No. 13-1499

In The
Supreme Court of the United States

LANELL WILLIAMS-YULEE,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR FREE SPEECH FOR PEOPLE AND THE HONORABLE JAMES C. NELSON AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of Respondent The Florida Bar.[1]

Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy in the constitutional law of campaign finance. Free Speech For People's thousands of supporters around the country engage in education and non-partisan advocacy to encourage and support effective government of, by, and for the American people.

The Honorable James C. Nelson is a retired Justice of the Montana Supreme Court. He served in that capacity for nearly twenty years, from 1993 to 2013. While on that Court, Justice Nelson wrote a highly-regarded dissenting opinion that addressed the dangers of excessive money in our political system. See *W. Tradition P'ship* v. *Att'y Gen.,* 271 P.3d 1, 34-36 (Mont. 2011) (Nelson, J., dissenting), rev'd *sub nom. Am. Tradition P'ship* v. *Bullock*, 132 S. Ct. 2490 (2012). In his 2004 election campaign, he found it necessary to personally solicit campaign contributions,

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than amici, their members, or their counsel contributed monetarily to preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. The consent letters have been lodged with the Clerk of this Court.

which is allowed in Montana. Justice Nelson has been an outspoken advocate for civil rights, and he continues to write and speak publicly regarding the dangers of unfettered political spending by wealthy and corporate interests, including the effect of such spending on judicial elections. Justice Nelson is also a member of the Board of Directors of Free Speech For People. He participates as an amicus curiae in this matter in his individual capacity.

SUMMARY OF ARGUMENT

Florida's personal solicitation clause is justified by the state's interest in preserving the dignity of the judiciary. Preservation of judicial dignity underlies judicial ethics regulation across a broad range of electoral and non-electoral contexts, and (along with other interests, *e.g.*, impartiality) supports the challenged clause because a state may properly determine that personal solicitation by a judge detracts from the dignity of judicial office. Moreover, petitioner's "narrow tailoring" arguments do not apply to the dignity interest.

The dignity of the judiciary is compelling because it grounds our legal system. From the smooth functioning of everyday courtroom proceedings to the public legitimacy of controversial legal decisions, our system depends in large part on treating judges as entitled to a special degree of respect. Consequently, preservation of the dignity of the judiciary has long

been recognized as justifying conduct and speech limits on courtroom participants. But just as importantly, state and federal judiciaries have developed rich ethics codes designed to preserve judicial dignity *outside* the courtroom. These codes hold judges to a particularly high standard even in their personal lives, because judges do not merely administer the law – they *symbolize* the law. For that reason, judges (like police officers) are subject to discipline for personal conduct and speech that is legal but undignified.

In that vein, Florida's judicial ethics code (like many others) embodies the principle that personal fundraising by a sitting or prospective judge is undignified, whether in the context of charitable organizations, political parties, or the judge's own election campaign. The injury to the dignity interest occurs when solicitees and the public observe a judge – who may hold or seek the power of life and death – stooping to asking for handouts. When a judge acts as a supplicant (before anyone, but especially before the very lawyers who will appear in her court) it detracts from the dignity of the judicial office.

The personal solicitation clause in Canon 7C(1) of the Florida Code of Judicial Conduct is narrowly tailored to the compelling interest in preserving judicial dignity because it prohibits precisely the activity that detracts from that dignity: fundraising solicitations from the judge herself. Petitioner's arguments that the clause is under- or over-inclusive are oriented towards attacking a different compelling

government interest, and simply do not apply to the dignity interest. The clause's connection to the state's dignity interest is not threatened by hypotheticals involving *someone else* personally soliciting donations, or a judge soliciting something *besides* money. The precise injury that the state has identified to judicial dignity is a sitting or prospective judge *herself* asking for *money*, whether in person, by phone, or in writing. That is precisely what the clause prohibits, while leaving open ample opportunities for others to ask for money, or for the judge to ask for other things. It hardly poses an excessive burden on judicial candidates to insist that fundraising requests be made in the names of campaign volunteers or staff, rather than those who may sit in judgment of life and death.

