 135 S. Ct. at 1667 (citing *White I*, 536 U.S. at 783). As the Court explained, "[p]oliticians are expected to be appropriately responsive to the preferences of their supporters," whereas "[a] judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors" in deciding cases. *Id.*; *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Thus, "[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code." Ariz. Rev. Stat. Ann. § 17A, Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 1.2, cmt. 2.

The Supreme Court has also cautioned that underinclusivity due to exemptions raises concerns because the government may be engaging in viewpoint or content discrimination or "may diminish the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)

(noting that "at the very least, the exemptions from Ladue's ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City's esthetic interest in eliminating outdoor signs").

There are limited exceptions to Arizona's political activities clauses. Judges and judicial candidates may make limited contributions to another candidate or political organization under Rule 4.1(A)(4), engage in political activity that pertains to the legal system or proposed changes in the law under Rule 4.1(C)(1), and purchase tickets for political dinners or other similar functions that do not constitute a public endorsement of a candidate under Rule 4.1(C)(2). Instead of indicating impermissible content discrimination, these exceptions further judicial candidates' and judges' First Amendment interests by permitting them to engage in political activity that is unlikely to undermine judicial impartiality and the public perception of judicial integrity. *See Williams-Yulee*, 135 S. Ct. at 1670 (holding that "the First Amendment does not put a State to [an] all-or-nothing choice" and determining that the Court would "not punish Florida for leaving open more, rather than fewer, avenues of expression"); *In re Vincent*, 172 P.3d 605, 610 (N.M. 2007) (holding that prohibiting a judge's public endorsement of a political candidate did not violate his First Amendment rights and noting that "public pronouncement of support . . . most offends our notions of impartiality" and that

"[a] private promise of support to a candidate, like a private contribution of money, creates less perception of partiality"). Thus, the political activities clauses are not fatally underinclusive.

B. Recusal Is Not a Workable Alternative and Undermines the State's Interest in the Appearance of an Impartial Judiciary.

The panel majority also held that the political activities clauses were overinclusive because "the Arizona defendants have failed to show why the less restrictive remedy of recusal of a successful candidate from any case in which he or she was involved in a party's political campaign or gave an endorsement is an unworkable alternative." *Wolfson*, 750 F.3d at 1160. The panel majority erred in holding that the Arizona Defendants had to prove that recusal was unworkable and in implying that it was a workable alternative.

Williams-Yulee aptly explains why recusal is not an acceptable alternative to Florida's solicitation ban:

> A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could 'erode public confidence in judicial impartiality' and thereby exacerbate the very appearance problem the State is trying to solve. Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their late recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.

135 S. Ct. at 1671-72 (quoting *Caperton v. A. T. Massey Coal Co.* 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting)).

Although Arizona's political activities clauses address a problem that is somewhat different from the problem the solicitation ban addresses, recusal is similarly an unworkable solution to remedy the risk of bias or appearance of bias that would result if the political activities clauses were eliminated. In upholding Minnesota's endorsement clause, the Eighth Circuit found that "recusal would be an unworkable remedy because candidates and judges would be free to endorse individuals who would become frequent litigants in future cases, such as county sheriffs and prosecutors" and "this has the potential to create 'an insurmountable burden for the court system.'" *Wersal*, 674 F.3d at 1027-28 (quoting *Wersal v. Sexton*, 607 F. Supp. 2d 1012, 1023 (D. Minn. 2009)). The same is true of Arizona's political activities clauses: if a judicial candidate actively participates in the campaign of a party who may be a frequent litigant in that candidate's court, recusal would create an insurmountable burden. Four of Arizona's counties have only one judge and two others have only two judges. http://www.azcourts.gov/2013annualreport/JudicaryOrganizationChart.aspx (last visited June 2, 2015). "If that one judge campaigns for someone who is then elected sheriff or district attorney, an outside judge would be necessary in every

criminal case and in all civil cases where the district attorney is its lawyer." *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting in part).

In addition to the practical problems with recusal, recusal motions erode public confidence in judicial impartiality and thus undermine the State's interest in the appearance of an impartial judiciary. *Williams-Yulee*, 135 U.S. at 1671-72. Similarly, the Eighth Circuit found "little comfort in recusal as a less restrictive means of addressing Minnesota's separate interest in avoiding the appearance of impropriety." *Wersal*, 674 F.3d at 1028. Thus, the panel incorrectly concluded that recusal provided a less restrictive alternative to Arizona's political activities clauses.

C. Rule 4.1(A)(5), Which Does Not Prohibit Speech About Political Issues, Is Not Overbroad.

The panel also held that Rule 4.1(A)(5) was overbroad because "it is not limited to restrictions on participation in political campaigns on behalf of persons who may become *parties* to a suit, but may also include political campaigns on ballot propositions and other *issues*, including political campaigns for ballot propositions that present no risk of impartiality toward future parties." *Wolfson*, 750 F.3d at 1160. But the panel misconstrues the Rule and fails to accord sufficient deference to the State's judgment on how best to preserve public confidence in the judiciary.

Rule 4.1(A)(5) prohibits a judicial candidate from "actively tak[ing] part in any political campaign other than his or her own campaign." The comments to Rule 4.1 clarify that judges and judicial candidates are not prohibited from making "statements or announcements of personal views on legal, political, or other issues." Rule 4.1, cmt. 14.[1] In addition, Rule 4.1(C)(1) allows judicial candidates to "engage in activities, including political activities, to improve the law, the legal system and the administration of justice." Arizona interprets Rule 4.1(C)(1) broadly to permit judicial candidates to publicly discuss his or her personal opinion of an initiative or other political subject. *See* Ariz. Sup. Ct. Judicial Ethics Advisory Op. 96-09 (1996) (interpreting former Canon 5A(5) of the Arizona Code of Judicial Conduct, which is substantively the same as Rule 4.1(C)(1), to allow judicial candidates to "publicly discuss the effects of proposed changes in the law, the legal system and the administration of justice and participate in debates about proposed ballot propositions affecting such matters"). The panel therefore erred in

[1] This comment is consistent with the Arizona Judicial Ethics Advisory Opinion that recognizes that "[a] judicial candidate may publicly discuss his or her personal opinion of an initiative measure or other political subject" under *White I* provided that he or she does not make pledges, promises, or commitments about cases that are likely to come before the court. Ariz. Sup. Ct. Judicial Ethics Advisory Op. 06-05 (2006); *see also* Ariz. Sup. Ct. Judicial Ethics Advisory Op. 08-01 (2008) (reiterating that "a judicial candidate may discuss his or her personal opinions on any subject" under *White I*).

construing Rule 4.1(A)(5) to prohibit judicial candidates' participation in political campaigns involving ballot measures. [2]

In responding to Yulee's argument that Florida's solicitation ban restricts too much speech, the Court commented on how little speech the ban restricted and noted that it "leaves judicial candidates free to discuss any issue with any person at any time." *Williams-Yulee*, 135 S. Ct at 1670. The Court concluded that the argument misperceived the breadth of the compelling interest underlying the ban and asked the Court to draw unworkable lines that were best left to the State to draw:

> In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges.'"

Id. at 1671 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

Because judges and judicial candidates in Arizona remain free to discuss any issue, including a ballot measure, at any time, the panel erred in holding that Rule 4.1(A)(5) was not narrowly tailored. Under *Williams-Yulee*, the State was entitled

[2] The parties did not previously brief Rule 4.1's application to ballot measures because Wolfson alleged that he wanted to actively participate in other candidates' election campaigns, *Wolfson*, 750 F.3d at 1149 n.4, not that he wanted to support a ballot proposition or that such activity would violate Rule 4.1(A)(5).

to some deference in determining how best to draw the line between activities that show actual bias or may be perceived as showing bias and those that do not.

CONCLUSION

The Court should affirm the district court decision.

DATED this 12th day of June, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 40-1(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40-1(a)(7)(B) because it contains 3,690 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of the Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5)(A) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 12th day of June, 2015

s/ Paula S. Bickett
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Maureen Riordan

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON, Plaintiff-Appellant, v. **COLLEEN CONCANNON**, in her official Capacity as member of the Arizona Commission on Judicial Conduct, *et al.*, Defendants-Appellees.	No. 11-17634 On appeal from the United States District Court for the District of Arizona, No. 3:08-CV-08064-FJM

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Pursuant to Federal Rule of Appellate Procedure 29 and this Court's Circuit Rule 29-2, the Conference of Chief Justices ("Conference") respectfully submits this *amicus curiae* brief in support of Appellees and generally in support of the constitutionality of Codes of Judicial Conduct ("Codes").[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

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

This *amicus* brief is being filed pursuant to a policy unanimously approved by the Conference's Board of Directors. The policy authorizes the filing of a brief if critical interests of state courts are at stake, as they are in this case. In most state

[1]All parties to this appeal have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

jurisdictions, standards for ethical behavior of judges and candidates for judicial office are prescribed in codes of conduct promulgated by the jurisdiction's highest court. The Conference therefore has a strong interest in ensuring that codes of judicial conduct are constitutional, clear, respected, and effective. The Conference's policy is to avoid taking a position on a specific state's code of judicial conduct; rather, the Conference supports the constitutionality of the Codes in general.

The Conference has filed *amicus curiae* briefs in prior cases where constitutionality of the Codes was implicated, and the U.S. Supreme Court and other courts of appeals have relied on these briefs. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009); *id.* at 901 (Roberts, C.J., dissenting); *Republican Party of Minnesota v. White*, 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting); *Siefert v. Alexander*, 608 F.3d 974, 986 (7th Cir. 2010). The Conference recently participated as an *amicus* in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), where it advocated positions ultimately adopted by the Supreme Court. *See* Br. of *Amicus Curiae* Conference of Chief Justices, *Williams-Yulee v. Florida Bar*, No. 13-1499, 2014 WL 7366052 (Dec. 24, 2014). The Conference has filed an *amicus* brief in support of *en banc* rehearing in this case. *See* Br. of *Amicus Curiae* Conference of Chief Justices, Docket No. 53 (June 16, 2014). Pursuant to the Conference policy, this brief has been reviewed and

approved by a special committee of the Conference chaired by the Chief Justice of North Dakota and composed of the present or former Chief Justices of Arizona, Massachusetts, New Hampshire, Pennsylvania, South Carolina, Texas, and Utah.

INTRODUCTION

The Codes of Judicial Conduct, adopted by all states, carefully balance the First Amendment free speech rights of judicial candidates and sitting judges against each state's compelling interest in ensuring public confidence in judicial integrity and impartiality. As the Supreme Court recently emphasized, "public perception of judicial integrity is 'a state interest of the highest order.'" *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. at 889) (additional citations omitted). That is so because "[t]he judiciary's authority … depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee*, 135 S. Ct. at 1666.

The Codes are the result of careful consideration by judges and prominent members of the bar entrusted by their states with safeguarding the promise of judicial integrity, impartiality, and independence. As the Supreme Court observed, the Codes "are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" *Caperton*, 556 U.S. at 889 (citing Conference's *Amicus* Brief at 4, 11). "These codes of conduct serve to maintain the integrity of the judiciary and

the rule of law," and are a critical component of "the judicial reforms the States have implemented to eliminate even the appearance of partiality." *Id.* at 888-89.

The Arizona Supreme Court has adopted a Code of Judicial Conduct that permits judicial candidates to speak to voters about their qualifications for office and viewpoints on issues, but imposes certain restrictions, including restrictions on political or fundraising activity. These restrictions apply to both sitting judges and candidates for judicial office. Appellant challenges the constitutionality of five provisions of the Arizona Code of Judicial Conduct — Rule 4.1(A)(2) (restriction on speeches for political organizations or candidates); Rule 4.1(A)(3) (restriction on endorsements); Rule 4.1(A)(4) (restriction on solicitations for political organizations or candidates); Rule 4.1(A)(5) (restriction on participation in other political campaigns); and Rule 4.1(A)(6) (restriction on in-person solicitation of campaign contributions).

