No. 16-9

In the Supreme Court of the United States

RANDOLPH WOLFSON,
Petitioner,

v.

COLLEEN CONCANNON ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Center for Competitive Politics in Support of Petitioner

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QUESTION PRESENTED

Whether the court below, and other courts, have read the deliberately narrow decision in *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656 (2015), as authorizing restrictions far broader than the ones this Court contemplated.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Competitive Politics is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. The Center has filed *amicus curiae* briefs in many of the notable cases concerning restrictions on campaign speech. It believes that speech by judicial candidates merits strong First Amendment protection.

SUMMARY OF ARGUMENT

In *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656 (2015), this Court upheld a judicial campaign speech restriction precisely because the restriction was so narrowly tailored. *Id.* at 1671. This Court noted that the speech restriction affected only "a narrow slice of speech," and that the restriction "le[ft] judicial candidates free to discuss any issue with any person at any time." 135 S. Ct. 1656, 1670 (2015). And this Court stressed that the restriction left judicial candidates free to speak through their campaign committees: "[Judicial candidates] cannot say, 'Please give me money.' They can, however, direct their campaign committees to do so." *Id.* at 1670.

Yet several lower courts have neglected these important aspects of the *Williams-Yulee* decision, and

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to the filing of the brief.

have relied on *Williams-Yulee* to uphold far broader restrictions:

1. In this case, the Ninth Circuit upheld a restriction on (among other things) judicial candidates endorsing other candidates. Pet. 4a, 20a.

2. The Sixth Circuit has upheld a restriction on all judicial campaign solicitations, including by campaign committees, outside a specified time window. *O'Toole* v. *O'Connor*, 802 F.3d 783, 791 (6th Cir. 2015) (refusing to issue a preliminary injunction against the enforcement of the restriction, on the grounds that "Plaintiff has failed to demonstrate a likelihood of success on the merits" of its First Amendment claim).

3. The Kentucky Supreme Court has upheld a rule preventing judicial candidates from acting as political party spokespeople or hosting events for a political party. *Winter* v. *Wolnitzek*, 482 S.W.3d 768, 777-78, 780-81 (Ky. 2016).

Courts have thus embraced the aspect of the *Williams-Yulee* reasoning that upheld a speech restriction, while ignoring the language that this Court deliberately used to cabin the scope of the *Williams-Yulee* doctrine.

Political speech—including political speech in judicial elections—is at the heart of the First Amendment's protections. This Court should safeguard that speech by reaffirming the narrowness of the *Williams-Yulee* decision.

ARGUMENT

I. *Williams-Yulee* Upheld the Florida Restriction Because the Restriction Was So Narrow

In *Williams-Yulee*, this Court considered a challenge to a Florida restriction on judicial candidates' speech—"[judicial candidates] shall not personally solicit campaign funds, or solicit attorneys for publicly stated support * * * but may establish committees of responsible persons" to solicit funding for their election campaigns." 135 S. Ct. at 1663 (internal quotation marks omitted).

This Court reaffirmed that strict scrutiny is just as rigorous when the restricted speech is judicial speech: "[The state] faces a demanding task in defending [the speech restriction] against [the judicial candidate's] First Amendment challenge. * * * '[I]t is the rare case' in which * * * a speech restriction is narrowly tailored to serve a compelling interest." *Id.* at 1665-66 (citation omitted).

And this Court found that the Florida restriction satisfied the tailoring requirement of strict scrutiny in large part because the restriction was so narrow. "By any measure, [the Florida restriction] restricts a narrow slice of speech." *Id.* at 1670. "[It] leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media." *Id.* at 1660.

This Court also emphasized that the Florida restriction limited only personal solicitations by the candidates themselves, while leaving those same candidates free to solicit donations through their committees. "[Judicial candidates] cannot say, 'Please give me money.' They can, however, direct their campaign committees to do so." *Id*. at 1670. And this Court found that the Florida restriction survived strict scrutiny only because it allowed judicial candidates "to raise money through committees," and to "otherwise communicate their electoral message in practically any way." *Id*. at 1672.

II. Lower Courts Have Nonetheless Used *Williams-Yulee* to Uphold Broad Speech Restrictions

Though *Williams-Yulee* emphasized that the Florida restriction survived strict scrutiny in part because it was so narrow, lower courts are relying on *Williams-Yulee* to uphold much broader speech restrictions.

A. The court below upheld a restriction limiting candidates' ability to participate in political debate

In the decision below, the Ninth Circuit relied on *Williams-Yulee* to uphold restrictions on judicial candidates "publicly endors[ing] another candidate for public office," "mak[ing] speeches on behalf of another candidate or political organization," and "actively tak[ing] part in any political campaign." Pet. 4a. The Ninth Circuit repeatedly cited *Williams-Yulee*. Pet. 6a-20a. Yet *Williams-Yulee* had emphasized that the Florida restriction was permissible only because it was so narrow, "leav[ing] judicial candidates free to

discuss any issue with any person at any time." 135 S. Ct. at 1670. And the Arizona restriction directly prevents judicial candidates from freely discussing a range of topics, including their mere involvement in a political campaign.