ARGUMENT

I. The dignity of the judiciary is a compelling state interest.

The state and lower federal courts have invoked three principal categories of interests in support of personal solicitation restrictions for judicial candidates: (1) preserving judicial *impartiality* or integrity, *e.g.*, *Siefert* v. *Alexander*, 608 F.3d 974, 989 (7th Cir. 2010) (noting interest to "preserve judicial impartiality"); Pet. App. 10a (noting interest in "protecting the integrity of the judiciary"); (2) preserving the *appearance* of (i.e., public confidence in) judicial impartiality, *e.g.*, *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (noting

"the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity"); Pet. App. 10a (noting separate interest in "maintaining the public's confidence in an impartial judiciary"); and (3) preventing coercion (or its appearance) when judges solicit lawyers or litigants who may appear before them, *Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) (noting interest in preventing "the coercive effect, or its appearance").

These interests are complemented by another government interest – the *dignity* of the judiciary – which serves as a fundamental justification for longstanding traditions, laws, and principles of judicial ethics that apply to judicial conduct in general, and judicial election campaigns in particular. Protection of judicial dignity is compelling because respect for judges and courts is important for smooth courtroom functioning and democratic legitimacy of judicial decisions – in sum, for maintaining the rule of law. Many longstanding and well-accepted restrictions on judicial conduct and speech – including prohibitions on charitable solicitations and political fundraising for other candidates – are justified to a substantial degree by the interest in preserving judicial dignity. The conduct proscribed by the canon at issue in this case (campaign fundraising solicitation by sitting or aspiring judges) poses an even greater threat to judicial dignity than that other prohibited conduct.

A. Tradition, law, and judicial ethics establish the government's interest in preserving the dignity of the judiciary.

Judicial dignity begins with the laws and traditions of the courtroom itself, which are designed to command respect for the judge:

> Court sessions generally commence when the bailiff says, "All rise for the Honorable. . . ." The judge then enters the room wearing judicial robes and takes his or her seat on an elevated platform; the gallery is seated; and the parties' first words to the court or judge are, "May it please the court" or "Your Honor."

Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 193-194 (2011). This demand for respect derives originally from "the aristocratic tradition of according dignity, and thus deference, to high-ranking institutions and officers." *Id.* at 194. But it is no mere vestige; as explained in Part I.B, *infra*, it remains an essential feature of our judicial system because it is necessary for smooth courtroom functioning. Consequently, it is enforceable through the contempt power. "Courts independently must be vested with 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach and insults of pollution.'" *Int'l Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 831 (1994) (alteration in original) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204,

227 (1821)). Moreover, the law does not claim a bright-line distinction between the dignity of the *court* and the dignity of the *judge*. At trial, "the court is so much the judge and the judge so much the court that the two terms are used interchangeably * * * and contempt of the one is contempt of the other," such that any contempt of court in a judge's presence is "an offense against his dignity." *Sacher* v. *United States*, 343 U.S. 1, 12 (1952).

This power to protect the dignity of the judiciary within the courtroom was familiar to the Founders and already well established by the time the First Amendment was enacted. See Judiciary Act of 1789 § 17, 1 Stat. 83 (authorizing federal courts to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same") (codified as amended at 18 U.S.C. 401); 4 William Blackstone, *Commentaries on the Laws of England* *126 (1765) ("threatening or reproachful words to any judge sitting in the courts" are punishable by imprisonment, and "even in the inferior courts * * * contemptuous behavior, is punishable with a fine by the judges there sitting"). And it is now considered "unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile* v. *State Bar*, 501 U.S. 1030, 1071 (1991).

But outside the courtroom, judges do not *enforce* the dignity of the judiciary. Rather, they are *restricted*

in their speech and conduct by pervasive ethics regulations designed to preserve that dignity.

Preservation of judicial dignity is a general principle undergirding the entire structure of judicial ethics regulation. But it is also can be an enforceable requirement in its own right. Outside the election context, canons of judicial ethics have long prohibited extrajudicial activities that would "detract from the dignity of the judge's office," Code of Conduct for U.S. Judges, Canon 4; ABA Model Code of Judicial Conduct (1972), Canon 5A, or, in a more recent formulation, "demean the judicial office," Fla. Code of Judicial Conduct, Canon 5A(3); ABA Model Code of Judicial Conduct (1990), Canon 4A(2);[2] see also ABA Canons of Judicial Ethics (1924), Canon 4 ("A judge's official conduct should be free from impropriety and the appearance of impropriety * * * and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day [*sic*] life, should be beyond reproach.").