In striking these provisions, the vacated panel opinion — which was issued prior to the Supreme Court's decision in *Williams-Yulee* — misapprehends the narrow tailoring analysis applicable in the context of judicial elections and adopts an artificial (and indefensible) distinction between incumbent and non-incumbent judicial candidates. The panel's rationale for striking down the political activities and in-person solicitation restrictions cannot be sustained in the wake of *Williams-Yulee* and considered decisions of this Court's sister circuits. This Court should

affirm the constitutionality of these restrictions as critical to maintaining the public trust in the integrity of the states' judiciary.

SUMMARY OF ARGUMENT

State codes of judicial conduct have long served as the primary means by which states protect the integrity of their judiciaries and preserve the appearance of judicial impartiality. Arizona's restriction on in-person solicitation, nearly identical to the provision upheld by the Supreme Court in *Williams-Yulee*, is valid for all the reasons discussed in that opinion. The panel's effort to cabin its erroneous holding to non-incumbent judicial candidates is contrary to the approach taken by the Supreme Court and this Court's sister circuits. There is no support in the First Amendment jurisprudence for subjecting competitors in the same election to different First Amendment rules.

The Codes' restrictions on judicial candidates' activities in support of other political organizations or campaigns — such as public speeches, endorsements, or solicitations — are likewise critical to safeguarding the judiciary's impartiality, in actuality and in appearance. These restrictions are narrowly tailored to target the kind of political activity that presents the greatest threat to the appearance of judicial impartiality. The Codes prevent judges from publicly aligning themselves with candidates or organizations that may become frequent parties before the court. At the same time, the Codes do not restrict any speech or activity designed to

enable the public to assess a candidate's qualifications for judicial office or political and legal views.

Judicial recusal is neither an effective nor a more narrowly tailored alternative. Recusal cannot remedy the systemic harm done to the public confidence in judicial impartiality when judges and judicial candidates actively assume highly politicized roles. Recusal also can be contrary to a judge's duty to minimize the conflicts that could require recusal, and constant recusals can erode public confidence in judicial impartiality, exacerbating the very problem the Codes seek to solve.

The panel also went astray when it invalidated the restriction on judicial candidates' participation in other political campaigns on the basis that it would unconstitutionally prevent their involvement in ballot initiatives. The Arizona Supreme Court's Judicial Ethics Advisory Committee has repeatedly explained that the Codes do not prohibit judicial speech on issues presented in ballot initiatives, and there is no reason to assume the Arizona Supreme Court would suddenly adopt a different interpretation.

As the Supreme Court emphasized, a state's "considered judgments" in fashioning restrictions to protect the public confidence in the judiciary's integrity reflect sensitive choices and deserve judicial respect. *Williams-Yulee*, 135 S. Ct. at 1671. The challenged provisions of the Codes should be upheld.

ARGUMENT

I. THE SUPREME COURT DECISION IN *WILLIAMS-YULEE* MANDATES UPHOLDING THE CONSTITUTIONALITY OF ARIZONA CODE RULE 4.1(A)(6)'S RESTRICTION ON IN-PERSON SOLICITATION.

The panel acknowledged that "states have a compelling interest in the appearance and actuality of an impartial judiciary," *Wolfson v. Concannon*, 750 F.3d 1145, 1156 (9th Cir. 2014) (citing *White*, 536 U.S. at 775-76), but then erroneously adjudged Arizona's restriction on in-person solicitation not to be narrowly tailored to serve that compelling state interest, *Wolfson*, 750 F.3d at 1157-58. The panel's reasoning is in direct conflict with the Supreme Court's decision in *Williams-Yulee*, which upheld a nearly identical restriction of the Florida Code of Judicial Conduct, Canon 7C(1).[2]

The panel first opined that Arizona's in-person solicitation restriction is overinclusive because it "extend[s] beyond one-on-one, in-person solicitations to group solicitations, telephone calls, and letters." *Wolfson*, 750 F.3d at 1157 (internal quotation marks and citation omitted). In the panel's view, such "indirect methods of solicitation … present little or no risk of undue pressure or the appearance of a quid pro quo." *Id.* (internal quotation marks and citation omitted).

[2] Both Arizona Code Rule 4.1(A)(6) and Florida Canon 7C(1) are based on the same provision of the American Bar Association's Model Code of Judicial Conduct — Rule 4.1. *See Wolfson*, 750 F.3d at 1150 n.6; *Florida Bar v. Williams-Yulee*, 138 So. 3d 379, 385 & n.1 (Fla. 2014).

As the Supreme Court explained, "[t]his argument misperceives the breadth of the compelling interest that underlies [the in-person solicitation restriction]." *Williams-Yulee*, 135 S. Ct. at 1671. Just like Florida in *Williams-Yulee*, Arizona

> has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but *the interest remains whenever the public perceives the judge personally asking for money*.

Id. (emphasis added).

A state's fashioning of restrictions on judicial campaign solicitation is entitled to judicial deference. As the Supreme Court instructed, states' "considered judgments" to draw a line and prohibit all in-person solicitations "deserve [judicial] respect, especially because they reflect sensitive choices by States in an area central to their own governance — how to select those who 'sit as their judges.'" *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Here, Arizona "has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern." *Williams-Yulee*, 135 S. Ct. at 1671.

The panel also viewed the in-person solicitation restriction as underinclusive because it permitted fundraising by the judicial candidate's campaign committee,

and the committee could disclose who contributed and who refused. *Wolfson*, 750 F.3d at 1157-58. This rationale, too, is foreclosed by *Williams-Yulee*. As the Supreme Court explained, most states "ha[ve] reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee." *Williams-Yulee*, 135 S. Ct. at 1669. The campaign committee's ability to disclose the contributors' names to the candidate does not alter the analysis. *Williams-Yulee* rejected a similar argument that Florida's in-person solicitation restriction was underinclusive because it permitted judicial candidates to write thank you notes to campaign donors (which necessarily presupposed knowledge of the donors' identity). *See id*.

In sum, as the Supreme Court observed,

> personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. [A state's] choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Id.

Because Appellant seeks declaratory and injunctive relief, *see Wolfson*, 750 F.3d at 1149, there are no facts in the record that distinguish this case from *Williams-Yulee*. Under the binding Supreme Court precedent, restrictions on the

in-person solicitation in which Appellant wishes to engage, *see id.* at 1149 n.4, are narrowly tailored to the state's compelling interest in ensuring public confidence in the judiciary's impartiality.

II. THE FIRST AMENDMENT DOES NOT ADMIT OF A DISTINCTION BETWEEN INCUMBENT AND NON-INCUMBENT JUDICIAL CANDIDATES.

The panel justified its invalidation of restrictions on judicial candidates' political and solicitation activities by ostensibly confining its decision to non-incumbent judicial candidates. *Wolfson*, 750 F.3d at 1151-52; *id.* at 1160-67 (Berzon, J., concurring). This novel distinction — which no other court has adopted — is indefensible as a legal and a practical matter.

There is no precedent for subjecting competitors in a single election to different First Amendment rules. The in-person solicitation restriction at issue in *Williams-Yulee* applied to both incumbent and non-incumbent judicial candidates, and petitioner was not a sitting judge, but a challenger. *See* 135 S. Ct. at 1663, 1668. The Supreme Court, however, paid no heed to that fact.[3] On the contrary, in rejecting the underinclusiveness challenge, the Court lauded the fact that Florida's

[3] In fact, petitioner in *Williams-Yulee* was openly "skeptical of any constitutional distinction between incumbents and non-incumbents." Pet. for a Writ of Certiorari, *Williams-Yulee v. Florida Bar*, No. 13-1499, 2014 WL 2769040, at *11 n.3 (June 17, 2014). By the same token, Appellant here did not advance any such distinction, instead seeking to invalidate the Codes "on their face, including as to sitting judges campaigning for retention or reelection." *See Wolfson*, 750 F.3d at 1151.

solicitation restriction "applie[d] evenhandedly to all judges and judicial candidates." *Id.* at 1668.

The Eighth Circuit likewise upheld as narrowly tailored a state's solicitation and endorsement restrictions, as applied to a *non-incumbent* candidate. *Wersal v. Sexton*, 674 F.3d 1010, 1024-31 (8th Cir. 2012) (*en banc*). As the *Wersal* court explained, when judges or judicial candidates "directly solicit contributions," that creates "'the appearance of and potential for impropriety.'" *Id.* at 1030 (citation omitted). That danger (and the concomitant compelling state interest) does not disappear when the non-incumbent candidate seeking judicial office engages in personal solicitation.

As the Eighth Circuit observed, "[w]hen a judge *or judicial candidate* endorses another candidate, it creates a risk of partiality toward the endorsed party and his or her supporters, as well as a risk of partiality against other candidates opposing the endorsed party." *Wersal*, 674 F.3d at 1025 (emphasis added). As a result, "the public may perceive the judge to be beholden to political interests." *Id.* Similarly, as the Supreme Court noted, "[w]hen *the judicial candidate* himself asks for money," "solicitation by *the candidate* personally creates a … risk of undermining public confidence." *Williams-Yulee*, 135 U.S. at 1669 (emphasis added). This public perception will be the same regardless of whether the judge in question is an incumbent or a newly elected judge. That is why neither the

Supreme Court nor any other circuit to have considered challenges to the Codes brought by non-incumbent seekers of the judicial office has adopted this distinction, instead discussing and affirming these canons with respect to both sitting judges and judicial candidates. *See Williams-Yulee*, 135 U.S. at 1668-73; *Wersal*, 674 F.3d at 1024-28; *Bauer v. Shepard*, 620 F.3d 704, 707-11 (7th Cir. 2010). The panel's now-vacated opinion stands alone in trying to parse the constitutionality of the Codes based on the status of the challenger.

Both the ABA Model Code and the Code of Conduct for United States Judges reject such a distinction. Rule 4.1 of the ABA Model Code applies equally to "a judge *or a judicial candidate*." ABA Model Code, Rule 4.1 (emphasis added). Similarly, the Code of Conduct for U.S. Judges "is designed to provide guidance to judges *and nominees for judicial office*." Code of Conduct for United States Judges Canon 1 Commentary (emphasis added).

The panel's central premise was that the Codes' restrictions "apply to judges whether or not a judge is actively campaigning for retention or reelection, [but] only apply to non judge candidates during an election campaign for judicial office." *Wolfson*, 750 F.3d at 1152. But that fact makes no practical difference, and misapprehends the state's objective in enacting these restrictions. By their own terms, the challenged provisions of the Codes concern *campaign-related activities* — restrictions on speeches for political organizations or candidates, *see*

Ariz. Code of Jud. Conduct R. 4.1(A)(2); on candidate endorsement, *see id.* R. 4.1(A)(3); on solicitations for political organizations or candidates, *see id.* R. 4.1(A)(4); on participation in political campaigns, *see id.* R. 4.1(A)(5); and on in-person solicitation of campaign contributions, *see id.* R. 4.1(A)(6).

As the Supreme Court explained, the relevant state interest that the Codes seek to uphold is a state's interest "in regulating judicial *elections*." *Williams-Yulee*, 135 S. Ct. at 1672 (emphasis added). A judicial candidate's campaign-related fundraising and endorsement activity is what bears on the public perception of the judiciary's impartiality and integrity, and this activity influences such perception whether carried out by a sitting judge or an aspiring one. Many non-incumbent judicial candidates become judges. Indeed, many such candidates run unopposed or as prohibitive favorites. Because voters are aware of the likely or possible outcome, states have an interest in preserving the actuality and the appearance of judicial independence and integrity and in regulating those candidates' solicitations and endorsements. A state's "considered judgment[]" that such restrictions are necessary to further this compelling state interest is entitled to judicial respect. *Id.* at 1671.

