No. 13-1499

# In the Supreme Court of the United States

LANELL WILLIAMS-YULEE,

*Petitioner*,

v.

THE FLORIDA BAR,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Florida**

## REPLY BRIEF FOR PETITIONER

ERNEST J. MYERS
LEE W. MARCUS
*Marcus & Myers, P.A.*
*1515 Park Center Drive*
*Suite 2G*
*Orlando, FL 32835*
*(407) 447-2550*

EUGENE R. FIDELL
*Yale Law School*
*Supreme Court Clinic*
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

ANDREW J. PINCUS
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
*Counsel of Record*
PAUL W. HUGHES
*Mayer Brown LLP*
*1999 K Street NW*
*Washington, DC 20006*
*(202) 263-3127*
*mkimberly@*
*mayerbrown.com*

*Counsel for Petitioner*

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes, Canons, and Other Authorities**

## REPLY BRIEF FOR PETITIONER

Petitioner Lanell Williams-Yulee was punished for signing a form letter that both requested support and solicited campaign contributions, and for posting the signed letter on her campaign website. There were no face-to-face requests for contributions and no personalized written requests. The First Amendment prevents Florida from imposing sanctions for that conduct.

Respondent and its *amici* focus principally on explaining how judicial impartiality is threatened by direct, face-to-face solicitation by sitting judges. But they say virtually nothing about why a form letter and web posting could have that effect. That failure is understandable. Particularly in the context of Florida's campaign finance regulations—which permit contributions to judicial candidates; permit candidates to know who is solicited, who donated, and who did not; and permit candidates to write thank-you notes to donors—there is no credible basis for concluding that prohibiting form letters and web postings is sufficiently related to judicial impartiality to permit the State to ban that speech.

*First*, Canon 7C(1)'s ban on candidate solicitations is a content-based regulation of speech, subject to strict scrutiny review. This Court's precedents make clear that the more relaxed "closely drawn" standard developed in the context of limits on campaign contributions may not be applied to assess the constitutionality of an across-the-board ban on solicitations by candidates.

*Second*, the ban cannot be justified as an anticorruption measure. To begin with, any link between a ban on candidate solicitation of lawful contributions

and prevention of *quid pro quo* corruption is too attenuated to satisfy strict scrutiny. Even if there were a sufficient link between the anticorruption interest and the ban on solicitation, moreover, the regulation is not narrowly tailored. Neither respondent nor its *amici* provide a single example of corruption resulting from the sending of a mass-mailed letter or the posting of a request for campaign contributions on a website—and they cannot explain how prohibiting those actions would materially reduce a threat of corruption.

*Third*, the State's interest in preserving judicial impartiality also cannot justify the across-the-board ban. The arguments advanced by respondent's *amici* focus on the risk posed by campaign contributions—they do not explain how an across-the-board ban on solicitation of contributions by a candidate protects against the risk of bias given the existence of the contributions themselves. At most, the impartiality interest might be implicated when judicial candidates engage in face-to-face solicitation—neither respondent nor its *amici* even attempt to explain how or why the same concern is implicated by form letters and web postings. The regulation therefore is not narrowly tailored.

*Fourth*, the solicitation ban cannot be upheld based on a state interest in protecting lawyers and others from a judge's use of her authority to coerce campaign contributions. Form letters and web postings are not coercive—this state interest too is implicated only by face-to-face solicitation.

In sum, petitioner was punished for engaging in speech protected by the First Amendment. The finding of wrongful conduct and accompanying sanctions therefore must be reversed.

### A. Strict Scrutiny Review Applies.

Canon 7C(1) is a content-based speech regulation. It applies when a candidate's communication "solicit[s] campaign funds," whether orally or in writing. Because the regulation is based on the content of the candidate's speech, it is subject to review under the strict scrutiny standard. Pet. Br. 11-12. That is the test applied by the court below. Pet. App. 7a ("in order to be constitutional and not in violation of the First Amendment, Canon 7C(1) must be narrowly tailored to serve a compelling state interest").