That is because judges do not just *administer* the law; they *symbolize* the law. See *In re Sanders*, 145

[2] The most recent revision of the ABA model code removes references to dignity in specific rules, in favor of a catch-all principle that "[j]udges should maintain the dignity of judicial office at all times." ABA Model Code of Judicial Conduct (2007), pmbl. ¶ 2. Since Florida (like nearly half the states) has not adopted the ABA's 2007 revisions, all subsequent references herein are to the 1990 model code.

P.3d 1208, 1213 n.16 (Wash. 2006) (en banc) ("Judges are the symbol of the law, and as such their actions reflect upon the judicial system."). Thus, states can hold judges to "the *highest possible* standard of ethical conduct." *In re Harper*, 673 N.E.2d 1253, 1261 (Ohio 1996) (citation omitted; emphasis added).

Under this standard, judges have been disciplined for personal conduct and speech that is legal but undignified, and thus casts the judge (and by implication the judiciary as a whole) into disrepute, even if it would be constitutionally protected for an ordinary citizen. See, *e.g.*, *In re Flanagan*, 690 A.2d 865 (Conn. 1997) (disciplining judge for consensual affair with married court reporter); *In re Tschirhart*, 371 N.W.2d 850, 853 (Mich. 1985) (disciplining judge for flippant media remarks about his visit to a Nevada brothel, and noting that "[w]hen a judge's character and morals come into question not only do the people lose respect for him as a person, but worse, respect for the Court over which he presides is lost as well").

This distinguishes judges from other elected officials. While a legislator, mayor, or governor who conducted an affair or made flippant statements about a lawful brothel visit might suffer politically for poor judgment, he would not be subject to legal discipline. But judges are subject to a higher standard of personal comportment, in order to protect the dignity of the judiciary. Even for purely "personal conduct," a judge must "accept freely and willingly restrictions that might be viewed as burdensome by

the ordinary citizen." Code of Conduct for U.S. Judges, Canon 2A cmt.; Fla. Code of Judicial Conduct, Canon 2A cmt. For example, in the context of online activities, a requirement that a judge's extrajudicial activities not "demean the judicial office" requires a higher standard of decorum:

> Online activities that would be permissible and appropriate for a member of the general public may be improper for a judge. While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so.

Judicial Ethics Comm., Cal. Judges Ass'n, Op. No. 66, *Online Social Networking* 5 (Nov. 23, 2010), *at* http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf. Since publicly posting such a photograph does not raise questions of judicial bias or courtroom competence, the best analysis of this example is protection of judicial dignity. Cf. Fla. Code of Judicial Conduct, Canon 2A cmt. ("Irresponsible * * * conduct by judges erodes public confidence in the judiciary.").

In this respect, judges are akin to police officers, who also symbolize the law itself, are given special power and responsibility, and must meet a higher standard of personal conduct and speech than the general public. For that reason, courts have sustained disciplinary actions against police for off-duty conduct that is legal but "unbecoming" an officer. See, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77 (2004) (per curiam) (rejecting First Amendment challenge to

dismissal of police officer for making and selling sexually explicit videos); *Harper* v. *Crockett*, 868 F. Supp. 1557 (E.D. Ark. 1994) (rejecting First Amendment challenge to discipline of police officer who was publicly rude to bank teller while off-duty). Military officers must similarly avoid "conduct unbecoming an officer and a gentleman." 10 U.S.C. 933.[3] Many such "conduct unbecoming" offenses, such as public rudeness, would be constitutionally protected for civilians under the First Amendment. But those who wear the uniform – or the robe – must meet a higher standard.

In the election context, judges and judicial candidates[4] in Florida must "maintain the dignity appropriate

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[3] Under this rubric, officers are subject to discipline for (otherwise) legal but "unbecoming" conduct or speech. See, *e.g.*, *United States* v. *Czekala*, 38 M.J. 566, 574-576 (A.C.M.R. 1993) (affirming "conduct unbecoming" conviction based on specifications of adultery and wrongful divorce, and noting that refusal to pay debt can also constitute offense even for debt later discharged in bankruptcy), aff'd, 42 M.J. 168 (C.A.A.F. 1995). The justification for this provision is that "[i]n military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." *Fletcher* v. *United States*, 26 Ct. Cl. 541, 563 (Ct. Cl. 1891), rev'd on other grounds, 148 U.S. 84 (1893).