Nor is the panel correct that "endorsements made by a non-judge candidate cannot trade on the prestige of an office that candidate does not yet hold." *Wolfson*, 750 F.3d at 1154; *see also id.* at 1167 (Berzon, J., concurring). The non-

incumbent judicial candidate — particularly an unopposed candidate or a heavy favorite — lends his endorsement the anticipatory prestige of the judicial office he seeks. Presumably, that is why his endorsement is being sought. Under the panel's misguided logic, a U.S. Supreme Court nominee (if not already a sitting judge) should be free to dispense political endorsements until the day of his Senate confirmation because, until the nominee attains the judicial office, he has no prestige to confer. *But see* Code of Conduct for United States Judges Canon 1 Commentary.

An electoral regime in which "candidates vying for the same seat" are subject to different rules is "antithetical to the First Amendment." *Davis v. FEC*, 554 U.S. 724, 743-44 (2008). And it is unlikely that a state would ever adopt such a fundamentally unfair regime. The only fair and plausible method of regulating solicitations and endorsements by incumbent judges is to regulate solicitations and endorsements by all candidates for judicial office. The panel's artificial distinction between incumbent and non-incumbent judicial candidates is not only at odds with the First Amendment jurisprudence, but also unmoored from common experience and electoral fairness.

III. THE POLITICAL ACTIVITIES RESTRICTIONS OF ARIZONA CODE RULES 4.1(A)(2)-(5) ARE NARROWLY TAILORED TO A COMPELLING STATE INTEREST.

The Supreme Court's opinion in *Williams-Yulee* is not only dispositive of the constitutionality of the solicitation clause in Arizona Code Rule 4.1(A)(6), but also sets forth the proper constitutional analysis of the political activities clauses in Arizona Code Rules 4.1(A)(2)-(5). This Court should join its sister circuits and uphold the political activities restrictions as narrowly tailored to a compelling state interest in protecting public confidence in judicial integrity and impartiality.

A. The Restrictions on Public Speeches and Endorsements of Arizona Code Rules 4.1(A)(2)-(3) Are Constitutional.

Arizona Code Rule 4.1(A)(2) requires both judges and judicial candidates to refrain from "mak[ing] speeches on behalf of a political organization or another candidate for public office." Ariz. Code of Jud. Conduct R. 4.1(A)(2).[4] Arizona Code Rule 4.1(A)(3), in turn, provides that judges or judicial candidates shall not

[4] Seven states within this Circuit have a similar rule. *See* Alaska Code of Jud. Conduct Canon 5A(1)(c); Cal. Code of Jud. Ethics Canon 5A(2); Hawai'i Rev. Code of Jud. Conduct R. 4.1(a)(2); Idaho Code of Jud. Conduct Canon 5A(1)(c); Mont. Code of Jud. Conduct R. 4.1(A)(2); Nev. Code of Jud. Conduct R. 4.1(A)(2); Wash. Code of Jud. Conduct R. 4.1(A)(2); *see also* Guam Rules for Jud. Disciplinary Enforcement R. 6(A)(1); Code of Conduct for the Commonwealth [of the Northern Mariana Islands] Judiciary and Procedure for Filing Grievances Involving Members of the Judiciary ("Code of Conduct for the Commonwealth of the Northern Mariana Islands Judiciary") Canon 7B(1)(b). Federal judges and nominees for federal judicial office in this Circuit and elsewhere are subject to the same restriction. *See* Code of Conduct for United States Judges Canon 5(A)(2) (requiring that a federal judge or judicial candidate refrain from "mak[ing] speeches for a political organization or candidate").

"publicly endorse or oppose another candidate for any public office." Ariz. Code of Jud. Conduct R. 4.1(A)(3).[5] The panel majority conceded that these provisions (together with the fundraising restriction in Arizona Code Rule 4.1(A)(4)) present "the closest question," but nevertheless struck them down. *Wolfson*, 750 F.3d at 1158. As *Williams-Yulee* demonstrates, however, the issue is no longer a close one; these provisions of the Codes are constitutional.

The Supreme Court made clear that a state's desire to protect "public perception of judicial integrity" is a compelling state interest. *Williams-Yulee*, 135 S. Ct. at 1666; *see supra* at 7-8. Because "[j]udges are not politicians," "a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." *Id.* at 1662. Rather, a state may enact narrowly tailored restrictions on speech in order to "assure its people that judges will apply the law without fear or favor." *Id.* The restrictions on speeches and endorsements are narrowly tailored to serve the compelling state interests of preserving impartiality and avoiding the appearance of impropriety.

[5] Eight states within this Circuit have an analogue to this rule. *See* Alaska Code of Jud. Conduct Canon 5A(1)(b); Cal. Code of Jud. Ethics Canon 5A(2); Hawai'i Rev. Code of Jud. Conduct R. 4.1(a)(3); Idaho Code of Jud. Conduct Canon 5A(1)(b); Mont. Code of Jud. Conduct R. 4.1(A)(3); Nev. Code of Jud. Conduct R. 4.1(A)(3); Ore. Code of Jud. Conduct R. 5.1(A)(1); Wash. Code of Jud. Conduct R. 4.1(A)(3); *see also* Guam Rules for Jud. Disciplinary Enforcement R. 6(A)(1); Code of Conduct for the Commonwealth of the Northern Mariana Islands Judiciary Canon 7B(1)(b). Federal judges and judicial nominees are under similar strictures. *See* Code of Conduct for United States Judges Canon 5(A)(2) (a judge "should not … publicly endorse or oppose a candidate for public office").

In the absence of such restrictions, a judge or judicial candidate would be free to endorse or give public speeches on behalf of candidates running for the offices of county prosecutors or attorneys general — law enforcement officials who may appear before these judges frequently, either themselves or through subordinates. As the Seventh Circuit emphasized when upholding the constitutionality of Wisconsin's endorsement restriction, "endorsements may be exchanged between political actors on a quid pro quo basis." *Siefert*, 608 F.3d at 984 (citation omitted). "'Without this rule, judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement.'" *Id.* at 986 (quoting Conference's *Amicus* Brief at 23).

Such public association risks undermining the actual and perceived fairness of the proceedings in which the candidate who had been publicly endorsed by the judge now appears before him. As the Eighth Circuit stressed, "[w]hen a judge or judicial candidate endorses another candidate, it creates a risk of partiality toward the endorsed party and his or her supporters, as well as a risk of partiality against other candidates opposing the endorsed party." *Wersal*, 674 F.3d at 1025 (plurality op.); *see also id.* at 1034 (Loken, J., concurring in the judgment) ("This kind of *personal* affiliation between a member of the judiciary and a member of the political branches raises the specter — readily perceived by the general public —

that the judge's future rulings will be influenced by this political dependency.") (emphasis in original). As a result, the public "might think that the judiciary is behind the endorsement, or implicitly threatening retaliation against those who do not accept the judge's recommendation." *Bauer*, 620 F.3d at 712 (upholding Indiana's restrictions on speechifying).

Public flaunting of a judge's alignment with a particular political candidate could seriously injure the public's perception of the judiciary's independence without enhancing the judicial candidate's ability to exercise his First Amendment rights. A public speech or endorsement by a judge or judicial candidate in favor of another candidate for office "is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker." *Siefert*, 608 F.3d at 984. Indeed, as one member of the panel majority acknowledged,

> when sitting judges support the campaigns of nonjudicial candidates — via endorsements, speeches, money, or other means — the public may begin to see them not as neutral arbiters of a limited system of governance, but as participants in the larger game of politics.

Wolfson, 750 F.3d at 1165 (Berzon, J., concurring) (footnote omitted). The same is true of a public speech or endorsement by a candidate for judicial office. *See supra* at 17. And unlike the speech at issue in *White*, endorsements or speeches on behalf of other candidates relate neither to "[d]ebate on the qualifications" of the

judicial candidate nor to "disputed legal and political issues." *See* 536 U.S. at 781, 784-85. Restraints on partisan jockeying and political alignment, with most of campaign speech permissible, do not deny "relevant information to voters during an election." *See id.* at 782.

The panel nevertheless invalidated the public speeches and endorsement restrictions as underinclusive on the rationale that they apply only once a non-incumbent candidate has indicated an intention to run for judicial office. *Wolfson*, 750 F.3d at 1159. Not only could this rationale justify striking down *any* restriction predicated on some triggering event, *see id.* at 1168 (Tallman, J., dissenting in part), but it also cuts the other way. That limitation demonstrates the tailored nature of these provisions; they restrict no more speech than necessary.[6] "[T]he First Amendment imposes no freestanding underinclusiveness limitation." *Williams-Yulee*, 135 S. Ct. at 1668 (internal quotation marks omitted). Arizona Code Rules 4.1(A)(2)-(3) "aim[] squarely at the conduct most likely to undermine

[6] Indeed, the drafters of the Model Code, and Arizona in adopting that model, specifically phrased these provisions to take account of the Supreme Court's ruling in *White*. *See, e.g.*, ABA Joint Comm'n to Evaluate the Model Code of Jud. Conduct, Meeting Minutes, Oct. 15-16, 2005, at 1, *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/meetings/minutes/minutes_sum_101505.authcheckdam.pdf. The ABA Joint Commission rejected a broader version of the rule that would have prohibited speaking "in support of or against a political organization," in favor of the current rule that prohibits only speeches on behalf of an organization. *See* Redlined Version of Canon 5, May 26, 2005, at 1, *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/redline_canon5_052605.authcheckdam.pdf.

public confidence in the integrity of the judiciary" — endorsements or speeches on behalf of political candidates while a judge or judicial candidate is himself campaigning for office. *See id.* Endorsements made during campaigns — by judges or non-judge candidates — are exactly the conduct most likely to impair public perception of the judiciary, at a time when the public attention is focused on a candidate's electoral activities. Sitting judges and non-incumbent candidates alike are still permitted to express their opinions about candidates in private, *see* Ariz. Code of Jud. Conduct R. 4.1 cmt. 5; they simply cannot broadcast those opinions in the form of public speeches or endorsements — the very type of speech likely to affect the public's perception of judicial impartiality.

Just like the restriction at issue in *Williams-Yulee*, Rules 4.1(A)(2)-(3) "appl[y] evenhandedly to all judges and judicial candidates." *Williams-Yulee*, 135 S. Ct. at 1668. The restriction may not be perfectly tailored — which is what the panel apparently demanded — but the First Amendment requires only that it be "narrowly tailored." *Id.* at 1671. As the Supreme Court admonished, "[t]he impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary," and a state's "considered judgments" as to how to further that compelling state interest "deserve … respect." *Id.* (internal quotation marks omitted).

The panel's analysis parts company with the Supreme Court (and other courts of appeals) in yet another way. The panel held up recusal as ostensibly a more narrowly tailored alternative in a "case in which [the successful candidate] was involved in a party's political campaign or gave an endorsement." *Wolfson*, 750 F.3d at 1159. But as the Supreme Court explained, when rejecting recusal as an alternative to an in-person solicitation restriction, recusal "would disable many jurisdictions," and "a flood of postelection recusal motions could 'erode public confidence in judicial impartiality' and thereby exacerbate the very appearance problem the State is trying to solve." *Williams-Yulee*, 135 S. Ct. at 1671-72 (citation omitted). This rule would be particularly impractical here, because "only very small counties" in Arizona elect judges, and such "small counties may well have only one superior court judge." *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting in part). Moreover, "recusal would be an unworkable remedy because candidates and judges would be free to endorse individuals who would become frequent litigants in future cases, such as county sheriffs and prosecutors." *Wersal*, 674 F.3d at 1027-28 (citing *Siefert*, 608 F.3d at 987); *see also Bauer*, 620 F.3d at 712.

Even with respect to concerns about judicial bias (or perception of such bias), recusal is a solution only for a given case. The state has a compelling interest in ensuring the public perception of the entire judiciary, not just that of

individual judges. *Cf. Williams-Yulee*, 135 S. Ct. at 1667, 1672. Recusal is no answer to the harm done to the public confidence in judicial impartiality when judges and judicial candidates assume highly politicized roles. *See Wolfson*, 750 F.3d at 1165 (Berzon, J., concurring) ("there is a powerful state interest in preventing sitting judges from playing the part of political powerbroker and creating the publicly visible interdependence that corrodes confidence in judicial autonomy").