Respondent and some *amici* contend that the Court should instead apply the "closely drawn" scrutiny standard. This Court's precedents require rejection of that contention.

To begin with, both standards require state regulation to satisfy a heavy burden: "regardless whether [the Court] appl[ies] strict scrutiny or *Buckley*'s 'closely drawn' test, [the Court] must assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon* v. *FEC*. 134 S. Ct. 1434, 1445 (2014). Here, as in *McCutcheon*, the "substantial mismatch between the [State's] stated objective and the means selected to achieve it," invalidates Canon 7(C)(1) under either standard. 134 S. Ct. at 1446 (internal quotation marks omitted).

If the choice of standard could influence the outcome, however, strict scrutiny must be applied. The rationale underlying the "closely drawn" test—which was developed in the context of contribution limits—is wholly inapplicable to a complete ban on candidate solicitation of contributions that may lawfully be received by the candidate's own campaign committee.

The *Buckley* Court concluded that "contribution limits impose a lesser restraint on political speech because they 'permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976) (per curiam)). The Court therefore "focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still 'rigorous standard of review.'" *Ibid*.

Subsequently, in *McConnell* v. *FEC*, 540 U.S. 93 (2003), the Court applied this standard to restrictions on contribution solicitations that were "adopted to implement [a] contribution limit, or to prevent circumvention of that limit." *Id*. at 138-139. One of the provisions at issue in *McConnell*, for example, banned national political parties and federal candidates from receiving "soft money" and imposed a parallel restriction on the solicitation of those funds. *Id*. at 139.

The Court held that the inclusion of restrictions on solicitation did not require application of strict scrutiny to assess the constitutionality of a combined contribution/solicitation prohibition: "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose * * * to regulate contributions on the demand rather than the supply side." *McConnell*, 540 U.S. at 138. The relevant question was whether the solicitation prohibition "burdens speech in a way that a direct restriction on the contribution itself would not." *Id*. at 138-139.

*McConnell* recognized "'the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.'" 540 U.S. at 140. It found that the solicitation restrictions at issue in *McConnell* left national parties and federal candidates with "ample opportunities for soliciting federal funds on behalf of entities" subject to the statutory contribution limitations. *Id.* at 139; see also *id.* at 177 (restrictions "leav[e] open substantial opportunities for solicitation and other expressive activities"); *id.* at 183 (similar observation).

The Court relied on the existence of those alternative solicitation options in upholding the solicitation restrictions: "The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or union contribute money through its PAC in no way alters or impairs the political message 'intertwined' with the solicitation." *McConnell*, 540 U.S. at 140. Indeed, the Court determined that "the restriction here tends to increase the dissemination of information *by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors*." *Ibid.* (emphasis added).

Because the solicitation restrictions had "only a marginal impact on political speech" similar to that of direct limits on contributions, they were properly reviewed under *Buckley*'s less rigorous standard for contribution limitations. *McConnell*, 540 U.S. at 140-141. Justice Kennedy rejected the majority's approach and applied strict scrutiny review to the solic-

itation restrictions. *Id*. at 314-315 (concurring in the judgment and concurring and dissenting in part).[1]

None of *McConnell*'s justifications for reduced scrutiny apply here. Canon 7C(1) imposes a comprehensive ban on candidate solicitation: far from allowing candidates "ample opportunities" to solicit financial support, it flatly prohibits all such solicitations. Canon 7C(1) does not "implement [a] contribution limit, or * * * prevent circumvention of that limit" (*McConnell*, 540 U.S. at 138); rather, it bars candidates from soliciting contributions that are permissible under Florida law. And Canon 7C(1) does not promote solicitation by candidates from a wider array of donors, but instead bars any and all solicitation. Because requests for campaign funds are often intertwined with "informative and perhaps persuasive speech seeking support" (*McConnell,* 540 U.S. at 139-140), moreover, the restriction intrudes significantly on core First Amendment speech.

