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Williams-Yulee and the Inherent Value of Incremental Gains in Judicial Impartiality

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I. INTRODUCTION

There is a public perception that the judiciary is being bought. Since the early 1990s, judicial election fundraising has skyrocketed.[1]

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Over $30.6 million was raised by judicial candidates' committees during the 2011-12 biennium.[2] Independent spending has surged as well.[3]

In an ideal world, the majority of the money would be devoted to electing the best candidate rather than seeking particular judicial results. For the public, the reality is different. Americans at large believe that campaign contributions impact judicial decisions.[4] Businesses share this sentiment.[5]

Perhaps most troubling of all, judges themselves share these concerns. In a 2006 New York Times interview, Ohio Supreme Court Justice Paul Pfeifer said, "I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote."[6] And former Texas Supreme Court Chief Justice Wallace Jefferson wrote:

> In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court,

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1. *See* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, at 5 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf, *archived at* http://perma.cc/GJ7F-96ZN; ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-2010, at 5 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/NewPolitics2010.pdf, *archived at* http://perma.cc/BEV5-KX2E.

2. ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12, 6 (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf, *archived at* http://perma.cc/5J6J-E9EK. Judicial candidates in 2013 raised $1.5 million. *See Contributions to State Supreme Court Candidates in Elections in 2013*, NAT'L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/show-me?y=2013&f-core=1&c-r-ot=J# (last visited Dec. 31, 2014). A total figure for the 2014 elections won't be available for a few months because some final campaign finance filings still need to be filed and analyzed. *See Contributions to State Supreme Court Candidates in Elections in 2014*, NAT'L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/show-me?y=2014&f-core=1&c-r-ot=J# (last visited Dec. 31, 2014) (indicating 82% of reports for 2014 are available as of December 31, 2014).

3. *See also* BANNON, *supra* note 2, at 5 (showing rise of independent spending by graphing percentages of candidate and non-candidate spending from 2001 to 2012).

4. *See, e.g.*, Greenberg Quinlan Rosner Research Inc. et al., Justice at Stake Frequency Questionnaire 4 (2001), *available at* http://www.justiceatstake.org/media/cms/JASNational SurveyResults_6F537F99272D4.pdf, *archived at* http://perma.cc/TZA3-4FJ7 (indicating 76% of respondents believe campaign contributions made to judges have at least "some influence" on their decisions).

5. Zogby International, Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 4 (2007), *available at* http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf, *archived at* http://perma.cc/V8QQ-48FS (indicating that 79% of respondents believed campaign contributions have at least "some influence" on judges' decisions).

6. SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, at 27 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf, *archived at* http://perma.cc/KT7T-SD4F.

> you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical.[7]

To combat the detrimental impacts of money on the judiciary, many courts and legislatures have enacted rules specific to judicial campaigns to try to limit the elections' negative effects on judicial impartiality and the appearance of impartiality. One such restriction is a prohibition on personal solicitation of contributions by candidates, which is found in the ABA Model Code of Judicial Conduct and some form of which is currently in place in thirty of the thirty-nine states that elect judges.[8] The question before the U.S. Supreme Court in *Williams-Yulee v. The Florida Bar* is whether Canon 7(C) of Florida's Judicial Code of Conduct, prohibiting personal solicitation by judicial candidates,[9] violates the First Amendment rights of judicial candidates.[10] The identity of the person making "the ask" is important: In a recent Brennan Center / Justice at Stake poll of registered voters in the thirty-nine states that elect judges, sixty-three percent of respondents stated that it would decrease their confidence in courts if judicial candidates could ask for contributions directly.[11]

The personal solicitation prohibition is one part of a larger set of policies that states utilize to safeguard judicial impartiality and the appearance of impartiality. Because judicial impartiality is on a spectrum rather than being a dichotomous value, gains in the reality and appearance of judicial impartiality have inherent value. And, in this case, the gains resulting from the prohibition outweigh the First

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7. Wallace B. Jefferson, *Make Merit Matter by Adopting New System of Selecting Judges*, HOUS. CHRON. (Mar. 21, 2009), http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php.

8. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(8) (2010); AM. JUDICATURE SOCIETY, METHODS OF JUDICIAL SELECTION, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 31, 2014) (listing thirty-nine states as having judicial elections of some kind). Twenty-two of the states have prohibitions that are similarly broad compared to Florida's prohibition. Petition for Writ of Certiorari at 13 & n.6, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (June 17, 2014), 2014 WL 2769040.

9. "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. . . ." FLA. CODE JUD. CONDUCT 7C(1).

10. Williams-Yulee v. The Florida Bar, 138 So. 3d 379 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014).

11. 20/20 INSIGHT LLC, 39 STATES THAT HOLD JUDICIAL ELECTIONS 1 (Dec. 14, 2014), *available at* http://www.brennancenter.org/sites/default/files/analysis/Williams-Yulee%20Poll%20Dec%202014.pdf, *archived at* http://perma.cc/LE56-48C8.

Amendment burden. Consequently, the Supreme Court should uphold the solicitation prohibition as constitutional.

In this Article, we first examine the proper standard of review and determine that closely drawn scrutiny is appropriate. Next, we explore whether the personal solicitation prohibition satisfies closely drawn scrutiny and determine that it does. Finally, we briefly discuss the issue of judicial elections generally and their impact upon judicial impartiality and the appearance of judicial impartiality.

II. CLOSELY DRAWN SCRUTINY IS THE PROPER STANDARD OF REVIEW

A key issue at the outset is to determine the type of speech at issue in this case and the resulting implications for the standard of review. The Supreme Court has explained that the "degree of scrutiny turns on the nature of the activity regulated."[12]

Most campaign finance provisions are subject to one of three levels of scrutiny, from least to most intensely scrutinizing: exacting scrutiny, closely drawn scrutiny, and strict scrutiny. For example, disclosure requirements for political spending are subject to the relatively deferential "exacting scrutiny," because they "may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[13] Contribution limits are subject to "closely drawn scrutiny" because a

> contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution . . . . At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.[14]

On the far end of the spectrum, independent expenditures bans are subject to strict scrutiny because the activity at issue has a very significant speech component and is greatly burdened.[15]

Contrary to the lofty language bandied about in the Supreme Court briefs filed by those opposing the personal solicitation prohibition,[16] Florida's Canon 7(C) is not a restriction of "core"

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12. FEC v. Beaumont, 539 U.S. 146, 162 (2003).

13. Citizens United v. FEC, 558 U.S. 310, 366 (2010).

14. Buckley v. Valeo, 424 U.S. 1, 21 (1976).

15. *Citizens United*, 558 U.S. 310, 340 (2010) (citing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

16. Brief for Petitioner at 8, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Nov. 12, 2014), 2014 WL 6465548 at *8 (Canon 7(C) "prohibits speech at the core of the First Amendment—the speech of candidates for elective office."); Brief for Am. Civil Liberties Union & Am. Civil Liberties Union of Fla. as Amici Curiae Supporting Petitioners at 19, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Nov. 24, 2014), 2014 WL

political speech. Even the Petitioner partially concedes this point.[17] Instead, a solicitation by a would-be judge is a hybrid of speech and non-speech activity that asks the listener to engage in a financial transaction. Though there is some speech element to the request,[18] it hardly seems to be of the stuff the Founders would have thought to be a part of our most basic democratic rights.[19] Just as saying "I hereby sell you Blackacre" or falsely shouting "Fire!" in a crowded theater rightly have legal implications that cannot be entirely avoided by invoking the First Amendment,[20] even though both statements have speech components, one similarly should not be permitted to invoke the First Amendment so strongly for this financial transaction either. Beyond this, the prohibition on personal solicitation does not actually prohibit all solicitations—it merely requires that the message come from someone other than the judge. The canon thus represents a marginal restriction on speech.

Given this, the proper standard of review in this case is "closely drawn" scrutiny rather than strict scrutiny.[21] This standard requires

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6706840 at *19 [hereinafter Brief for Am. Civil Liberties Union] ("A citizen's advocacy of his or her own fitness for public office is speech that lies at the core of the First Amendment."); Brief for Randolph Wolfson et al. as Amici Curiae Supporting Petitioners at 6, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Nov. 24, 2014), 2014 WL 6706839 at *6 ("The Personal Solicitation Clause Regulates Core Political Speech.").

17. Brief for Petitioner, *supra* note 16, at 12 ("[S]olicitation of money by itself may not constitute a purely political message.").