The panel's decision turned this Circuit into an outlier among the federal courts of appeals. Two other circuits have upheld identical or nearly identical restrictions on public speeches and endorsements. As the Eighth Circuit concluded in *Wersal*, Minnesota's nearly identical endorsement clause "serves the compelling interests of preserving impartiality and avoiding the appearance of impropriety." 674 F.3d at 1025. The Seventh Circuit similarly upheld a nearly identical provision of the Indiana Code of Judicial Conduct. *Bauer*, 620 F.3d at 710-11. As the Seventh Circuit stressed, "[a]llowing judges to participate in politics would poison the reputation of the whole judiciary and seriously impair public confidence, without which the judiciary cannot function." *Id.* at 712-13; *see also Siefert*, 608 F.3d at 987-89.[7] The Supreme Court's observation in *Williams-Yulee*

[7] States' highest courts have unanimously upheld endorsement prohibitions. *See, e.g.*, *In re Vincent*, 172 P.3d 605, 606, 609 (N.M. 2007); *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003).

is equally applicable here: "States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity." 135 S. Ct. at 1673.

B. Arizona Code Rule 4.1(A)(4) Is a Proper Exercise of a State's Right To Protect the Integrity of Its Judiciary.

Arizona Code Rule 4.1(A)(4) restricts the ability of judges or judicial candidates to solicit funds for political organizations or campaigns. Ariz. Code of Jud. Conduct R. 4.1(A)(4).[8] *Williams-Yulee* affirmed a state's right to enact a rule prohibiting personal solicitation by judicial candidates, and it applies with equal force to a state's authority to enact a rule, such as Rule 4.1(A)(4), prohibiting judicial candidates from soliciting for political organizations and campaigns.[9]

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[8] Every state and territory within the jurisdiction of this Circuit has a rule similar to Rule 4.1(A)(4). *See* Alaska Code of Jud. Conduct Canon 5A(1)(e); Cal. Code of Jud. Ethics Canon 5A(3); Hawai'i Revised Code of Jud. Conduct R. 4.1(a)(4); Idaho Code of Jud. Conduct Canon 5A(1)(e); Mont. Code of Jud. Conduct R. 4.1(A)(4); Nev. Code of Jud. Conduct R. 4.1(A)(4); Ore. Code of Jud. Conduct R. 5.1(A)(2); Wash. Code of Jud. Conduct R. 4.1(A)(4); Guam Rules for Jud. Disciplinary Enforcement R. 6(A)(1); Code of Conduct for the Commonwealth of the Northern Mariana Islands Judiciary Canon 7B(1)(c). There is also a federal analogue to Rule 4.1(A)(4) in the Code of Conduct for United States Judges. Canon 5(A)(3) prohibits a federal judge from "solicit[ing] funds for [and] pay[ing] an assessment to … a political organization or candidate."

[9] Rule 4.1(A)(4) also includes two other restrictions — not challenged in this case — related to the amount a judge or judicial candidate can personally contribute to a political organization or candidate.

Indeed, there is no principled distinction between the provision at issue in *Williams-Yulee*, which prohibits personal solicitation for one's own campaign, and a rule that prohibits a solicitation for a political organization that may spend funds advancing the solicitor's candidacy. The same state interests animate both rules.

As with the rule upheld in *Williams-Yulee*, Rule 4.1(A)(4) and similar Code provisions in other states are narrowly tailored to serve a state's compelling interest in preserving the integrity of its judiciary and maintaining the public's confidence in an impartial judiciary. *See* 135 S. Ct. at 1661. The rule also protects attorneys and parties that regularly have matters before a court from the pressure that is inherent in a solicitation from a judge or judicial candidate. *See id.* at 1669. Therefore, Rule 4.1(A)(4) and similar rules "deserve … respect, especially because they reflect sensitive choices by States in an area central to their own governance — how to select those who 'sit as their judges.'" *Id.* at 1671 (quoting *Gregory*, 501 U.S. at 460).

At issue is the right of states to maintain the integrity and the appearance of impartiality of their judiciaries by fashioning rules that require judges to refrain from soliciting funds that may be applied to the judge's political advantage but undermine the public's confidence in the judge's independence and impartiality. *See id.* Because "[j]udges are not politicians," they may be asked to adhere to a code of conduct that goes beyond that which is expected of a legislative or

executive candidate. *Id.* at 1672. Rules such as the one at issue here reflect the public's reasonable expectation that judges and judicial candidates refrain from conduct that would compromise the very office that they hold or seek. The ubiquity of these rules reflects a broad consensus on their importance in preserving the independence, impartiality, and integrity of our judiciary, which is the very essence of judicial office.

Like a rule prohibiting endorsement of candidates, a rule against soliciting contributions for other campaigns "does not regulate speech with regard to any underlying issues." *Wersal*, 674 F.3d at 1026. Solicitation of funds, like endorsement, "is a direct expression of bias in favor of or against potential parties to a case, or at the very least, damages the appearance of impartiality." *Id.* Therefore, the restriction on campaign solicitation "targets precisely that speech which most likely implicates [a state's] compelling interests." *Id.*

A state's choice to prohibit soliciting funds for political organizations and campaigns deserves special respect because a "local judge who tips the outcome of a close election in a politician's favor would necessarily be a powerful political actor, and thus call into question the impartiality of the court." *Siefert*, 608 F.3d at 986. As such, the panel's "remedy of recusal," *Wolfson*, 750 F.3d at 1159, is simply unworkable, for reasons given by the Supreme Court in *Williams-Yulee*. *See* 135 S. Ct. at 1671-72; *supra* at 21-22. Recusal may be an even less effective

remedy when the contributions flow to an organization that supported the judge's candidacy rather than to the judge directly. It would be difficult to discern when contributions made to a committee other than the judge's own campaign committee should warrant the judge's recusal.

The panel also erred in concluding that Rule 4.1(A)(4) was underinclusive for covering only behavior that "occurs beginning the day after a non judge candidate has filed his intention to run for judicial office." *Wolfson*, 750 F.3d at 1159. The Supreme Court in *Williams-Yulee* "decline[d] to wade into this swamp," because to survive strict scrutiny a restriction on judicial campaign activities must only be "narrowly tailored, not … perfectly tailored." 135 S. Ct. at 1671 (internal quotation marks and citation omitted); *supra* at 21. A state's considered choice of a restriction designed to further a compelling state interest in maintaining the integrity of the judiciary deserves respect.

C. Arizona Code Rule 4.1(A)(5)'s Restriction on a Judicial Candidate's Active Participation in Other Political Campaigns Is Not Unconstitutionally Overbroad.

The last provision at issue, Arizona Code Rule 4.1(A)(5), directs that a judge or judicial candidate shall not "actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office." Ariz.

Code of Jud. Conduct R. 4.1(A)(5).[10] As applied to participation in political campaigns of other candidates, the rule is narrowly tailored to address the same concerns that animate the restrictions on public speeches and endorsements. *See supra* at 19-21.

Indeed, the panel seemed to accept that Rule 4.1(A)(5) would be constitutional if "limited to restrictions on participation in political campaigns on behalf of persons who may become *parties* to a suit." *Wolfson*, 750 F.3d at 1160 (emphasis in original). The panel, however, struck this restriction as overbroad because it hypothesized that Rule 4.1(A)(5) may encompass "political campaigns for ballot propositions that present no risk of impartiality towards future parties." *Id.* As such, the Panel conjectured, Rule 4.1(A)(5) would unconstitutionally prohibit speech about legal issues, in contravention of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

The panel's conjecture flies in the face of multiple advisory opinions issued by the Arizona Supreme Court's Judicial Ethics Advisory Committee. These opinions make clear that judicial participation related to ballot initiatives, at least as they involve the administration of justice, is perfectly permissible under Arizona's Code. Even prior to the Supreme Court's decision in *White*, the

[10] This restriction implements, for both judges and judicial candidates, a provision of the Arizona Constitution that requires a justice or judge of any court of record not to "actively take part in any political campaign other than his own." Ariz. Const. art. VI, § 28.

Advisory Committee explained, in interpreting Rule 4.1(A)(5)'s predecessor provision, that Arizona judges could contribute money to support a ballot initiative to increase the salaries of state legislators because such activity "does not favor or disfavor a particular political party or candidate, and does not constitute 'political activity' or a 'political campaign.'" Ariz. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. 98-04 (1998), at 2-3.[11] A judge may even write and sign a statement supporting such a ballot initiative and have the Arizona Secretary of State publish that statement in the pamphlet that is mailed to the home of each registered voter. *Id.* at 3. By making a public statement about a ballot measure a judge "is not actively taking part in a political campaign or improperly engaging in political activity." *Id.* Indeed, as the Advisory Committee noted, "nothing in the code prohibit[s] a judge from taking a stand on broad issues of public policy relating to the operation of sound government." *Id.*

After *White*, the Advisory Committee stressed that the provisions of the Arizona Code must be read in light of the Supreme Court's guidance. Thus, the Advisory Committee explained that, consistent with *White*, "[a] judicial candidate may publicly discuss his or her personal opinion of an initiative measure or other political subject … because a candidate may express views on any disputed issue."

[11] Rule 4.1(A)(5)'s predecessor provision, Canon 5A(1)(d) of the Arizona Code of Judicial Conduct, contained an identical restriction on political campaign activities.

Ariz. Sup. Ct., Jud. Ethics Advisory Comm., Advisory Op. 06-05 (2006), at 2 (citing *White*, 536 U.S. 765).

To invalidate a law as overbroad, the challenger must "demonstrate[], 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)) (alterations in original). Given the Advisory Committee's past interpretations and express instruction that the provisions of the Arizona Code must be read in harmony with the Supreme Court's decision in *White*, there is no basis to suppose that either the Arizona Supreme Court or the Advisory Committee would suddenly reverse course and interpret Rule 4.1(A)(5) to prohibit judicial candidates' involvement in ballot propositions, so as to set this provision on a constitutional collision course with *White*. If anything, this Court should assume the contrary — that the Arizona Supreme Court would explore "*every reasonable construction* … in order to save a statute from unconstitutionality." *Skilling v. United States*, 561 U.S. 358, 405-06 (2010) (citation omitted) (emphasis in original); *see also Greyhound Parks of Ariz., Inc. v. Waitman*, 464 P.2d 966, 969 (Ariz. 1970) ("Where different interpretations of an ambiguous provision in the statute are possible, a construction should be adopted which avoids constitutional doubts.").

CONCLUSION

This Court should uphold the constitutionality of the Codes of Judicial Conduct.

Respectfully submitted,

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June 12, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29(d) AND
CIRCUIT RULE 29-2(c)(3)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and this Court's Circuit Rule 29-2(c)(3) because this brief contains 6,899 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2015.

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Igor V. Timofeyev

DATED: June 12, 2015

NO.11-17634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,

Plaintiff-Appellant,

v.

COLLEEN CONCANNON; GUSTAVO ARAGON, JR.; ROGER BARTON; LOUIS FRANK DOMINGUEZ; PETER J. ECKERSTROM; GEORGE H. FOSTER; ANNA MARY GLAAB; S' LEE HINSHAW; DAVID STEVENS; J. TYRELL TABER; LAWRENCE F. WINTHROP; AND MARET VESSELLA,

Defendants-Appellees.

On Appeal From The United States District Court For Arizona
No. 08-CV-08064 : The Honorable Frederick J. Martone

BRIEF OF AMICI STATES OF WASHINGTON, HAWAI'I, AND OREGON IN SUPPORT OF DEFENDANT-APPELLEES

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I. INTERESTS OF AMICI CURIAE

Amici States file this brief in support of Defendants-Appellees as a matter of right under Fed. R. App. P. 29(a).