[4] Florida's judicial election provisions, like those of the ABA model code, apply to judicial *candidates*, not just sitting judges. See Fla. Code of Judicial Conduct, Canon 7A(1); ABA Model Code of Judicial Conduct, Canon 5C(2). The state's judicial dignity interest applies to non-incumbent candidates because (1) the actions of declared candidates for judicial office reflect on the judiciary; (2) candidates might *become* sitting judges; and

(Continued on following page)

to judicial office." Fla. Code of Judicial Conduct, Canon 7A(3)(b); ABA Model Code of Judicial Conduct, Canon 5A(3). For example, judicial candidates have been disciplined for campaign conduct or speech that might be acceptable in a race for legislative or executive office, but is undignified for a sitting or prospective judge. See, *e.g.*, *Disciplinary Counsel* v. *Evans*, 733 N.E.2d 609, 611 (Ohio 2000) (finding that neglecting to supervise campaign volunteer who arranged for prison inmates to build campaign signs violated dignity canon); *In re Bybee*, 716 N.E.2d 957, 963 (Ind. 1999) (per curiam) (finding that candidate's knowing misrepresentations about incumbent judge's record violated dignity canon). This is no mere nicety, but rather vital to the rule of law itself:

> Maintaining the dignity of the Judiciary is necessary to protect the rule of law – a root principle of our social compact and the one sure standard upon which this diverse and frequently fractious nation believes it can rely. * * * It does not exaggerate to say that the concept has an iconic status and that faith in the rule of law is akin to a civil religion. Judges are symbols of the rule of law. Therefore, those who aspire to judicial office have a special responsibility – a duty in fact – to

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(3) applying electoral restrictions *only* to sitting judges would create pro-challenger imbalances. These practical reasons for applying the same standards to incumbents and non-incumbents justify extension of dignity-based restrictions to non-incumbent judicial candidates.

> conduct themselves in their campaigns with a dignity that reflects and honors the public's reverence for the unique office they seek.

Md. Judicial Campaign Conduct Comm., *Campaign Conduct Handbook 2014*, at 3 (Feb. 2014), *at* http://www.mdjccc.org/pdfs/campaignconducthandbook2014.pdf.[5]

B. The dignity interest is compelling because courts depend on respect for their authority.

Preserving the *dignity* of the judiciary is compelling because it furthers public acceptance of the *authority* of the judiciary. And courts require respect for that authority in order to function.

At the most mundane level, smooth functioning of a courtroom requires largely voluntary cooperation from a wide array of participants: lawyers, litigants, witnesses, jurors, reporters, and spectators. From minor (but countless) orders in everyday motion practice to verdicts in bench trials, from orderly oral arguments to jury instructions, from compliance with local practice customs to the very quiet and order in the courtroom, all follow in part from a fundamental respect for the judge – not just the abstraction of "the judiciary," but the person wearing the robe.

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[5] The Maryland Judicial Campaign Conduct Committee is a non-governmental citizens' committee formed at the request of (and with a chair appointed by) the Chief Judge of the Maryland Court of Appeals. *Id.* at 1.

That respect comes not only from the fear of contempt, professional discipline, or removal from the courtroom. These remedies must remain available in extreme cases, but courts could not function if they had to be exercised regularly. Rather, courtroom functioning depends on the participants respecting the judge precisely because he or she is the judge, and entitled to an unusual degree of respect in our otherwise informal and often cacophonously disrespectful society. That is why, when oyez is called, all *do* rise, speak in proper turn, and generally cooperate with the judge in creating and maintaining a respectful and orderly proceeding even when it is highly adversarial. Our legal culture recoils from disruptive courtroom tactics, such as in the "Chicago Seven" trial. See *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972) (describing counsel's repeated insults to judge). In other countries or legal systems that lack respect for the judiciary, administration of justice can be severely compromised. See, *e.g.*, Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 Case W. Res. J. Int'l L. 155, 156-165 (2007) (cataloguing types of disruptive tactics and summarizing major historical trials characterized by disruption). Describing the risks of such courtroom tactics (and other uncivil behavior), Chief Justice Burger warned of "the jungle * * * closing in on us and taking over all that the hand and brain of Man has created in thousands of years, by way of rational discourse and in deliberative processes, including the

trial of cases in the courts." Hon. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 212 (1971).