18. *Cf. Buckley* discussing contribution limits and the extent to which contributions qualify as speech.

19. *See* Brief for the Brennan Ctr. for Justice at N.Y.U. School of Law et al. as Amicus Curiae in Support of Respondent-Appellee at 1–13, McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (No. 12-536) (July 24, 2013), 2013 WL 3874429 at *1–13 (arguing that the Founders were obsessed with protecting the integrity of the new government from improper influences). *But see* McCutcheon v. FEC, 134 S. Ct. 1434, 1440–41 (2014):

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and *contribute to a candidate's campaign*.

(emphasis added). For a brief analysis on this passage from *McCutcheon*, see David Earley, *Is Buying Influence a Right?*, BRENNAN CTR. FOR JUSTICE (Oct. 15, 2014), *available at* http://www.brennancenter.org/blog/is-buying-influence-a-right, *archived at* http://perma.cc/5ZME-RCQK.

20. Schenck v. United States, 249 U.S. 47, 52 (1919).

21. Siefert v. Alexander, 608 F.3d 974, 988 (7th Cir. 2010). *See also* In re Fadeley, 802 P.2d 31, 41 (Or. 1991); *but see* Wolfson v. Concannon, 750 F.3d 1145, 1156 (9th Cir. 2014) (applying strict scrutiny and striking down the prohibition as unconstitutional); Carey v. Wolnitzek, 614 F.3d 189, 198 (6th Cir. 2010) (same); Republican Party of Minn. v. White, 416 F.3d 738, 763–64 (8th Cir. 2005) (same); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (same); Williams-Yulee v. The Florida Bar, 138 So. 3d 379, 384 (Fla. 2014) (applying strict scrutiny and upholding the solicitation prohibition as constitutional); Simes v. Ark. Judicial Discipline and Disability Comm'n, 247 S.W.3d 876, 879 (Ark. 2007) (same).

that the law be "closely drawn" to a "sufficiently important interest."[22] This standard stems from the Supreme Court's 1976 *Buckley v. Valeo* decision, which (for better or for worse) is still the cornerstone of modern campaign finance law today.[23] As the Court explained in upholding contribution limits, "a limitation upon the amount that any one person or group may contribute to a candidate . . . entails only a marginal restriction upon the contributor's ability to engage in free communication."[24] The *McConnell* Court also applied closely drawn scrutiny while upholding the various solicitation restrictions in the Bipartisan Campaign Reform Act of 2003.[25]

Note that the fact that a prohibition rather than a limit is involved does not cause the standard of review to shift from closely drawn scrutiny to strict scrutiny. The Supreme Court expressly rebutted this argument in its 2003 *Beaumont* case, explaining that "[i]t is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself."[26] The Second Circuit similarly applied closely drawn scrutiny in upholding a Connecticut prohibition on political contributions by contractors in 2010.[27]

III. FLORIDA'S CANON 7(C) SURVIVES CLOSELY DRAWN SCRUTINY

As stated above, the prohibition of personal solicitation must be "closely drawn" to a "sufficiently important" government interest. We will first examine the latter prong.

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22. FEC v. Beaumont, 539 U.S. 146, 162 (2003); Buckley v. Valeo, 424 U.S. 1, 25 (1976); Siefert v. Alexander, 608 F.3d 974, 988 (7th Cir. 2010).

23. In fact, until the Court's recent decision in *McCutcheon*, no portion of Buckley had been expressly overruled, in spite of decades of nuanced campaign finance jurisprudence coming after the decision. With *McCutcheon*, however, the Court signaled that a new era may be upon us in which *Buckley* is no longer sacred. Though *Buckley* upheld an aggregate contribution limit, Chief Justice Roberts explained that *Buckley* merely "provides some guidance" and "does not control." McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014). Hence, according to Roberts, it was not a true overruling. The dissent, however, expressly stated that the majority was partially overruling *Buckley*. McCutcheon v. FEC, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting).