This Court accepted en banc review of the panel's decision, *Wolfson v. Concannon*, 750 F.3d 1145, 1149 (9th Cir. 2014), which held that five provisions of the Arizona Code of Judicial Conduct do not survive strict scrutiny under the First Amendment. Every State has adopted a code of judicial conduct, and most States—those that select or retain judges by election—have provisions that are identical or similar to those invalidated by the panel. Each State adopting a code of judicial conduct has done so to address its compelling interests in ensuring an impartial judiciary and in maintaining the public's confidence in an impartial judiciary. Those interests are well articulated in the Preamble to Arizona's Code of Judicial Conduct[1]:

> An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial

[1] Arizona Code of Judicial Conduct, Preamble, *available at* http://www.azcourts.gov/Portals/137/NewCode/2014ArizonaCodeofJudicialConduct.pdf.

> office as a public trust and strive to maintain and enhance confidence in the legal system.

Substantively identical language has been adopted by every other State in the Ninth Circuit's jurisdiction except Oregon.[2]

Amici States believe that provisions in their codes of judicial conduct that regulate political campaign activities of judges and judicial candidates are necessary to maintain the integrity of an elected judiciary and sufficiently narrowly tailored to survive strict scrutiny under the First Amendment.

II. ARGUMENT

A. The Panel's Decision in This Case Is Inconsistent With the Supreme Court's Decision in *Williams-Yulee v. Florida Bar*

The panel in this case recognized that where judges are elected, as they are in 39 States,[3] there is a "fundamental tension between the ideal of apolitical

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[2] Alaska Code of Judicial Conduct, Preamble, *available at* http://www.courts.alaska.gov/rules/cjc.htm#pre; California Code of Judicial Conduct, Preamble, *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf; Hawaii Code of Judicial Conduct, Preamble, *available at* http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm#PREAMBLE; Idaho Code of Judicial Conduct, Preamble, *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf; Montana Code of Judicial Conduct, Preamble, *available at* http://courts.mt.gov/content/supreme/newrules/rules/jud-canons.pdf; Nevada Code of Judicial Conduct, Preamble, *available at* http://judicial.state.nv.us/nevcodejudicialconduct3new.htm; Washington Code of Judicial Conduct, Preamble, *available at* http:// www.cjc.state.wa.us/Gov_provision/code_ preamble.htm.

[3] *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015). Eight-nine percent of all state court judges (and 87 percent of all state appellate judges) face

judicial independence and the critical nature of unfettered speech in the electoral political process." *Wolfson*, 750 F.3d at 1149.

The panel also recognized that States have a compelling interest in both "the reality and appearance of an impartial judiciary," but it nevertheless held that five provisions of the Arizona Code of Judicial Conduct unconstitutionally restrict the speech of non judge candidates because the restrictions are not sufficiently narrowly tailored to survive strict scrutiny. *Id.* The panel based its holding on *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002), but its holding is inconsistent with the more recent decision in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), which held that the First Amendment permits some restrictions on the speech of judges and judicial candidates. As the Court explained: "Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." *Id.* at 1662.

B. States Have a Compelling Interest in Maintaining Both Judicial Impartiality and Public Confidence in Judicial Impartiality

In *Williams-Yulee*, a single canon of judicial conduct was at issue, which prohibited personal solicitation of campaign funds by judges or judicial candidates,

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voters in some kind of election. American Const. Soc'y for Law & Policy, Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* 2, 4 n.9 (June 2013), *available at* http://www.acslaw.org/JusticeAtRisk_Nov2013.pdf.

but allowed them to establish committees to solicit campaign funds. Applying strict scrutiny,[4] the Court found that the canon "advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech." *Williams-Yulee*, 135 S. Ct. at 1666.

Florida articulated two interests the Court described as compelling: the State's interest in protecting the integrity of the judiciary, and its interest in maintaining the public's confidence in an impartial judiciary. *Id.* The Court observed that those interests have a pedigree dating at least to the Magna Carta, that the same interests underlie both the common law judicial oath and the oath taken by federal judges when taking the bench, and that the Court's own precedents have described the interest in safeguarding "public confidence in the fairness and integrity of the nation's elected judges" as a "vital state interest" that is "of the highest order." *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)). The States' interest in judicial impartiality also has a constitutional footing: "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal

[4] Although only four Justices joined the section of the majority opinion applying strict scrutiny, the four dissenting Justices agreed that strict scrutiny should apply. *See Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 1685 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980), *quoted in Williams-Yulee*, 135 S. Ct. at 1674 (Ginsberg, J., concurring in part and concurring in the judgment). And while actual impartiality is essential, the public perception of impartiality is important. *See Mistretta v. United States*, 488 U.S. 361, 407, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Harlan, J., concurring) (for those appearing before a judge, "the appearance of evenhanded justice . . . is at the core of due process").[5]

The Court explained that these interests are distinct from the parallel state interest in preventing the appearance of corruption in legislative and executive elections, because "the role of judges differs from the role of politicians," even

[5] The canon challenged in *Williams-Yulee* and the rules challenged in this case exist in a larger context, that of judicial ethics. To protect the integrity of the judiciary, rules of judicial conduct subject judges to a standard of comportment that likely would be considered burdensome by a legislator or mayor—or, for that matter, an unelected citizen. But to the public, judges symbolize the law itself. *In re Disciplinary Proceeding Against Sanders*, 159 Wash. 2d 517, 525 n.16, 145 P.3d 1208 (2006). Because judges are given special power and responsibility, a judge must "accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen," including restrictions for purely "personal conduct." Code of Conduct for United States Judges, Canon 2 cmt. 2A, *available at* http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#c. *Accord* Arizona Code of Judicial Conduct, Rule 1.2 cmt. 2, *available at* http://www.azcourts.gov/Portals/137/NewCode/2014ArizonaCodeofJudicialConduct.pdf at 9; Washington Code of Judicial Conduct, Rule 1.2 cmt. [1], *available at* http://www.cjc.state.wa.us/Gov_provision/code_canons.htm#rule1_2.

where the judiciary is elected. *Williams-Yulee*, 135 S. Ct. at 1667 (citing *White*, 536 U.S. at 783; *id.* at 805 (Ginsburg, J., dissenting)). Unlike politicians, who are expected to be responsive to the preferences of their supporters, a judge deciding case should not base his or her decision on the preferences of his or her supporters; those who contributed to an elected judge's campaign should receive no special consideration. *Williams-Yulee*, 135 S. Ct. at 1667. On that basis, the Court concluded its cases applying the First Amendment to political elections were of little value in determining the constitutionality of a restriction on speech in judicial elections. *Id.*

The Supreme Court's conclusion that the role of judges differs from the role of politicians should displace the panel's apparent conclusion that by electing judges, States, by definition, turn judges into politicians. *Wolfson*, 750 F.3d at 1155 (quoting Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 Ind. L. Rev. 735, 736 (2002)). To the extent the panel disapproved of elected judges (States that wish to avoid a politicized judiciary "can choose to do so by not electing judges," *Wolfson*, 750 F.3d at 1156), that disapproval is inappropriate in light of the decision in *Williams-Yulee*:

> The desirability of judicial elections is a question that has sparked disagreement for more than 200 years . . . . [I]t is not [our] place to resolve [this] enduring debate. . . . Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like

> the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.

Williams-Yulee, 135 S. Ct. at 1661.

C. The Challenged Provisions in the Arizona Code of Judicial Conduct, Like the Provision Upheld in *Williams-Yulee*, Are Narrowly Tailored to Target the Most Direct Threats to Judicial Impartiality and the Public Perception of Judicial Impartiality

In this case, five provisions of Arizona's Code of Judicial Conduct are challenged. The panel recognized that "Arizona, like every other state, has a compelling interest in the reality and appearance of an impartial judiciary," but it held that the five challenged provisions were not sufficiently narrowly tailored to survive strict scrutiny. *Wolfson*, 750 F.3d at 1149.

Arizona's Rule 4.1(A)(6)[6] provides that a judge or judicial candidate shall not "personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4[.]" Read together with Rule 4.4, Arizona's prohibition of personal solicitation by judges and judicial candidates is substantively identical to the provision upheld in *Williams-Yulee*. Similar restrictions have been adopted in 30 of the 39 States that elect trial or appellate judges,[7] including several States within the Ninth Circuit.[8] The panel held the rule

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[6] http://www.azcourts.gov/Portals/137/NewCode/2014ArizonaCodeofJudicialConduct.pdf at 35.

[7] *Williams-Yulee*, 135 S. Ct. at 1663.

unconstitutional as applied to judicial candidates who are not sitting judges "because it restricts speech that presents little to no risk of corruption or bias towards future litigants and is not narrowly tailored to serve those state interests." *Wolfson*, 750 F.3d at 1157. That conclusion is foreclosed by the decision in *Williams-Yulee*, which rejected very similar arguments regarding under-inclusiveness and lack of narrow tailoring.

In *Williams-Yulee*, the Court rejected the petitioner's argument that the Florida canon was underinclusive because it allowed other conduct that could damage both the fact and appearance of judicial integrity. The Court explained that a State may focus on its most pressing concern—the First Amendment does not require a State to address all aspects of a problem in "one fell swoop"—and the solicitation ban in the Florida canon was aimed "squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates." *Williams-Yulee*

[8] *See* Idaho Code of Judicial Conduct, Canon 5(C)(2), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf at 33; Oregon Code of Judicial Conduct, Rule 5.1(E), *available at* http://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/CodeJudicialConduct.pdf/$File/CodeJudicialConduct.pdf at 19; Washington Code of Judicial Conduct, Rule 4.1(A)(7), *available at* http://www.cjc.state.wa.us/Gov_provision/code_canons.htm#rule4_1; *see also* Alaska Code of Judicial Conduct, Canon 5(C)(3), *available at* http://www.courts.alaska.gov/rules/cjc.htm#5 (applying to judges who are candidates for retention).

135 S. Ct. at 1668. And it applied evenhandedly and without exception to all judges and judicial candidates. *Id.* at 1668-69.

The Court also specifically rejected the argument that the Florida canon was fatally underinclusive because it allowed solicitation by judicial campaign committees. It upheld Florida's reasonable conclusion that solicitation by judicial candidates "creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee" because they present "markedly different appearances to the public." *Id.* at 1669. Observing that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary, the Court stated that "[t]hese considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges.'" *Id.* at 1661 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)).

The Court held the Florida canon was narrowly tailored, allowing judicial candidates to "discuss any issue with any person at any time," to "write letters, give speeches, and put up billboards," to "contact potential supporters in person, on the phone, or online," and to "promote their campaigns on radio, television, or other media." *Id.* at 1670. What they could not do is personally ask for money,

although they could direct their campaign committees to do so. The canon restricted only "a narrow slice of speech." *Williams-Yulee* 135 S. Ct. at 1670.

As in *Williams-Yulee*, Rule 4.1(A)(6) restricts only "a narrow slice of speech." It narrowly prohibits conduct that the State has reasonably concluded most directly undermines public confidence in the integrity of the judiciary—the ability to personally ask for money—while leaving judicial candidates broad avenues for conveying their messages and meaningful alternatives for raising campaign funds. Like the restriction upheld in *Williams-Yulee*, Arizona's restriction on personal solicitation of campaign funds is narrowly tailored to serve compelling state interests.[9]

The panel's conclusion in this case also appears to be at odds with the available evidence, which shows both that campaign spending in judicial elections has grown rapidly in the last 15 years and that campaign contributions have been dominated by business groups, lawyers, and lobbyists. American Const. Soc'y for

[9] Nor does the evidence show that rules such as Florida's Canon 7(C)(1) (Florida Code of Judicial Conduct, Canon 7, *available at* http://www.floridasupremecourt.org/decisions/ethics/canon7.shtml) or Arizona's Rule 4.1(A)(6) favor incumbent judges. In both 2012 and 2014, in the 30 States that prohibit at least some form of personal solicitation, nine of the top twenty fundraisers for state supreme court seats were non-incumbent judicial candidates. *See* Nat'l Inst. on Money in State Politics, *Showing contributions to State Supreme court candidates in elections in selected jurisdictions*, 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 (last visited June 9, 2015).