---

[1] Some *amici* point to Justice Kennedy's conclusion in *McConnell* (540 U.S. at 308) that an anticorruption rationale could be sufficient to justify a solicitation restriction. *E.g.*, Public Citizen *et al*. Am. Br. 6-7. But the uncontroversial conclusion that preventing corruption is a compelling interest that *may* justify solicitation restrictions as well as contribution limits, says nothing about whether a particular solicitation restriction *is* permissible under the First Amendment. Indeed, Justice Kennedy found the anticorruption rationale insufficient to justify some of the restrictions at issue in *McConnell* (540 U.S. at 298-307) and found those same provisions insufficiently tailored to satisfy strict scrutiny (*id*. at 314-317). In upholding one restriction as narrowly tailored, Justice Kennedy emphasized that "it does not ban all solicitation by candidates, but only their solicitation of soft-money contributions; and it incorporates important exceptions to its limits." *Id*. at 314.

*McConnell* thus provides no support for application of the relaxed *Buckley* "contribution" standard. Its rationale instead confirms that strict scrutiny is the proper test.

Respondent's invocation (Br. 6) of the Court's decision in *FEC* v. *National Right to Work Committee*, 459 U.S. 210 (1982), is similarly unavailing. In that case, which involved claims grounded in the right of association, the Court did not specify whether it was applying strict scrutiny or some other test. But the Court's analysis rested to a large degree on the challenged regulation's applicability to corporations. *Id.* at 208-210; compare *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (rejecting that approach). That factor is not present here.

Some of respondent's *amici* advocate reduced scrutiny on a different rationale, contending that requests for contributions receive reduced protection under the First Amendment. Conference of Chief Justices Am. Br. 23-24; Dorsen *et al.* Am. Br. 10-13. But this Court has repeatedly subjected limitations on charitable solicitations to strict scrutiny review. *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 789, 792 (1988); *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Surely the same standard applies to solicitations relating to the political activity that is the core concern of the First Amendment.[2]

---

[2] Some *amici* argue that requests for campaign contributions do not qualify as core protected speech. But what could be more core than requesting the funds needed to campaign for elective office? Any campaign can be silenced if it cannot obtain financial support. The *McConnell* Court's explanation of the linkage between contribution solicitations and a candidate's substantive messages (540 U.S. at 139-140) confirms that conclusion.

In sum, this content-based restriction is subject to strict scrutiny review.

### B. The Prohibition Is Not Justified By the State's Interest In Preventing Corruption.

Respondent relies exclusively on the government interest in preventing *quid pro quo* corruption or its appearance. Resp. Br. 1-3. That is a compelling government interest. But the critical questions are, *first*, whether that interest is materially promoted by an across-the-board prohibition against solicitations by candidates; and, *second*, whether applying the prohibition in that context is narrowly tailored to serve that government interest. Respondent's argument fails on both counts.

Some risk of *quid pro quo* corruption is inherent in Florida's regulatory plan. The fact that contributions to judicial candidates' campaigns are permitted provides a means for a *quid*: A corrupt candidate can ensure compliance with any illegal plan because he or she will know who has contributed to the campaign and who has not. And a corrupt "contributor" can be sure that the judicial candidate is aware of the contribution because thank-you notes to contributors are permitted. Pet. Br. 18-20. Given those realities, respondent cannot—and does not—explain how preventing candidates from requesting lawful contributions, taken alone, materially advances the interest in preventing corruption.

The same interest in preventing corruption extends to every other category of elected official. But respondent cannot point to any other situation in which a candidate is barred from soliciting contributions that may lawfully be donated to her campaign.

That is because the anticorruption interest is not advanced by such a prohibition.[3]

The polls cited by respondent (Br. 9-10) prove the point. Respondent says (*id*. at 9) that "campaign contributions" are "having an undue influence." It is the candidate's knowledge of who contributions (and who does not) that creates the public concern, not the identify of the solicitor.