24. Buckley v. Valeo, 424 U.S. 1, 20 (1976).

25. *See* McConnell v. FEC, 540 U.S. 93, 136–38 & n.40 (2003), *overruled in part on other grounds by* Citizens United v. FEC, 558 U.S. 3010, 365–66 (2010); *see also id.* at 177, 181–82. *But see id.* at 314 (Kennedy, J., concurring in part in the judgment and dissenting in part) (applying strict scrutiny to solicitation prohibition). *See also* Siefert v. Alexander, 608 F.3d 974, 988 (7th Cir. 2010) (applying closely drawn scrutiny while noting Justice Kennedy's preference for the application of strict scrutiny).

26. FEC v. Beaumont, 539 U.S. 146, 162 (2003).

27. Green Party of Conn. v. Garfield, 616 F.3d 189, 199, 205 (2d Cir. 2010) (quoting *Beaumont*, 539 U.S. at 149, 161–62).

A. The Government's Interests Are Sufficiently Important

There are at least two distinct interests in this case: actual judicial impartiality and the public's confidence in the integrity of the judiciary, particularly the appearance of judicial impartiality. There is no dispute among the parties that judicial impartiality is an important government interest.[28] Indeed, the Supreme Court has recognized that judicial impartiality is a state interest of the highest order.[29]

The primary dispute is over the definition of the appearance of impartiality and whether that is an interest of the state. In her brief, the Petitioner elides over the question of whether the appearance of impartiality is an important government interest and instead moves straight into inquiries about how broad such an interest should be and how it would be difficult to make principled constitutional decisions if a broad conception of the appearance of impartiality is accepted by the Court.[30] To be sure, advocates of prohibiting personal solicitation by judicial candidates should not be permitted to talismanically invoke a broad definition of the appearance of impartiality and believe that settles the question. But where reasonable evidence suggests that the appearance of impartiality should be viewed expansively, the Court should give this idea due consideration.

In fact, the Court has already strongly endorsed the idea that the appearance of impartiality extends beyond particular controversies:[31] "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[32] Justice Kennedy explained in *Caperton* that "public confidence in the fairness and integrity of the nation's elected judges . . . is a vital state interest."[33] Justice O'Connor has explained that "[the] crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold."[34] As the Supreme

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28. *See* Brief for Petitioner, *supra* note 16, at 14.

29. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

30. Brief for Petitioner, *supra* note 16, at 14–17.

31. This notion was suggested in *Republican Party of Minnesota v. White,* 536 U.S. 765, 774–84 (2002).

32. Mistretta v. United States, 488 U.S. 361, 407 (1989).

33. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009) (internal citation and quotation marks omitted).

34. Letter from Justice Sandra Day O'Connor (Aug. 2010), *in* JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-09 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf, *archived at* http://perma.cc/TGJ9-WNA8.

Court said in *Offut v. United States*, "[J]ustice must satisfy the appearance of justice."[35]

Indeed, the appearance of impartiality must be an important state interest. First, *Caperton*, decided seven years after *White*, was decided based upon an appearance of partiality rather than a finding of actual partiality.[36] In fact, the *Caperton* Court expressly stated that it was not determining actual bias.[37] Hence, the appearance of impartiality raises a critical due process issue.

Second, there are societal interests at stake beyond whether the litigants in an individual case appear to have been treated fairly. It is only through respect for the judiciary's judgments that the legislature, the executive, and the public will adhere to those decisions. If any of those entities begin to routinely disregard judicial decisions, the results could be truly disastrous.

B. Prohibiting Personal Solicitation Is Closely Drawn to the Government's Interests

Before delving into the minutia of tailoring, consider the nature of the campaign finance system and the laws and regulations that comprise it. An individual campaign finance provision is a part of a larger whole designed to prevent attempts at circumvention. As Samuel Issacharoff and Pamela Karlan explained in their influential article, *The Hydraulics of Campaign Finance Reform*, "[P]olitical money—that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests—is a moving target."[38] As new strategies for circumventing the campaign finance laws are devised, new regulations must be devised, which in turn result in new circumvention strategies, and so on. In this sense, campaign finance regulation is unlikely to ever truly be "solved"—instead it fluctuates between more and less effective rules. Requiring a lone campaign finance provision to single-handedly solve the problem it seeks to address is impossible. Recusal procedures can complement campaign finance rules and judicial ethics codes, but, as will be discussed below, are not sufficient as standalone measures to ensure public confidence in the judiciary.

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35. 348 U.S. 11, 14 (1954).