Law & Policy, Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* 5-6 (June 2013), *available at* http://www.acslaw.org/JusticeAtRisk_Nov2013.pdf. Both the public (76 percent of voters) and judges themselves (almost half of those surveyed) have reported their belief that campaign contributions have at least some influence on judges' decisions. *Id.* at 7. This is not to cast any aspersion on elected judges; the Supreme Court has properly recognized a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Rather, the point is that an effective judiciary also requires the respect of the litigants who appear in court and the respect of the public that is affected by its judgments. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). Without independence and integrity—and the public perception of independence and integrity—judges cannot maintain the legitimacy necessary to effect the rule of law.

By targeting that part of the campaign contribution process that poses the greatest risk of producing actual bias and that is most likely to raise concerns of an appearance of partiality, Rule 4.1(A)(6) meets the requirement of an adequate "fit between the stated governmental objective and the means selected to achieve that objective," while "'avoid[ing] unnecessary abridgment' of First Amendment

rights[.]" *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1445-46 (2014).[10]

After separately considering Arizona's Rule 4.1(A)(6), the panel collectively evaluated the other four challenged restrictions, Rule 4.1(A)(2)-(5), which limit the campaign-related activities of judges and judicial candidates to those necessary for their own campaigns.[11] The panel concluded that, as a group, they are not

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[10] *See also Williams-Yulee*, 135 S. Ct. at 1671 ("The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be 'perfectly tailored.' The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." (Citation omitted.)).

[11] Those subsections of Rule 4.1(A) provide that a judge or judicial candidate shall not

> (2) make speeches on behalf of a political organization or another candidate for public office;
>
> (3) publicly endorse or oppose another candidate for any public office;
>
> (4) solicit funds for or pay an assessment to a political organization or candidate, make contributions to any candidate or political organization in excess of the amounts permitted by law, or make total contributions in excess of fifty percent of the cumulative total permitted by law.
>
> (5) actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office[.]

Arizona Code of Judicial Conduct, Rule 4.1(A)(2)-(5), *available at* http://www.azcourts.gov/Portals/137/NewCode/2014ArizonaCodeofJudicialConduct.pdf at 35 (citation omitted). Again, similar or identical provisions have been adopted in most States, including every State within the Ninth Circuit's jurisdiction. *See* Alaska Code of Judicial Conduct, Canon 5(A)(1), *available at* http://www.courts.alaska.gov/rules/cjc.htm#5; California Code of Judicial Conduct, Canon 5(A), (C), *available at* http://www.courts.ca.gov/documents/

sufficiently narrowly tailored to serve the State's interest in an impartial judiciary. *Wolfson*, 750 F.3d at 1158. The panel considered three of the restrictions (Rule 4.1(A)(2)-(4)) to be underinclusive because they do not apply until a judicial candidate announces his or her candidacy. *Id.* at 1159. This conclusion—that the restrictions are unconstitutional because they do not prohibit speech by non-candidates—parallels an argument rejected in *Williams-Yulee*: that the State may ban the personal solicitation of funds by judicial candidates only if it bans all solicitation of funds in judicial elections. The Court responded:

> The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

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ca_code_judicial_ethics.pdf at 41, 43; Hawaii Code of Judicial Conduct, Rule 4.1, *available at* http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm#Rule_4.1; Idaho Code of Judicial Conduct, Canon 5(A), *available at* http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf at 29; Montana Code of Judicial Conduct, Rule 4.1, *available at* http://courts.mt.gov/content/supreme/new_rules/rules/jud-canons.pdf; Nevada Code of Judicial Conduct, Rule 4.1, *available at* http://judicial.state.nv.us/canon43new.htm; Oregon Code of Judicial Conduct, Rule 5.1(A), *available at* http://www.ojd.state.or.us/Web/ojdpublications.nsf/Files/CodeJudicialConduct.pdf/$File/CodeJudicialConduct.pdf at 19; Washington Code of Judicial Conduct, Rule 4.1(A)(2)-(4), *available at* http://www.cjc.state.wa.us/Gov_provision/code_canons.htm#canon4; *see also* Guam Rules for Judicial Disciplinary Enforcement, Rule 6, *available at* http://www.guamcourts.org/CompilerofLaws/CourtRules/GRJDE%20Final%2020130221.pdf at 12 (adopting ABA Model Code of Judicial Conduct; see Canon 5.A therein).

Williams-Yulee, 135 S. Ct. at 1670. There is no suggestion of pretext here. Nor does the First Amendment require that restrictions on the speech of judicial candidates must fall because those restrictions are not placed on persons who might, at some future time, become judicial candidates.

The panel also concluded the restrictions in Rule 4.1(A)(2)-(4) were not sufficiently narrowly tailored because recusal is a viable less restrictive alternative. *Wolfson*, 750 F.3d at 1159. The Supreme Court explicitly rejected this argument too:

> A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve.

Williams-Yulee, 135 S. Ct. at 1671-72. Moreover, because recusal is designed to remove a judge who may be biased in a particular case, it is ill-suited to address system-wide conduct that threatens judicial impartiality or the public perception of impartiality. And a litigant may be reluctant to request recusal for fear of offending a judge who declines the request.[12] The problem with recusal is magnified in

[12] The fact that recusal is a self-enforced measure may mean that it is under-enforced. *See Caperton*, 556 U.S. at 883 (noting possibility that a judge considering recusal may "misread[ ] or misapprehend[ ] the real motives at work in deciding a case"); *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) (describing how the human tendency to consistently and unconsciously downplay one's own biases while exaggerating

counties with only one or two judges. In Arizona, for example, four counties have only one superior court judge. *Wolfson*, 750 F.3d at 1168 (Tallman, J., dissenting in part). In Washington, six counties have only one superior court judge, and in ten counties one or two superior court judges are shared between two or three counties. Washington State Administrative Office of the Courts, *Washington State Court Directory* (2015), http://www.courts.wa.gov/court_dir/courtdirectory.pdf.

Finally, the panel held that Rule 4.1(A)(5) was overbroad because its restriction potentially addresses not just persons who may become parties to a suit, but also ballot propositions and other issues "that present no risk of impartiality towards future parties." *Wolfson*, 750 F.3d at 1160. As a factual matter, the panel was incorrect because Arizona interprets Rule 4.1(A)(5) as not prohibiting judicial candidates from supporting ballot measures.[13] But even had Rule 4.1(A)(5) reached as far as the panel states, a judicial candidate's active participation in certain issues—like ballot propositions—presents a very real risk of actual or perceived partiality if those issues reach the court in which the participating candidate now sits as a judge. In States such as Washington, controversial issues frequently are

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biases in others leads to systemic errors in applying the current substantive standards for disqualification, and observing that only in disqualification disputes are judges asked to assess themselves).

[13] *See* Arizona Sup. Ct. Judicial Ethics Advisory Op. 96-09 (1996) (interpreting former Cannon 5A(5) of the Arizona Code of Judicial Conduct, which is substantively the same as Rule 4.1(C)(1)), *available at* http://www.azcourts.gov/portals/137/ethics_opinions/1996/96-09.pdf.

addressed through ballot propositions, and state courts regularly are presented with cases challenging these propositions.[14] Washington's experience is shared, because all States in the Ninth Circuit except Hawaii allow initiatives or referenda.[15]

Moreover, the principles that animate Rule 4.1(A)(5)'s application to issues that may be presented to a successful judicial candidate are the same principles that motivate nominees for appointment as federal judges—who, when testifying in Senate confirmation hearings, justifiably avoid taking positions on issues that might come before them as a judge.[16]

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[14] In just the last ten years, for example, the following challenges to state or local initiatives or referenda have reached the Washington Supreme Court: *League of Educ. Voters v. State*, 176 Wash. 2d 808, 295 P.3d 743 (2013); *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wash. 2d 642, 278 P.3d 632 (2012); *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wash. 2d 41, 272 P.3d 227 (2012); *City of Port Angeles v. Our Water-Our Choice!*, 170 Wash. 2d 1, 239 P.3d 589 (2010); *Brown v. Owen*, 165 Wash. 2d 706, 206 P.3d 310 (2009); *American Legion Post 149 v. Dep't of Health*, 164 Wash. 2d 570, 192 P.3d 306 (2008); *Washington Citizens Action v. State*, 162 Wash. 2d 142, 171 P.3d 486 (2007); *Futurewise v. Reed*, 161 Wash. 2d 407, 166 P.3d 708 (2007); *1000 Friends of Washington v. McFarland*, 159 Wash. 2d 165, 149 P.3d 616 (2006).

[15] *See* Alaska Const. art. XI, § 1; Ariz. Const. art IV, pt. 1, § 1; Calif. Const. art II, §§ 10, 11; Idaho Const. art. III, § 1; Mont. Const. art. III, §§ 4, 5, art. XI, § 8, art. XIV, § 9; Nev. Const. art. XIX, §§ 1, 2, 4; Ore. Const. art IV,§ 1, art. VI, § 10, art. XI, § 14; Wash. Const. art. II, § 1.

[16] *See* Cong. Research Serv., Denis Steven Rutkus, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue* (June 23, 2010), *available at* http://fpc.state.gov/documents/organization/145137.pdf (describing how Supreme Court nominees have declined to answer Senate inquiries that would appear to make commitments or provide signals as to how they would vote as a Justice on future cases).

The concurring judge on the panel noted the similarity between Rule 4.1(A)(2)-(5) and Canon 5 of the Code of Conduct for United States Judges.[17] But she viewed the State as having no defensible interest in applying such restrictions to judicial candidates who are not sitting judges: "[T]he interest in an independent judiciary does not come into existence until a judge assumes office[.]" *Wolfson*, 750 F.3d at 1167. The amici States respectfully disagree. The concern that judicial candidates may become beholden to certain supporters or may prejudge issues they

[17] That Canon provides:

> (A) *General Prohibitions.* A judge should not:
>
> (1) act as a leader or hold any office in a political organization;
>
> (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
>
> (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
>
> (B) *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.
>
> (C) *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

Code of Conduct for United States Judges, Canon 5, *available at* http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#f.

later must decide is a real concern, no less so in an election than in an appointment. *See Caperton*, 556 U.S. 868 (appellate judge should have recused because litigant's prior contribution to his election campaign created a serious risk of actual bias). The States have a legitimate and compelling interest in maintaining the public's confidence in an impartial judiciary and, as the Supreme Court explained in *Williams-Yulee*, that interest extends to judicial candidates, not just to sitting judges. *Williams-Yulee*, 135 S. Ct. at 1668-69.

The restrictions on the participation of judges and judicial candidates in the political campaigns of other persons, like the restriction on personal solicitation of campaign funds by a judge or judicial candidate, are targeted at the conduct posing the most direct threats to judicial impartiality and the public perception of judicial impartiality. *See In re Vincent*, 172 P.3d 605, 610 (N.M. 2007) ("It is the public pronouncement of support that most offends our notions of impartiality."). They do not sweep in more conduct than is necessary to address those direct threats.

III. CONCLUSION

The provisions of the Arizona Code of Judicial Conduct challenged in this case are narrowly tailored to serve compelling state interests in judicial integrity

and public confidence in judicial integrity. This Court sitting en banc should hold that they survive strict scrutiny under the First Amendment.

RESPECTFULLY SUBMITTED this 12th day of June 2015.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON, Plaintiff-Appellant v. **COLLEEN CONCANNON**, in her official Capacity as member of the Arizona Commission on Judicial Conduct, et al., Defendants-Appellees	No. 11-17634 On appeal from the United States District Court for the District of Arizona, No. 3:08-CV-08064-FJM

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE ARIZONA JUDGES' ASSOCIATION, JUSTICE AT STAKE, THE CAMPAIGN LEGAL CENTER, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND 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.

Amicus curiae the Arizona Judges' Association is comprised of judicial officers who seek to improve Arizona's administration of justice by promoting policies that preserve fair and impartial courts, facilitate public understanding of how the judiciary operates, and encourage cooperation among all stakeholders to build a more effective judicial system.

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.

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[1] This *amicus curiae* brief is filed with the consent of all parties to this proceeding. No party's counsel authored any portion of this brief. No party or party's counsel contributed money intended to fund this brief's preparation or submission. No person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund this brief's preparation or submission. This brief does not purport to represent the position of NYU School of Law.