Similarly, when *judges themselves* act in an undignified manner, the public loses respect for the judiciary. In Wisconsin, after an unusually mean-spirited (and the nation's second-most expensive) state supreme court election in 2011, followed by accusations of one justice choking another, an independent poll found that "Wisconsin voters' confidence in their Supreme Court had fallen to just 33 percent, down from 52 percent only three years earlier." Alicia Bannon et al., Brennan Ctr. for Justice, *The New Politics of Judicial Elections 2011-12*, at 9 (Oct. 2013), *at* http://perma.cc/8FN9-YQH2. But subtler encroachments upon judicial dignity can also erode respect and legitimacy for the judiciary. For that reason, judicial ethics principles attest that "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." Fla. Code of Judicial Conduct, Canon 1 cmt.

Judicial dignity is particularly important for the rule of law in "hot-button" cases. As Alexander Hamilton argued, the judiciary is the "least dangerous" branch because it "has no influence over either the sword or the purse" and "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist* No. 78, at 465 (Clinton Rossiter ed., 1961). The power of judicial opinions and orders thus stems from the public legitimacy of the judiciary's authority. And when judges

stand up to the legislative and executive branches, which *do* control the purse and sword respectively, it is essential for the rule of law that the authority of the least dangerous branch be accepted by the more dangerous branches. The judicial pen is only mightier than the executive sword when public respect for the judiciary demands it so.

There may be no perfect solution to the problem of preserving the dignity of the judiciary. But most states, like the federal courts, impose some requirement that judges maintain "dignity" to sustain the respected position of judges as answerable to higher codes of conduct than the rest of society (including elected politicians) as part of a comprehensive scheme designed to promote the rule of law.

Of course, the dignity interest is intertwined with other interests underlying states' election-related judicial ethics provisions. Indiana's former Chief Justice has catalogued four distinct bases for the judicial ethics codes' restrictions on judges' speech and conduct, the first of which corresponds to the dignity interest: "The American tradition sets judges aside from the hurly-burly of sometimes unseemly political strife. We place courts and judges on a higher plateau and hope that in doing so they will act the part and ask us to do the same on matters of importance." Hon. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1067 (1996). Depending on the scenario, the dignity interest may not always take center stage, and courts pair discussion of the dignity

interest with other complementary interests. See, *e.g.*, *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000) (treating preservation of the "appearance of fairness and impartiality" and "protecting the reputation of the judiciary" as separate interests, and finding them *both* compelling for First Amendment purposes). But the fact that the dignity interest does not always have the starring role does not diminish its compelling nature.

To be sure, the interest in judicial dignity is not limitless. See *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968) (acknowledging "the need to further respect for judges and courts," but holding that it does not overcome the Sixth Amendment right to jury trial in criminal contempt cases); *Bridges* v. *California*, 314 U.S. 252 (1941) (holding that contempt citation issued for publishing criticism of court during pending litigation violated First Amendment). As against third parties, outside the courtroom, it may not be compelling at all. But as to the conduct of *judges themselves*, preservation of the dignity of the judiciary is a compelling interest.

C. States can properly conclude that the spectacle of judges hustling for money would detract from judicial dignity.

A state could properly conclude that the sight of judges jockeying for donations would diminish respect for judges, in the eyes of lawyers, litigants, the media, and the public. Well-accepted judicial ethics principles

have long limited judges' solicitation of money for other purposes, such as charitable or political fundraising. See Fla. Code of Judicial Conduct, Canons 4D(2)(a) (providing that a judge "shall not personally or directly participate in the solicitation of funds" for charitable or civic organizations), 7A(1)(e) (prohibiting fundraising for a "political organization or candidate"); Code of Conduct for U.S. Judges, Canons 4C, 5A(3). Indeed, with some exceptions, a judge may not even "be a speaker, guest of honor, or otherwise be featured at an organization's fund-raising event." Fla. Code of Judicial Conduct, Canon 5C(3)(b) cmt.; Code of Conduct for U.S. Judges, Canon 4C cmt.

Once again, the interest in preserving judicial dignity is interwoven with related interests. For example, when judges solicit money for these organizations, "the person solicited [may] feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control," Fla. Code of Judicial Conduct, Canon 5C(3)(b) cmt., and the process "may create an impression that those who heed the judge's solicitation are in special favor with the judge," Judicial Ethics Comm., Cal. Judges Ass'n, Op. No. 33, *Solicitation of Funds for Defense Before the CJP* 3 (1986), *at* http://www.caljudges.org/files/pdf/Op%2033%20Final.pdf. But these non-electoral solicitation bans are also rooted in the principle that "[i]t demeans the judicial office for a judge to ask others for money for any purpose, even a charitable one." *Ibid*.