Respondent relies (Br. 6-8) on this Court's decision in *McConnell*, asserting that the portion of that ruling upholding solicitation prohibitions as measures preventing *quid pro quo* corruption also governs here. But the solicitation prohibitions in *McConnell* were limited—they barred national parties or candidates from soliciting contributions in amounts or from sources that could not be donated to the party or to the candidate's committee. They thus prevented circumvention of contribution limitations that were valid under the First Amendment as anticorruption measures. See pages 4-6 & note 1, *supra*.

Here, by contrast, candidates are prohibited from soliciting contributions that may lawfully be made to their campaign committees. *McConnell*'s anticircumvention rationale is therefore wholly inapplicable.[4]

---

[3] Respondent states (Br. 14) that the Florida Supreme Court has no authority to regulate other branches of the state government. But that does not explain why respondent cannot provide even a single example of adoption by a state legislature of such an across-the-board restriction outside the judicial context.

[4] Respondent is mistaken in asserting (Br. 7-8) that one of the provisions upheld in *McConnell*—Section 323(e)—was not an anticircumvention provision. It prohibits candidates from soliciting a category of support, soft money, that may not lawfully be donated to candidates' committees. 52 U.S.C. § 30125(e).

Moreover, *McConnell*'s determination that these restrictions did not violate the First Amendment specifically rested on the fact that candidates could solicit contributions for their own committees. See page 5, *supra*. Respondent's reliance on *McConnell* is thus misplaced.

Finally, respondent contends that solicitation of contributions by third parties eliminates the "direct link between the contributor and the candidate that creates the potential for *quid pro quo* corruption and the appearance of corruption." Br. 10-12; *see also id.* at 14-15. That simply is not true: the contribution goes directly to the candidate's committee. If anything, the solicitation ban serves only the cosmetic effect of concealing the direct link between contributor and candidate that continues to exist.

The portion of this Court's decision in *McCutcheon* on which respondent relies (Br. 8-9) illustrates the distinction. There, the Court contrasted direct donations to a candidate's committee with donations to another candidate, or to a party committee or PAC, that are "subsequently re-routed" to the candidate's committee. 134 S. Ct. at 1452. Because the rerouting "occurs at the initial recipient's discretion—not the donor's," the risk of *quid pro quo* corruption is reduced. *Ibid.*

Here, of course, the donation is made directly to the judicial candidate's committee—the solicitor has no power to direct it elsewhere. *McCutcheon*'s discussion of a reduced risk of corruption is therefore irrelevant.

Respondent's argument, if accepted, would mean that candidates for *any* elective office could be barred from soliciting contributions. The anticorruption in-

terest extends to all elected officials—if that interest is sufficient to permit an across-the-board prohibition for judicial candidates, it would suffice to permit a ban for any other candidate for public office. That result is inconsistent with the Court's reasoning in *McConnell*.

Finally, even if there were a sufficient link between the anticorruption interest and the ban on solicitation, the regulation is not narrowly tailored. All of the examples of corruption cited by respondent's *amici* involve face-to-face conduct—principally bribes. Harding *et al.* Am. Br. 8-10. Neither respondent nor its *amici* provide a single example of corruption resulting from the sending of a mass-mailed letter or the posting of a request for campaign contributions on a website. The anticorruption rationale cannot justify application of Canon 7C(1) here.

### C. Application Of Canon 7C(1) Is Not Supported By The Interest In Protecting Impartiality And Its Appearance.

Respondent's *amici* assert that the State's interest in an impartial judiciary supports the application of Canon 7C(1) here. That interest may qualify as compelling, but it fails to satisfy the strict scrutiny standard here.

*First*, as with the anticorruption interest, it is difficult to see how the solicitation ban protects impartiality given the other aspects of Florida's judicial campaign finance regime.