Amicus curiae 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.

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

SUMMARY OF ARGUMENT

As the Supreme Court recently underscored in *Williams-Yulee v. Florida Bar*, states have a compelling interest in maintaining judicial integrity. To do so, states must establish measures to ensure that courts are fair, impartial, and independent of partisan political forces, both in reality and appearance. Arizona has chosen to select some of its judges through a system of nonpartisan elections that was intended to preserve judicial independence from the political branches and partisan politics. In order to further its recognized compelling interest in judicial integrity, Arizona has adopted a Code of Conduct – comprised of a limited number

of over-arching rules that are implemented by enforceable rules and enhanced by explanatory or aspirational comments – limiting the political activities of both sitting judges and judicial candidates. These rules, which ensure that the judiciary remains independent from political forces, are best understood as part of a broader set of policy choices and regulations through which Arizona and other states have, since the founding of the republic, crafted public policy to promote judicial integrity.

Moreover, these rules must also be understood within the context of efforts to protect judicial integrity in all circumstances, regardless of the method of judicial selection: They are binding on judges at all times, as well as on judicial candidates, and have been adopted even in jurisdictions that do not use judicial elections, including the federal government.

Ultimately, these rules cannot be considered in isolation, or even solely in relation to judicial elections; instead, they can only be fully understood in the context of a larger set of policies designed to ensure that the judiciary is fair and impartial, independent, and respected. Striking down these rules would call into question the constitutionality of all limits on the political activity of judges (including the well-established federal rules) and increase the risk of the politicization of the American judiciary.

ARGUMENT

I. ARIZONA HAS A COMPELLING INTEREST IN PROTECTING JUDICIAL INTEGRITY

As the United States Supreme Court has made clear, states have a "compelling interest in judicial integrity." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). Judicial integrity is "a state interest of the highest order" because "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) ("*White I*") (Kennedy, J., concurring). And judicial integrity remains a compelling interest regardless of whether judges are elected or appointed. *See Williams-Yulee*, 135 S. Ct. at 1673 ("A State's decision to elect judges does not compel it to compromise public confidence in their integrity."). As most states have done, Arizona has taken a step to protect the integrity of its judiciary by adopting restrictions on political activities by judges, based on the American Bar Association's Model Code of Judicial Conduct.

Judicial integrity requires that courts be fair and impartial as well as independent, in both reality and appearance. To be fair and impartial, courts must apply the law to the facts without bias or favor towards any party. *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). Judicial

independence, which preserves the separation of powers and enables meaningful judicial review of legislation, is likewise central to judicial integrity.

Our governmental system is built on the separation of powers: The judiciary must be independent from the partisan forces that control the executive and legislative branches not only to ensure confidence in the integrity of the judiciary, but also because judicial review sometimes requires judges to strike down laws embodying political policy preferences. As Madison explained in The Federalist No. 47, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961). But separating the judiciary from the other branches of government "means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place." John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 969 (2002). Thus, it is essential that the judiciary be truly independent.

A judiciary that is independent is:

> (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches, such as the political party apparatus by which legislators and elected executive officials organize themselves and

> their supporters; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches.

J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics* 8 (2004), *available at* https://www.brennancenter.org/publication/after-white-defending-and-amending-canons-judicial-ethics/; *see also Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion) ("It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard for the views of his constituents.").

Judicial integrity also requires the appearance of fairness, impartiality, and independence. The judiciary has a unique role in our tripartite system of government. "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.'" *Williams-Yulee*, 135 S. Ct. at 1666 (citing The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961)). Instead, its authority "depends in large measure on the public's willingness to respect and follow its decisions." *Id.* Indeed, the public's belief that a court's judgments are fair and impartial is at the core of due process. *See, e.g.*, *In re Gault*, 387 U.S. 1, 26 (1967) ("[T]he *appearance* as well as the actuality of fairness, impartiality and orderliness [are] the *essentials of due process.*" (emphasis added)); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he *appearance* of evenhanded

justice . . . is *at the core of due process*." (emphasis added)). For this reason, it is essential that "justice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954). Adjudication by an "impartial judge is essential to due process" because "it 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." *White I*, 536 U.S. at 776.

Achieving a judiciary that is fair, impartial, and independent in reality and appearance requires limits on how a judge can behave, particularly in the realm of politics. "Judicial independence and neutrality require judges to limit or abstain from involvement in a variety of activities commonly enjoyed by others in the community, including politics." *In re Matter of William A. Vincent, Jr.*, 172 P.2d 605, 610 (N.M. 2007) (quoting *In re Inquiry Concerning McCormick*, 639 N.W.2d 12, 15 (Iowa 2002)). And "[w]hen judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior." *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010); *see also In re Dunleavy*, 838 A.2d 338, 354 (Me. 2003) ("Because a judgeship is in the nature of a public trust, it is unreasonable to permit a judge to subjugate that trust to her or his personal desire to actively participate in the political process.").

II. THE POLITICAL ACTIVITIES RULES ADVANCE ARIZONA'S COMPELLING INTEREST IN JUDICIAL INTEGRITY AND ARE CONSTITUTIONAL

A. Limiting Political Activity by Judges and Judicial Candidates Is Appropriate in Light of Their Unique Role

As Chief Justice Roberts explained in *Williams-Yulee*, "[j]udges are not politicians, even when they come to the bench by way of the ballot." 135 S. Ct. at 1662. It is because of this unique role that states must be permitted to regulate judges' and judicial candidates' political activities, so as to preserve both the appearance and the reality of a judiciary insulated from the political branches. Indeed, while the Supreme Court held in *White* that allowing judges to participate in public conversations about contested issues does not threaten the integrity of the courts, *see White I*, 536 U.S. at 778 ("Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." (quotation and citation omitted)), engaging in political activities as a judge or judicial candidate poses a clear and direct threat to judicial independence and impartiality. As the Seventh Circuit explained, "[w]hile *White I* teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is." *Siefert*, 608 F.3d at 986. Likewise, just as the Supreme Court in *Williams-Yulee* found that the personal solicitation canon may constitutionally be applied to judicial candidates, so too should the political

activities rules apply to judicial candidates as well as judges. The same compelling interests are at stake when judicial candidates engage in political activity as when sitting judges do – both scenarios raise concerns that a judge or a candidate seeking to become a judge are enmeshed in politics, drawing into question their judicial credibility and independence from the political branches.

Such engagement in political activity risks reducing public confidence in judicial independence and impartiality, as well as having an impact on judicial decision-making. First, when judges and judicial candidates wade into the political realm by making endorsements in elections, they raise reasonable questions about their independence and impartiality. *See Siefert*, 608 F.3d at 986 ("A local judge who tips the outcome of a close election in a politician's favor would necessarily be a powerful political actor, and thus call into question the impartiality of the court."). Thus, the political activities rules address "a broader concern that freely traded public endorsements have the potential to put judges at the fulcrum of local party politics, blessing and disposing of candidates' political futures." *Id*. Arizona "has a justified interest in having its judges act and appear judicial rather than as political authorities." *Id*. at 987.

In addition to the appearance of impropriety that may arise when judges act as political powerbrokers, judicial entanglement in party politics may result in party loyalty, rather than fitness for the bench, being the chief qualification sought

in prospective judicial candidates. And once on the bench, favors owed to political actors may overshadow the impartial application of the law in particular cases or at a minimum appear to do so. *See id.* at 984 ("[E]ndorsements may be exchanged between political actors on a quid pro quo basis."). This threat is similar to that identified by the Supreme Court in *Caperton*, where the concern was a judge's "debt of gratitude" to a campaign supporter. *Caperton*, 556 U.S. at 882 ("Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to [his supporter] for his extraordinary efforts to get him elected."). In addition to the retrospective gratitude felt toward partisan supporters, judges enmeshed in the political fray who face reelection would face pressure to rule in ways that attract future political party support and stave off primary challengers who may be backed by party leaders.[2]

[2] "[U]nder some retention methods, judges' voting is associated with the political preferences of those who will decide whether the judges keep their jobs. For example, the results indicate that when judges face Republican retention agents in partisan reelections, they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals." Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623, 629 (2009). "Furthermore, when the preferences of those who will reappoint a judge change, so too do the judge's rulings. The results show that when a Republican governor replaces a Democratic governor, judges are more likely to vote in favor of the business in a business-versus person case, in favor of the employer in a labor dispute, and in favor of defendants in general in tort cases." *Id*.

These scenarios are particularly problematic in those highly scrutinized cases where a judge must decide a political issue – such as a ruling on legislation closely associated with a political party, or a ruling vindicating an individual's civil rights in a case closely associated with a party's position. In these cases, it is critical that judges act, and be seen as acting, as neutral arbiters rather than political actors. Even if a judge faithfully and impartially applies the law in such politically-charged cases, close association with political players will provide ammunition for partisans on the other side to call the judge's motivation into question and may damage public confidence in the legitimacy of the court's determination.

These concerns are not merely theoretical; history also shows that the rules were adopted and promulgated in direct response to instances of judges issuing "partisan political rather than impartial judicial decisions." *Moon v. Halverston*, 288 N.W. 579, 581 (Minn. 1939) (Loring, J., concurring). Indeed, these rules remain an important enforcement mechanism against present impermissible judicial conduct. In recent years, judges have faced discipline for improperly acting as informal campaign advisors, *see In re DeFoor*, 494 So. 2d 1121 (Fla. 1986), taking part in phone banking for political parties, *see In re Raab*, 793 N.E.2d 1287 (N.Y. 2003), putting up lawn signs for candidates, *see McCormick*, 639 N.W.2d

12, and spreading negative information regarding the opponent of the judge's spouse in a judicial election, *see In re Codispoti*, 438 S.E.2d 549 (W. Va. 1993).

B. The Rules Protect Judicial Integrity in Both Elective and Non-Elective Contexts

Importantly, although political activities rules of the type at issue in this case are perhaps most often discussed and analyzed in the context of judicial elections, the important protections from improper political influence that they provide also apply to all sitting judges, regardless of how they are selected. *Cf. White I*, 536 U.S. at 808 (Ginsburg, J., dissenting) ("The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." (quoting *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992))). This general applicability – to both judicial candidates and sitting judges, whether elected or appointed – distinguishes these rules from the "announce clause" at issue in *White I*. In *White I*, the majority held that the announce clause was not well-tailored "because it [wa]s woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms" – a concern not at issue in this case. 536 U.S. at 783.

Indeed, the importance of these rules in insulating the judiciary from partisan political forces is underscored by the fact that many states have adopted some variation of the ABA Model Code, and every state provides some limits on the political activities of judges.[3] The importance of rules ensuring judicial independence from partisan politics even outside of the electoral context is perhaps most apparent in the federal judiciary's Code of Conduct for United States Judges. Federal judges are, of course, appointed for life, and not subject to elections. Nonetheless, the Judicial Conference has seen fit to include for decades a political activities rule derived directly from the 1972 version of the ABA *Model Code*.[4] *See* Report of the Proceedings of the Judicial Conference of the United States (Sept. 1973) at 52 (reporting that the Joint Committee on Standards of Judicial Conduct authorized by the Judicial Conference chose to adopt, in large part, the ABA *Model Code*'s political activities rule). That rule, which is now Canon 5 of the Code of Conduct for United States Judges, prohibits judges from, among other things, making speeches on behalf of political organizations or candidates, publicly

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[3] *See* Am. Bar Ass'n, *Comparison of ABA Model Judicial Code and State Variations, Rule 4.1* (Feb. 3, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/4_1.authcheckdam.pdf (comparing state rules modeled on the ABA Model Code). Other states, while not adopting the model code, nevertheless place limits on judicial political activity. *Cf.* Ala. Canons of Judicial Ethics, Canon 7 ("A judge or judicial candidate shall refrain from political activity inappropriate to judicial office.").