36. *Caperton*, 556 U.S. at 886–87 ("On these extreme facts the probability of actual bias rises to an unconstitutional level.").

37. "We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias." *Id.* at 882.

38. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

At the same time, Issacharoff and Karlan rightly warned against going too far in regulating political activity.[39] Excessive regulation can smother the electoral process—though we might elect officials free from improper influences, we might also harm our democratic process by making it too difficult for a proper debate to occur and thereby deprive the electorate of the very information required to make an informed decision in selecting their government. Lawmakers and rulemakers should be cognizant of this fact as they go forward.

With this in mind, consider the prohibition of personal solicitation and how it furthers judicial impartiality and the appearance of impartiality.

First, the canon furthers judicial impartiality by diminishing the possibility that judges may, consciously or unconsciously, rule a certain way because of a financial contribution that was or was not given. As Justice Pfeifer's and Justice Walker's quotations in this Article's introduction illustrate, money given directly to judicial candidates is often meant to bolster lawyers' and litigants' chances of success in the courtroom. The Seventh Circuit explained that "[a] direct solicitation closely links the quid—avoiding the judge's future disfavor—to the quo—the contribution."[40] Prohibiting personal solicitation insulates judges to some degree from this potential exchange and leaves the business of asking for money, which cannot entirely be eliminated from the process, to someone else.

Second, the canon furthers the appearance of judicial impartiality by reducing the public's impression that solicitation may lead a judge to favor one party over another in court. The Seventh Circuit explained that the "appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means."[41] This rationale is borne out by polling. Of the sixty-three percent of respondents in the Brennan Center / Justice at Stake poll (referenced in the introduction of this Article) who stated that they would lose confidence in the courts if judicial candidates could personally ask for contributions,[42] fully eighty-one percent said that direct personal solicitation would lower their confidence "a great deal."[43]

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39. *Id.* at 1716 ("In other words, how far down the path of First Amendment destruction must the argument for reform be taken? These are critically important issues because there is every reason to expect moneyed interests to emerge in whatever crevices remain.").

40. Siefert v. Alexander, 608 F.3d 974, 989 (7th Cir. 2010).

41. *Id.* at 989–90.

42. 20/20 INSIGHT LLC, *supra* note 11.

43. *Id.*

Beyond this, personal solicitations lead lawyers and litigants who will appear before the judge to fear that those who do not contribute will be disfavored in court.[44] As the Arkansas Supreme Court explained, "Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court . . . inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate."[45]

One key to understanding *Williams-Yulee* is in recognizing that an incremental gain in judicial impartiality and the appearance thereof is inherently valuable because judicial impartiality falls along a spectrum rather than being a dichotomous value. We can see this is true by recognizing many potential sources of bias that we tolerate even though we may wish they were not present. A judge may have worked for a law firm representing one of the parties. A judge may have spent much of his or her career as a prosecutor or public defender. A judge may be friends with one of the attorneys. A judge may have received a campaign contribution from one of the parties.[46] In a perfect world, we could eliminate all potential sources of bias. But judges are human, court resources are finite, and in some circumstances we are societally willing to sacrifice some degree of potential impartiality in exchange for something else. Beyond this, were we to require a judge to step aside from every case in which there exists any possibility of partiality, however slight, the resulting recusal parade might itself threaten the public's confidence in the courts.[47]

It is tempting to perceive partiality as being either present or not because ultimately partiality will (or should) either result in a recusal or it will not. And in at least some circumstances, prohibiting personal solicitation could prevent additional partiality such that it will turn a situation where recusal is warranted into a situation where recusal is not (compared to the alternate universe where personal

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44. *See* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 379–80 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their prospects in court).

45. Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 882 (Ark. 2007).

46. The Seventh Circuit noted that "[i]t would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution." Siefert v. Alexander, 608 F.3d 974, 990 (7th Cir. 2010).

47. *Cf.* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting) ("I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision [to require recusal] will undermine rather than promote these values.").

solicitation is the norm). Yet, we rightly want more than the minimally acceptable level of impartiality in our judges. Just as the state can set recusal standards higher than due process requires,[48] the state can similarly endeavor to further the reality and appearance of impartiality.