The arguments advanced by respondent's *amici* focus on the adverse impact of campaign contributions on judicial impartiality and its appearance. Professors of Law, Economics, and Political Science Am. Br. 14 ("the research suggests, and many judges

agree, that the source and amount of campaign contributions to candidates for judicial office can affect judicial decision-making and case outcomes" and that "the rigors of running for judicial office can affect judicial decision-making"); Public Citizen, *et al.* Am. Br. 12-14.

These *amici* do not explain how an across-the-board ban on solicitation of contributions by a candidate, protects against the risk of bias given the existence of the contributions themselves. They simply state in conclusory fashion that Canon 7C(1) "shelters judges from the influence that personally politicking for campaign contributions might have on their decision-making." Professors of Law, Economics, and Political Science Am. Br. 19. But when the candidate still receives contributions, knows who gave and who didn't, writes thank-you notes, and can herself solicit non-monetary support, the "shelter[]" is illusory. Pet. Br. 18-20.

As another of respondent's *amici* asserts, the likely justification for an across-the-board ban is protecting the "dignity" of the judiciary. Free Speech for People *et al.* Am. Br. 4-25. Although an important concern, that goal does not rise to the level of a compelling interest sufficient to justify restrictions on core political speech. Indeed, this Court rejected very similar arguments in *White*. See 536 U.S. at 783-84.

*Second*, the impartiality interest could be implicated only when judicial candidates engage in face-to-face solicitation. Indeed, all of the examples of threats to impartiality or its appearance cited by respondent's *amici* involve exactly that—and principally face-to-face solicitation by sitting judges of lawyers who appear before them. Shugerman Am.

Br. 14-19; ABA Am. Br. 5-6; Public Citizen *et al.* Am. Br. 17-18.[5]

Other than conclusory assertions of a threat to impartiality, no one involved in this litigation has yet explained how or why the same concern is implicated by form letters and web postings. Several of respondent's *amici* candidly acknowledge that the government interest in this context is substantially more attenuated. *E.g.*, Phillips *et al.* Am. Br. 4 n.2 ("the most pernicious problems come when there is private oral or written solicitation by a candidate to a specific potential donor"); Conference of Chief Justices Am. Br. 15 n.3 (observing that the stated concerns "*may* apply to mass mailings as well as to direct in-person solicitation") (emphasis added).

Indeed, respondent and its *amici* recognize this distinction by referring repeatedly to the prohibition of "direct" personal solicitation by candidates. *E.g.*, Resp. Br. 1, 11 n.1, 16, 18; Conference of Chief Justices Am. Br. 3-6, 13-25; Public Citizen *et al.* Am. Br. 3, 5, 15. The Florida regulation does not include that limiting word, and characterizing a form letter and web posting as "direct" stretches the meaning of that word beyond all recognition. If Florida prohibited only "direct" solicitation, its prohibition would not apply on the facts here.

---

[5] The experiences of the former Chief Justices of the Supreme Courts of Texas and Alabama took place in States with *no* limits on solicitation by candidates, and therefore provide no support for Florida's determination that any solicitation threatens impartiality. Indeed, the examples cited by the former Chief Justices all involve face-to-face solicitation far removed from the form letter and website posting at issue here. Phillips *et al.* Am. Br. 15-17.

Because the impartiality interest is not threatened by form letters and web postings, the across-the-board prohibition fails the narrow tailoring requirement, and its application to petitioner's actions is impermissible under the First Amendment.

That conclusion is supported by the availability of recusal as an alternative for situations exempted from the solicitation prohibition. Respondent's *amici* argue that recusal cannot fully substitute for a solicitation restriction. *E.g.*, Conference of Chief Justices Am. Br. 26-28; Public Citizen *et al.* Am. Br. 20-22. But availability of recusal as an alternative means of protecting impartiality in circumstances in which solicitation is permitted further supports the conclusion that narrower tailoring is required.