[4] The 1972 ABA *Model Code*, in turn, was based upon, and was largely a reworking of, the original 1924 *Canons of Judicial Ethics*.

endorsing or opposing political candidates, soliciting funds for or contributing to political organizations or candidates, and otherwise engaging in political activity – the exact range of conduct prohibited by the Arizona provisions challenged here. *See* Code of Conduct for United States Judges, Canon 5.

The adoption of these rules by the federal judiciary, as well as by those states that have eschewed judicial elections, highlights that the interests sought to be furthered by political activities rules reflect the broad purpose of protecting the independence of judges from the pressures of partisan politics. *See In re Raab*, 793 N.E.2d at 1291 n.4 (recognizing that, in promulgating Canon 5, "[t]he federal government . . . perceive[d] the importance of shielding the federal judicial system from political influence and corruption and the appearance of political influence and corruption").[5]

III. ARIZONA'S CODE OF JUDICIAL CONDUCT IS AN ESSENTIAL COMPONENT OF ITS NONPARTISAN JUDICIAL ELECTION SYSTEM DESIGNED TO PRESERVE JUDICIAL INTEGRITY

States should not be required to suspend these generally applicable judicial rules simply because they have chosen to have an elected judiciary. States have long pursued the goal of judicial integrity through reforms to the processes of selecting, retaining, and regulating their judges – including the adoption of judicial

[5] In addition to these rules specific to the judiciary, the federal government and the states place limits on the political activities of government employees. Those rules have been upheld against constitutional challenge. *See, e.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973).

elections – and the political activities rules are an important component of this broader regime. For the same reason, states should not be required to excuse judicial candidates from the standards by which the judicial branch is regulated, which would result in an uneven playing field in judicial elections, as sitting judge candidates and non-judge candidates would be held to different standards.

Judicial codes of conduct, which have been adopted by nearly every state, as well as the federal judiciary, are a continuation of the states' longstanding efforts to "create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *See White I*, 536 U.S. at 808 (Ginsburg, J., dissenting) (internal quotation marks omitted). At the state level, judicial elections, and later, nonpartisan elections, emerged as an attempt to assert judicial independence from the other branches of government – the same values underlying the adoption of the political activities rules. After recognizing that judicial elections alone could not ensure judicial independence, many states enacted additional measures to bolster such independence, including rules regulating political activities. None of the reform measures alone is sufficient to remove politics from the judiciary; instead they work collectively to bolster judicial independence by helping insulate the judiciary from political forces and partisanship.

A. States Turned to Judicial Elections in Order to Promote Judicial Independence

An independent judiciary has been a fundamental principle of government since the founding of the United States. *See* The Declaration of Independence para. 11 (U.S. 1776) ("[King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."); *N.C. Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008) ("The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that 'the complete independence of the courts of justice is peculiarly essential' to our form of government.").

Early state constitutions provided for various models of judicial selection that were designed to prevent judges from being beholden to any single executive or other political entity – systems that included executive appointment and legislative consent, legislative election, and long periods of tenure. *See* Brief of Amicus Curiae Professor Jed Shugerman in Support of Respondent at 4, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (No. 13-1499), 2014 WL 7366053. These systems, however, ultimately failed to protect against the political branches' interference with the judiciary: "[B]y the early nineteenth century state judiciaries were beholden to the legislature, the executive, and, by extension, the parties that

controlled each. Governors with the power of appointment typically nominated persons supporting their agendas, and then threatened those judges with removal if they behaved independently." *Id*.

States began adopting judicial elections in the mid-nineteenth century in an effort to insulate judges from other political actors.[6] *See* Wendy R. Weiser, *Regulating Judges' Political Activity After* White, 68 Alb. L. Rev. 651, 676 (2005). Although judicial elections placed selection of judges in the public's hands, similar to that of the political branches, the "move for judicial elections was by no means an effort to make the judiciary like the other branches, but instead, an effort to elevate the judiciary and make it more independent of other branches so that it could better render justice." Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 Ind. L. Rev. 659, 660 (2002); *accord* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Studies 431, 447 (2004) (the move to elections was "intended,

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[6] Between 1847 and 1910, 20 of the 29 then-existing states switched to judicial elections, and all 17 states that joined the Union in that time adopted judicial elections. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. Legal Studies 431, 436 (2004). Arizona, which gained statehood two years later in 1912, adopted judicial election for all judges upon admission to the Union. *See* Nat'l Ctr. for State Courts, *History of Reform Efforts: Arizona*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=AZ (last visited June 12, 2015). In 1974, Arizona switched to merit selection for all judges except superior court judges in smaller counties. *Id*.

first and foremost, to provide judges with an independent base of power that would enable them to stand up to legislative pressure"); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 205 (reformers "intended the elective system to insulate the judiciary . . . from the branches that it was supposed to restrain"). "[W]hat was desired by the reformers" in the move to judicial elections "was an independent court, not a court subject to the popular will." Hanssen, *supra*, at 447; *cf. Williams-Yulee*, 135 S. Ct. at 1667 ("States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227–28 (7th Cir. 1993) (Posner, J.) ("We do not understand the plaintiffs to be arguing that because Illinois has decided to make judicial office mainly elective rather than . . . wholly appointive, it has in effect redefined judges as legislators or executive-branch officials. . . . Judges remain different from legislators and executive officials, even when all are elected.").

B. Arizona and Other States Adopted Nonpartisan Judicial Elections and Political Activity Rules to Further Protect Judicial Integrity

Judicial elections, however, did not succeed in ensuring judicial independence, as elections brought with them a significant role for the political parties and the potential for corruption. *See* Weiser, *supra*, at 676 ("Instead of making judges completely independent from politicians, judicial elections in many

states had caused judges to become responsive to the same political forces that dominated legislatures." (internal quotation marks omitted)); Renee L. Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 Geo. Mason L. Rev. 109, 118 (2007) ("Far from removing judges from politics . . . , judicial elections and short terms put some New York City judges under the influence of corrupt party bosses."). Partisanship was a particular problem for judicial independence: Political parties in many states were effectively able to select judicial candidates because of their strangleholds over electoral systems. *See* Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 Rutgers L. Rev. 1027, 1032–33 (2001). And judges were frequently subject to accusations of party treason because of decisions thought to be "contrary to the interests of" the party that endorsed them. *See Moon*, 288 N.W. at 581–82 (Loring, J., concurring).

In response to these ills, the Progressive Movement at the turn of the century – a movement that largely sought to eliminate the influence of political machines from the political system – successfully prodded states to adopt further reforms to insulate judicial elections from politics and partisanship, including fixed terms for

judges, staggered terms, and, most significantly, nonpartisan judicial elections.[7] *See* Hanssen, *supra*, at 446–47; Lerner, *supra*, at 141–43 (discussing New York's reforms, including extension of judicial terms, and noting that "[t]he words 'permanence' and 'independence' occur repeatedly in the [Convention] debates on this topic"). In short, rather than return to a patronage system that had proven inadequate to protect judicial independence, the focus in many states –including Arizona – in the last century has been to preserve an electoral selection system that promotes judicial integrity and to adopt constraints on partisan conduct that threatens judicial independence.

Nonpartisan elections were a particularly important development: Like the advent of judicial elections themselves, the move to nonpartisan judicial elections was "motivated by the desire to ensure the judiciary's independence" – in this case, "not only from the legislatures, but also from the political forces they represented." Weiser, *supra*, at 676. As one justice on the Minnesota Supreme Court explained, nonpartisan judicial elections were designed to "lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions." *Moon*, 288 N.W. at 581 (Loring, J., concurring).

[7] Between 1910 and 1958, 17 of 46 existing states switched to nonpartisan judicial elections, and one of the two new states to join the Union – Arizona – adopted nonpartisan judicial elections. Hanssen, *supra*, at 436–37.

However, even the move to nonpartisan judicial elections failed to insulate judges from the perils and pressures of partisan politics. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 869 (8th Cir. 2001) (noting that, in the 1930s, "merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement"), *rev'd sub nom White I*, 536 U.S. 765; Hanssen, *supra*, at 451 ("Nonpartisan elections for public officials also disappointed, as party machines proved nearly as adept as before at capturing the candidates.").

The American Bar Association's development of the *Canons of Judicial Ethics*, first adopted in 1924 as an aspirational model for judicial conduct, was a significant step towards promoting the goal of judicial integrity promised by judicial elections. 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, 450 (2006). Two of those rules – Canons 28 and 30[8] – specifically addressed

[8] Canon 28 read:

> While entitled to entertain his personal views or political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement

the political activity of judges, and effectively prohibited them from engaging in political activity. *See* Berness, *supra*, at 1035. Those rules were subsequently

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> of candidates for public office and participation in party conventions.

Canon 30 read:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.
>
> While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.
>
> If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.
>
> He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Am. Bar. Ass'n, *Canons of Judicial Ethics* (1924), *available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf.*

adopted in forty-three states – both states that had adopted judicial elections,[9] and states that relied on other methods to choose judges.[10]

The *Canons of Judicial Ethics*, and the ABA's *Model Code of Judicial Conduct* that replaced it in 1972, were a continuation of the century-old effort to ensure judicial integrity and independence from partisan politics. As commentators have noted, the codification of "traditional limitations on the political activities of judges" was the ABA's and the states' attempt to "remain[] committed to elective judicial selection systems" and the independence from political branches promoted by elective systems, while at the same time "limit[ing] the political activity of judges" to ensure that the downsides of judicial elections – namely, vulnerability to partisan politics – did not undermine the goals of an impartial and independent judiciary. *See* Berness, *supra*, at 1035. That the rules were adopted in an overwhelming majority of states suggests that states viewed them as a "mediating influence against the political and social pressures inherent in an elected judiciary." Sparling, *supra*, at 450.

As this brief history shows, when nonpartisan judicial elections on their own proved, like partisan elections, to be insufficient to maximize judicial

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[9] For example, Arizona, a judicial election state, adopted the ABA's rules in 1956. *See* Keith Swisher, *The Short History of Arizona Legal Ethics*, 45 Ariz. St. L.J. 813, 818 & n.11 (2013).

[10] *See supra* Part II.B (discussing importance of rules in both judicial election and judicial appointment jurisdictions).

independence, the states determined that rules directly prohibiting judges from engaging in political activities were necessary to protect and promote judicial integrity. These rules, which helped states avoid the pitfalls and dangers that proved to otherwise accompany judicial electoral politics, must be considered in the context of this "integrated system of judicial campaign regulation" that Arizona, and so many other states, have developed over the course of more than 150 years. *See White I*, 536 U.S. at 812 (Ginsburg, J., dissenting). Just as the political activities rules promote judicial integrity in unelected systems, they are likewise a critical component of nonpartisan electoral systems, enhancing the independence sought by states that chose to adopt judicial elections. As such, the rules are properly tailored to preserving and promoting judicial integrity in the face of the omnipresent pressure of partisan politics.

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Striking down Arizona's political activities rules would call into question the constitutionality of such rules in all jurisdictions – including the well-established federal rules that have, so far as we know, never been subject to constitutional challenge. At a minimum, a ruling invalidating Arizona's canons would prevent those states that have judicial elections from enforcing rules designed to generally protect judicial integrity and independence, effectively forcing those states to choose between having judicial elections and taking other steps to protect judicial

integrity. Either outcome would be contrary to well-established case law recognizing the rights of states to enact rules to promote judicial integrity, *see supra* Part I. And to single out states, like Arizona, that utilize judicial elections, would place onerous conditions upon the recognized ability of states to set forth the means for selecting their own judiciary, and undermine Arizona's policy choice to utilize elections as a mechanism for protecting judicial independence and the integrity of the courts. *See Williams-Yulee*, 135 S. Ct. at 1662 ("Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls.").

CONCLUSION

For the reasons set forth above, *amici* respectfully request that this Court affirm the District Court's judgment and uphold the constitutionality of Arizona's rules protecting nonpartisan judicial elections.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Cir. R. App. P. 40-1(a), I certify that this brief contains 5,947 words. This brief has been prepared using Microsoft Word in Times New Roman 14-point font size. This brief has been scanned and is virus free.

/s/ Richard Ziegler
Richard Ziegler

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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