The validity of prohibiting personal solicitation is further bolstered by the fact that many more effective provisions are simply unavailable. Recusal, while a critical tool, is no panacea, as we discuss below. Under existing law, candidates cannot be prohibited from fundraising and be required to accept public financing.[49] Large independent expenditures cannot be restricted.[50] Preventing judicial candidates from knowing who gave to their campaigns is difficult to enforce and impractical. In a country where thirty-nine states elect judges, and campaigns require money, prohibiting personal solicitation by judicial candidates is a notably workable method to strengthen our courts.

C. Alternative Provisions Complement, Rather Than Replace, Prohibiting Personal Solicitation

Many arguments have been made that Florida's Canon 7(C) is overinclusive, underinclusive, or that alternative provisions would be as effective as the solicitation prohibition without impacting speech. We will address some of them here.

Some have suggested that a constitutional alternative exists in prohibiting face-to-face in-person solicitations, but allowing other solicitations that lack the "coercion effect," such as the mailed solicitation at issue in this case.[51] Though mailed solicitations[52] may be *less* concerning than personal, face-to-face solicitations, this does not necessarily mean that mailed solicitations are *not* concerning. A would-be judge personally making a solicitation is sufficiently concerning to justify a prohibition, independent of any *additional* concerns that stem from face-to-face solicitation. Those guarding the

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48. *Caperton*, 556 U.S. at 889.

49. Buckley v. Valeo, 424 U.S. 1, 57 n.65, 97–108 (1976) (upholding federal public financing system based upon voluntary surrender of First Amendment rights).

50. Citizens United v. FEC, 558 U.S. 310, 360 (2010) ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

51. *See, e.g.*, Brief for Petitioner, *supra* note 16, at 22–23; Brief for Am. Civil Liberties Union, *supra* note 16, at 19.

52. And their ilk, such as phone solicitations, text message solicitations, email solicitations, newspaper solicitations, solicitations during a speech to a large audience, solicitations at fundraisers, etc.

integrity of the judiciary no more have to parse out this difference than the differences between direct solicitations from the bench, solicitations just outside the courtroom, solicitations on the courthouse steps, and solicitations around the corner at a coffee shop.

The argument that it is improper to regulate nonjudge candidates but perhaps acceptable to regulate sitting judges is similarly misguided. The fact that a sitting judge making solicitations raises *additional* concerns (most notably, that a contribution might be seen as inducing a favorable decision in the near future rather than in the somewhat more distant future after an election) does not mean that would-be judge solicitations are not concerning. If this were not the case, there would be no constitutional justification for imposing contribution limits on non-incumbent candidates for nonjudicial office. Yet, the courts have routinely upheld such provisions for decades.[53] The argument improperly conflates "less concerning" with "not concerning."

Though recusal is a useful and important tool in the quest for judicial impartiality, it cannot and should not serve as the primary means of safeguarding judicial impartiality and the appearance thereof. Recusal is a narrow mechanism designed to remove a specific judge from a particular case due to the possibility of bias. But the prohibition of personal solicitation addresses the systematic perception that judges are influenced through a quid pro quo of asking for and accepting contributions in exchange for favorable consideration. And on a case-by-case basis, recusal presents complicated and concerning issues of administrability.[54] In contrast, a prohibition on personal solicitation offers an easily administered bright-line rule well targeted to protect public confidence.

Further, recusal motions often require judges to assess themselves, and recusal thus may remain underenforced. As the Supreme Court explained in *Caperton*, a judge may "simply misread[] or misapprehend[] the real motives at work in deciding the case."[55]

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53. The Supreme Court has approved of contribution limits that apply to "all candidates." *See, e.g.*, Davis. v. FEC, 554 U.S. 724, 737 (2008) ("This Court has previously sustained the facial constitutionality of limits on discrete and aggregate individual contributions and on coordinated party expenditures.").

54. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 893–97 (Roberts, C.J., dissenting) (listing forty questions that will now have to be answered in light of *Caperton* majority opinion).

55. *Caperton*, 556 U.S. at 883; *see also* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. REV. 943, 945 (2011) ("We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."); Melinda A. Marbes, *Refocusing Recusals: How the Biased Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 251 (2013) ("Since we tend to consistently and unconsciously downplay our own biases while exaggerating

Recusal is also likely underused because recusal motions are costly and risky for a party. A litigant may be reluctant to seek recusal out of fear that the motion will be denied, offending the challenged judge while adding to the cost of litigation.[56] Furthermore, a dramatic increase in judicial recusal would interfere with the democratic role judges are required to perform.