Narrower tailoring of the restriction is also necessary because the across-the-board rule trenches on important First Amendment interests. As this Court has observed, "'solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views.'" *McConnell*, 540 U.S. at 139-140. The Court upheld the solicitation restrictions at issue there only because they left national parties and federal candidates, personally, with "ample opportunities for soliciting" the contributions that parties and candidate committees could lawfully receive. *Id.* at 139. That is not true here: candidates are barred completely from soliciting contributions that their committees may receive.

Moreover, neither respondent nor its *amici* address the significant concern that Florida's broad prohibition—like many restrictions on campaign-related speech—disproportionately favor incumbents and the well-connected: "incumbent judges (who ben-

efit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey* v. *Wolnitzek*, 614 F.3d 189, 204 (6th Cir. 2010). Respondent simply "[p]resum[es]" (Br. 17) that "any viable candidate will have sufficient support to be able to establish" a committee to solicit contributions effectively. While that presumption may apply to "establishment" candidates, there is no reason at all to believe that it applies to insurgents. This consideration, too, therefore requires Florida to utilize a more narrowly tailored rule.

*Third*, respondent's *amici* point to the adoption by a significant number of States of an across-the-board ban on contribution solicitations, asserting that the identical decision by those States is entitled to deference. *E.g.*, ABA Am. Br. 20; Conference of Chief Justices Am. Br. 28-29. But this Court rejected the very same argument in *White*, holding that the uniform adoption by the States of the speech ban at issue in that case provided no basis for ignoring the restriction's failure to satisfy the strict scrutiny standard. 536 U.S. 785-88.[6]

*Fourth*, respondent and its *amici* argue that a categorical prohibition is necessary because a less comprehensive ban would present insuperable line-drawing problems.

However, the regulations of other States demonstrate that more tailored restrictions are feasible.

---

[6] Other *amici* argue that the Court should defer to the States because of their authority to regulate lawyers. Again, that argument is inconsistent with the Court's holding in *White*.

Several States have adopted regulations that permit form letters and web postings and focus the prohibition on those circumstances that could give rise to a threat to impartiality. Minn. Code of Jud. Conduct, Canon 4.2(B)(3) (permitting form letters and in-person requests to groups of 20 people); Mo. Code of Jud. Conduct, Canon2-4.2(B) (permitting form letters); N.D. Code of Jud. Conduct, Rule 4.6 (permitting form letters and in-person requests to groups of 25 people); Ohio Code of Jud. Conduct, Rule 4.4(A)(1) (permitting form letters and in-person requests to groups of 20 people).

### D. Any State Interest In Preventing Coercion Is Inapplicable Here.

Some of respondent's *amici* assert that the solicitation ban furthers a state interest in protecting lawyers and others from a judge's use of her authority to coerce campaign contributions. Conference of Chief Justices Am. Br. 18-25; Dorsen *et al*. Am. Br. 13. That interest, although compelling in the abstract, provides no basis for upholding the across-the-board ban under strict scrutiny.

To begin with, the prohibition applies in myriad situations in which there is no possibility of coercion:

- Requests conveyed through form letters or a post on a website or at a large gathering;
- Requests directed to non-lawyers unlikely to appear as parties before the candidate;
- Requests directed to lawyers unlikely to appear before the candidate, because they practice in other communities or States or because they are not litigators.

As Judge Sutton observed for the Sixth Circuit, "indirect methods of solicitation" like "speeches to large groups and signed mass mailings" "present little or no risk of undue pressure." *Carey*, 614 F.3d at 205. After all, "[n]o one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge." *Ibid.* The same is true of speeches "to large assemblies of voters." *Republican Party of Minnesota* v. *White*, 416 F.3d 738, 765 (8th Cir. 2005). As one commentator has put it, "it is difficult to see how the candidate's signature on [a] fund-raising letter, perhaps with a short P.S., is any more 'coercive' than the same letter, with a 'Candidate for Judge' letterhead, signed by the chair of the committee, who everyone knows was chosen by the candidate"; and "it stretches the concept of coercive almost beyond recognition to forbid a candidate from [soliciting financial support from] the 500 assembled voters." Alan H. Morrison, *Judges and Politics: What to Do and Not to Do about Some Inevitable Problems*, 28 Just. Sys. J. 283 (2007).