This prohibition does not require evidence that a particular fundraising activity is *especially* undignified.

Some activities may stand out in that way. See, *e.g.*, N.Y. State Advisory Comm. on Judicial Ethics, Op. No. 90-28 (Mar. 1, 1990) (opining that a judge may not judge a church fundraiser's "grease pole and lumberjack contests" not only because it was connected to fundraising, but also because it "would be too prominent and undignified"), *at* http://www.nycourts.gov/ip/judicialethics/opinions/90-28.htm. But the dignity interest need not be limited to extreme cases.

Rather, a state may determine that personal solicitation of donations by judges, *as a category*, diminishes the dignity of the judiciary. The judicial role is grave. Florida could properly conclude that respect for its judiciary is diminished by the spectacle of men and women who on the one hand seek the awesome power of life and death,[6] but on the other hand ask for handouts to keep their jobs.[7] Of course, Florida already provides a general requirement for judicial candidates to "maintain the dignity

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[6] Florida judges can impose death on a capital defendant despite a unanimous jury vote for life. See Fla. Stat. § 921.141(3) (describing judicial override procedure).

[7] This case does not involve the superficially analogous scenario of prohibitions on judges lobbying legislatures for salary increases. That said, judicial ethics often prohibit judges from appearing before government bodies except in specific defined circumstances. *E.g.*, ABA Model Code of Judicial Conduct, Canon 4C(1) ("A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.").

appropriate to judicial office" in their campaigns. Fla. Code of Judicial Conduct, Canon 7A(3)(b). In essence, Florida (like most states with elected judiciaries) has determined that personal solicitation of contributions is *per se* undignified, and supplemented the general prohibition with a specific one.[8]

A former Texas Chief Justice put it well: when judges solicit money for contributions, "[t]he 'ask' is undignified, and the 'give' is fairly compelled." Hon. Wallace Jefferson, *Reform from Within: Positive Solutions for Elected Judiciaries*, 33 Seattle U. L. Rev. 625, 625 (2010); see also Hon. John Paul Stevens, *The Meaning of Judicial Activism*, 25 Chicago Bar Ass'n Rec. 42, 43 (May 2011) ("[I]t is inappropriate, if not demeaning, for a candidate for judicial office to ask lawyers and potential litigants for gifts or loans of money.").[9] The judge descends to the

[8] It is irrelevant whether a particular judicial candidate feels that personal solicitation is or is not injurious to the candidate's *personal* dignity. The people have concluded that the *category* of judicial personal solicitation diminishes the dignity of the *judiciary*. Cf. *United States* v. *Wilson*, 421 U.S. 309, 317 n.8 (1975) (noting in contempt context that "[i]n order to constitute an affront to the dignity of the court [the] judge himself need not be personally insulted."). Similarly, it is irrelevant whether a particular solicitee does or does not have a diminished respect for a specific judge, or the bench in general, as a result of a solicitation.

[9] Of course, soliciting contributions can also be demeaning for legislative or executive candidates. See, *e.g.,* Hon. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 613 (1982) (describing presidential candidates' "task of begging

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position of a supplicant – always damaging to judicial dignity, but especially so when the solicitee is a lawyer who may appear before the judge. The entreaty neutralizes or reverses a deference relationship that the legal system works hard to create and maintain in the interest of the rule of law. Moreover, the injury to judicial dignity is even greater when a judge is soliciting for her own campaign, as opposed to a charitable organization, because she is essentially seeking validation of her own ability to do the job, and a favor so that she can get (or keep) that job. This is not a new concern: in 1888, a noted Chicago civic reformer, criticizing Illinois's lower court system, lamented "the astounding spectacle * * * of a judge asking for patronage" and a system "calculated to destroy every idea of judicial dignity." Joseph W. Errant, *Justice for the Friendless and the Poor*, in *Proc. of the Ill. State Bar Ass'n* 75, 77-78.