Finally, contribution limits are not an adequate substitute for the canon. The problem is that a judge personally making a solicitation is uniquely damaging to judicial impartiality and, particularly, the appearance of impartiality. Though limits certainly contribute to greater impartiality and a perception of such, the indelible image of a judge (or would-be judge) holding out his or her hand for a contribution cannot be erased.

IV. THE FACT OF JUDICIAL ELECTIONS

An overarching issue in this case is the fact of judicial elections generally and their effect upon impartiality and the appearance of impartiality.[57] The Supreme Court has implied that since some states have chosen to utilize elections to fill judicial vacancies rather than some other means, any resulting appearance of partiality is simply the fault of the state and therefore the state cannot remedy this problem by means of infringing upon the First Amendment.[58]

There are a couple of responses to this. First, as discussed above, impartiality runs along a spectrum rather than being a dichotomous value, so there are reasons to want incremental gains in impartiality and the appearance of impartiality even if it does not result in a judge changing his or her recusal decision. Even if there is some infringement of the First Amendment, there are very real benefits to be had that outweigh First Amendment concerns.

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biases in others—this difference in perspective will lead to systemic errors in applying the current substantive standards for disqualification."); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 479 (2006) ("[J]udges may convince themselves they can rule fairly, unaware that the currents of bias often run deep").

56. *See* James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CTR. FOR JUSTICE 20 (2008).

57. This topic likely deserves its own separate article, but we will endeavor to briefly address it here nonetheless because of the issue's ubiquitous influence on this case.

58. Republican Party of Minn. v. White, 536 U.S. 765, 787 (2002); *id.* at 788 (O'Connor, J., concurring). Notably, O'Connor has publicly stated that her vote with the majority in *White*, which was decided 5-4, was a mistake. Linda Greenhouse, *Who's Sorry Now*, N.Y. TIMES (May 1, 2013), http://opinionator.blogs.nytimes.com/2013/05/01/whos-sorry-now/.

Second, this argument misses the larger point that the Court cannot simply shrug away partiality concerns as having been brought on by the state's own actions. In *White*, the Court explained one conception of how judicial elections and the First Amendment interact by saying that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles."[59] The problem with this formulation is that the states cannot "bring upon themselves"[60] the partiality of their judges any more than they can "bring upon themselves" the unconstitutional infringement of First Amendment rights.[61] There are competing constitutional rights on each side of the equation where judicial elections are concerned, and each deserves to be taken seriously.[62] In her *White* concurrence, Justice O'Connor at least hinted at the idea that judicial elections and the First Amendment may be incompatible. Indeed, she devoted her entire concurrence to "express[ing her] concerns about judicial elections generally."[63] Though we are not prepared to suggest that judicial elections are inherently incompatible with the First Amendment and due process concerns, we respectfully would ask the Court to not so quickly dismiss partiality concerns as simply being a creature of the state (perhaps a crocodile)[64] that its citizens have to live with. The Court should instead embrace its statement in *White* that it neither "assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[65]

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59. *White*, 536 U.S. at 788 (internal citations, ellipses, and quotation marks omitted).

60. *See id.* at 792 (O'Connor, J., concurring).

61. *See* J.J. GASS, BRENNAN CTR. FOR JUSTICE, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 10 (2004) ("The fundamental problem with that assertion is that the due process rights of individual litigants are not the state's to forfeit.").

62. *Cf.* Wolfson v. Concannon, 750 F.3d 1145, 1149 (9th Cir. 2014) ("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.").

63. *White*, 536 U.S. at 788 (O'Connor, J., concurring).

64. "The late Honorable Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

65. *White*, 536 U.S. at 783.

V. CONCLUSION

Judicial elections pose unique constitutional difficulties by creating an environment ripe for conflict between two vital interests: free speech and the integrity of the judicial branch. The personal solicitation prohibition represents one facet in a complex system designed to appropriately respect these vital interests that are in tension. Incremental gains in judicial impartiality and the appearance of impartiality are inherently valuable and the Court should give this fact due weight. The Supreme Court should uphold Florida's Canon 7(C) as constitutional.