*Amici* cite several federal statutes that prohibit solicitations by candidates, but each is much more narrowly tailored to cover only those situations in which coercion could be present. *E.g.*, 18 U.S.C. § 602 (prohibiting knowing solicitation of federal employees by members of Congress). The ban on solicitations directed at federal contractors (see 52 U.S.C. § 30119) relates to contributions that are unlawful; it therefore resembles the solicitation restrictions upheld in *McConnell* on a rationale inapplicable to

solicitations of contributions that lawfully may be received by the candidate's committee.[7]

A prohibition against soliciting lawyers and parties appearing before a judge surely could be justified on this basis; and the rationale might extend to direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate. But it provides no basis for upholding Canon 7C(1)'s across-the-board restriction.[8]

### E. The Court Should Reverse The Judgment Below On The Ground That Petitioner's Conduct Was Protected By The First Amendment.

Some *amici*, but not respondent, argue that—if the Court concludes that petitioner's conduct is protected by the First Amendment—the Court should hold only that Canon 7C(1) is invalid as applied to petitioner and not invalid on its face. Conference of Chief Justices Am. Br. 29-34.

Petitioner's interest here is to vindicate her own First Amendment rights by overturning the determi-

---

[7] The Hatch Act's restrictions apply to federal employees (see 5 U.S.C. § 7323), not candidates, and therefore infringe different First Amendment interests and fall under the different, and more limited, First Amendment constraints applicable to restrictions on government employees' speech. The same is true of restrictions on judges' activities other than activities relating to a judge's own election.

[8] Some *amici* advocate "preservation of political equality" as an interest justifying the solicitation ban. Dorsen *et al.* Am. Br. 12. But, as *amici* themselves recognize (*id.* at 14-15), the Court has already rejected that interest as a justification for restrictions on speech. There is no basis for a different result here.

nation that she engaged in improper conduct and the imposition of public disciplinary sanctions, including the assessment for court costs. See Pet. 5-8. Holding Canon 7C(1) invalid either as applied or on its face would accomplish that end.[9]

Even if the Court were to hold the regulation invalid as applied, however, Florida and other States with similarly-broad restrictions would presumably wish to move quickly to revise those restrictions in accordance with this Court's opinion. Otherwise, a significant amount of speech protected by the First Amendment could be chilled by maintaining in place prohibitions that encompass large categories of constitutionally-protected speech.

---

[9] *Amici* assert that facial invalidation is not an option here because petitioner did not preserve a separate overbreadth challenge. In the First Amendment context, however, a law may be invalidated on its face "because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted). That is the case here. Petitioner is not invoking the separate First Amendment overbreadth doctrine that permits invalidation of a statute on its face even if application of the challenged regulation to the plaintiff's own conduct would not violate the First Amendment. Cf. *Bd. of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U.S. 469, 483 (1989) ("the principal advantage of the over-breadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*").

## CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

ERNEST J. MYERS
LEE W. MARCUS
*Marcus & Myers, P.A.*
*1515 Park Center Drive*
*Suite 2G*
*Orlando, FL 32835*
*(407) 447-2550*

EUGENE R. FIDELL
*Yale Law School*
*Supreme Court Clinic*[10]
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

ANDREW J. PINCUS
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
*Counsel of Record*
PAUL W. HUGHES
*Mayer Brown LLP*
*1999 K Street NW*
*Washington, DC 20006*
*(202) 263-3127*
*mkimberly@*
*mayerbrown.com*

*Counsel for Petitioner*

JANUARY 2015

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