Finally, where personal solicitation is *permitted*, it may as a practical matter be *required*. If *some* judicial candidates personally solicit contributions, then only wealthy, well-connected, or unusually confident

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for funds from large contributors" as "demeaning"). But the Court may recognize judicial dignity as a compelling state interest supporting personal solicitation restrictions even if it would not uphold analogous restrictions in *non*-judicial elections. Legislators and executive officers exercise powers of purse and sword, see *The Federalist* No. 78, *supra*, at 465, and it might be dangerous to recognize their dignity as a compelling interest. By contrast, the "least dangerous" branch, *ibid.*, *requires* dignity in order to function effectively.

candidates would refrain from dialing for dollars. Thus, the dignitary harm to the judiciary caused by the practical requirement to personally solicit funds may impede the judiciary's ability to attract strong candidates. Those who would be excellent judges and able campaigners, but resist the abasement of direct personal fundraising, will avoid judicial service. As California's Chief Justice observed of judicial elections more broadly, "[m]any qualified men who would otherwise grace judicial office cannot bring themselves to run through such a gamut." Hon. Roger J. Traynor, *Who Can Best Judge the Judges*, 53 Va. L. Rev. 1266, 1276 (1967); see also Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neeley*, 86 Denv. U. L. Rev. 233, 243 (2008) ("What kind of election campaign looms at the entry to the bench is a significant filter affecting who will seek a seat or seek re-election.").

A state could determine that its courts' legitimacy is optimized if the people can select judges democratically, but the judges are slightly removed from the fundraising process. No contradiction lies in the ideas that a judge should submit to periodic elections, yet should not in the meantime conduct herself like "a 'merchant' who goes from door to door 'selling pots,'" *Breard* v. *City of Alexandria*, 341 U.S. 622, 650 n.* (1951) (Black, J., dissenting).

II. Florida's personal solicitation clause is narrowly tailored to its interest in preserving the dignity of the judiciary.

A. The provision is narrowly tailored because it prohibits precisely the speech causing the harm to judicial dignity.

The personal solicitation clause in Canon 7C(1) of the Florida Code of Judicial Conduct is a carefully crafted solution that enables judicial candidates to raise sufficient campaign funds without soiling the dignity of judicial office in the process: "[i]t permits the judge to obtain funds to carry out a campaign but eliminates the specter of contributions going from the hand of the contributor to the hand of the judge." *Fadeley*, 802 P.2d at 41. And this "limitation on the ability to raise funds need not cause the campaign to suffer, if the judge picks good people for his or her campaign finance committee." *Ibid.* It is narrowly tailored because it addresses *precisely* the conduct that detracts from judicial dignity (personal fundraising) while leaving open ample alternative opportunities for judicial campaigns to raise necessary funds. For this reason it is unlike the "announce clause" invalidated in *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). The solicitation clause does not "censor what the people hear," *id.* at 794 (Kennedy, J., concurring); it simply regulates which part of the judicial campaign apparatus makes the pitch.

Petitioner, citing the Sixth Circuit, argues that the personal solicitation clause favors "'incumbent

judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders.'" Pet. Br. 21 (quoting *Carey* v. *Wolnitzek,* 614 F.3d 189, 204 (6th Cir. 2010)). But these arguments are backwards. The personal solicitation clause "does not have a pro-incumbent character." *Simes* v. *Ark. Judicial Discipline & Disability Comm.*, 247 S.W.3d 876, 883 (Ark. 2007). To the contrary, the personal solicitation clause deprives incumbent judges of one of their most potent advantages over challengers:

> Limiting candidates' "requests" obviously has more impact on incumbents, whose "requests" carry more weight. As a Pennsylvania lawyer said in explaining his contribution to a local judge (to whom many local lawyers contributed "although they doubted [his] qualifications"): "What could I say? He was a sitting judge."

Schotland, 86 Denv. U. L. Rev. at 249 (alteration in original); Jefferson, 33 Seattle U. L. Rev. at 625 ("[L]awyers are shrewd enough to avoid the risk of incurring a judge's disfavor."). Similarly, it is precisely the "well-connected" who can best take advantage of legalized personal solicitation, by directly contacting those to whom they are so well connected. And as for petitioner's argument that the system favors wealthy self-financing candidates, that undesirable flaw inheres in *any* electoral system since this Court's

invalidation of spending restrictions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and cannot fairly be attributed to this narrow judicial ethics rule, which simply requires that someone else place the call or sign the letter.

B. The provision is neither under- nor over-inclusive.

Petitioner argues that the personal solicitation clause is both under- and over-inclusive with respect to the state's interests in preventing judicial corruption or bias. Pet. Br. 17-26. This argument simply does not apply to the state's dignity interest.

First, petitioner argues that the prohibition is under-inclusive because it does not prevent judicial candidates from learning who contributed. Pet. Br. 18-19. But the dignity interest is not based on what the *judge* perceives about the *solicitees*: it is based on what the *solicitees* and the public perceive about the *judge*. There is, in fact, a difference between a letter signed by a prospective judge and a personal request from "the candidate's best friend," *Carey*, 614 F.3d at 205. A fundraising letter mass-mailed by a sitting or prospective judge shows a person seeking life-or-death power stooping to the level of direct-mail techniques used to sell magazine subscriptions. A request from the candidate's best friend, or paid campaign manager, may well raise substantial concerns with respect to *other* compelling interests, such as prevention of bias or its appearance, but it does

not directly impinge upon judicial *dignity*. Nor does the fact that the solicitees know that the solicitor is acting on the judge's behalf render the distinction meaningless. By analogy, in the court itself, it is understood that courthouse employees are acting as the judge's agents, even though they sometimes do things that might be undignified for the judge to do herself.

Second, petitioner argues that the prohibition is under-inclusive because it does not prevent judicial candidates from soliciting non-monetary support. Pet. Br. 20. But a state could conclude that asking for volunteer assistance is considerably more dignified than asking for a check. Florida makes a similar nuanced distinction with respect to non-profit organizations, providing that a judge "shall not personally or directly participate in the solicitation of funds," Fla. Code of Judicial Conduct, Canon 5C(3)(b)(i), but placing no express limits on solicitation of volunteer effort.[10]

Finally, petitioner argues that the clause is over-inclusive because it includes speeches at large gatherings, mass mailers, and letters posted on web sites. Pet. Br. 22-23. To be sure, the greatest harm to judicial dignity comes from "hand-to-hand" or direct

[10] Petitioner also argues that the prohibition is under-inclusive because judges may learn who made independent expenditures on their behalf. Pet. Br. 20-21. The dignity interest is not implicated at all in this context.

phone solicitations. See, *e.g.*, Jefferson, 33 Seattle U. L. Rev. at 625 (providing an illustrative sample telephone transcript of a state supreme court chief justice soliciting a lawyer for donations). But one-to-many solicitations also detract from judicial dignity. When a judge speaks at a large gathering, the attendees may hope to be informed, educated, even inspired. Cf. ABA Model Code of Judicial Conduct, Canon 4B (judges may "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects"). They might anticipate learning fine points of practice, grand principles of justice, or at least an update on court administration. When the judge speaks of such matters, the educational function of the judiciary is fulfilled. But when the judge's speech pivots to asking attendees to open their wallets, the dignity of the judiciary slowly drains away. And the affront to judicial dignity is not *diminished* by the fact that 100 attendees heard the pitch; rather, it is *magnified* by the presence of 100 witnesses.

While the harm to judicial dignity caused by personally signed mail solicitations – *e.g.,* the mass mailer signed by petitioner and posted on her campaign web site – may be less in degree, it is of the same quality. The recipient of a fundraising letter opens her mail to find, amongst the bills, preapproved credit card offers, and magazine subscription solicitations, a letter from a sitting or aspiring judge, asking the recipient to check a box and return a check or a

credit card authorization in an enclosed pre-addressed envelope. When the letter comes from a campaign committee, the reputation and image of the judge at least sit at some remove, but when the letter is signed by the judge herself, all pretense is lost.

The curious visitor to the judge's web site has a similar experience: after browsing the judge's biography and perhaps a statement of judicial philosophy, she builds a sense of how that judge will exercise the weighty powers of her office, only to click another tab and see that the dignified jurist has posted a personal plea for dollars to whichever random strangers might happen upon her web site. Florida may properly conclude that this is not good for the dignity of the judiciary, and impose the very modest requirement that someone else sign the request.[11]

Some of the majesty of the judiciary may already be irretrievably lost. But it hardly poses an excessive burden for judicial candidates to insist that fundraising requests be posted in the names of campaign personnel, rather than those who may sit in judgment of life and death.

[11] The fact that some states have decided not to regulate personal solicitation in mass mailings or speeches to large groups, or to regulate personal solicitation at all, does not mean that Florida's canon is over-inclusive. It simply means that some states have decided not to regulate constitutionally regulable solicitation.

CONCLUSION

Florida's personal solicitation clause is narrowly tailored to a compelling government interest in preserving the dignity of the judiciary. The Court should affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

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