Likewise, *Williams-Yulee* emphasized that the Florida restriction did not withdraw any speech—even solicitations of contributions—from public debate, because a judicial candidate's campaign committee was free to engage in that speech even if the candidate herself was not. But the Arizona restriction leaves open no such alternative for candidates to communicate their message via their committees. *See* Ariz. Code Jud. Conduct R. 4.1(B) ("A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A)," which includes the prohibition on endorsing others candidates).

The Arizona speech restriction thus goes much further in suppressing valuable political speech than the restriction in *Williams-Yulee* did. Displaying a lawn sign with a candidate's name, writing a Facebook post praising a candidate, and giving a speech supporting a candidate are all public endorsements of a candidate. They are also likely, in many cases, to be inseparably bound up with the discussion of issues of public policy. *See Buckley* v. *Valeo,* 434 U.S. 1, 42 (1976) (per curiam) ("[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are inti-

mately tied to public issues involving legislative proposals and governmental actions."). Such wide-ranging public debate about who should win office and why is vital to democracy and to self-expression; but once Arizonans run for judicial office, the state forbids them from engaging in this political speech. By upholding this broad speech restriction, the Ninth Circuit strayed far beyond this Court's narrow decision in *Williams-Yulee*.

B. The Sixth Circuit upheld a restriction banning solicitations by both candidates and their committees, which likewise ignores the limitations inherent in this Court's *Williams-Yulee* decision

The Sixth Circuit in *O'Toole*, like the Ninth Circuit in *Wolfson*, upheld a speech restriction that went considerably beyond the reasoning of *Williams-Yulee*. The Ohio Code of Judicial Conduct prohibits both judicial candidates and their campaign committees from collecting campaign contributions until about four months before the primary election and eleven months before the general election. 802 F.3d at 787-88. The Sixth Circuit concluded that the restriction was likely constitutional, but the court's logic suggested that, in its view, the restriction is certainly constitutional. And the opinion relied on *Williams-Yulee* repeatedly. *Id.* at 789-90.

But the Sixth Circuit did not acknowledge that *Williams-Yulee* expressly relied on the narrowness of the Florida law and its exclusion of campaign committee speech. The Sixth Circuit reasoned that, "[w]hile

the concerns raised by a judicial campaign committee's solicitation may be more attenuated than those raised by direct candidate solicitation, the close connection between judicial candidates and their campaign committees under Ohio law implicates many of the same concerns regarding judicial integrity and propriety." *Id.* Yet in *Williams-Yulee*, this Court stressed that the speech restriction on candidates was constitutional in large part precisely because campaign committees remained free to speak: "[Judicial candidates] cannot say, 'Please give me money.' They can, however, direct their campaign committees to do so." 135 S. Ct. at 1670.

That explanation was part of *Williams-Yulee*'s explanation of why the Florida rule "restrict[ed] a narrow slice of speech" and was thus "narrowly tailored." *Id.* Yet the Sixth Circuit neglected this important justification for this Court's *Williams-Yulee* holding.

Campaigns are expensive. Running radio commercials, printing lawn signs, and hiring a campaign manager are only a few of the costly tasks needed to run for office. Candidates must therefore fundraise, and fundraising takes time, especially for candidates who lack name recognition.

The Ohio restriction reduces the resources available for some candidates, particularly newcomers who must build the campaign machinery to solicit and collect donations—in a way that the restriction upheld by this Court in *Williams-Yulee* did not. It also removes an entire category of speech—campaign solicitations, and any discussion of issues bound up with those solicitations—from the public sphere. *Cf. Williams-*

Yulee, 135 S. Ct. at 1665 ("noncommercial solicitation is characteristically intertwined with informative and perhaps persuasive speech") (citations and internal quotation marks omitted). *O'Toole*, like the Ninth Circuit's decision below, stretched this Court's *Williams-Yulee* analysis beyond the limitations that this Court itself imposed on that analysis.

C. The Kentucky Supreme Court upheld a restriction limiting judicial candidates' ability to express their judicial ideology through political participation, which similarly ignores the limitations inherent in this Court's *Williams-Yulee* decision

Finally, in *Winter* v. *Wolnitzek*, 482 S.W.3d 768 (Ky. 2016), the Supreme Court of Kentucky upheld a judicial canon that barred a judicial candidate from "act[ing] as a leader or hold[ing] any office in a political organization." *Id.* at 777. And the Kentucky Supreme Court relied on this Court's decision in *Williams-Yulee*, claiming that it "addressed the same point and the same compelling interests were at stake." *Winter*, 482 S.W.3d at 780.

But this too sets aside the limitations that this Court carefully adopted as part of its *Williams-Yulee* reasoning. The Florida restriction, this Court stressed, "leaves judicial candidates free to discuss any issue with any person at any time." 130 S. Ct. at 1670. Yet the Kentucky restriction prevents candidates from "planning, organizing, directing, and controlling * * * party functions with the goal of achieving success for the political party," *Winter*, 482 S.W.3d at 777, for instance by "acting formally or informally as a party

spokesperson," *id.* In practice, that restriction will prohibit candidates from discussing certain issues with certain people, such as by helping fellow party leaders strategize concerning what policy positions the party should champion, or by discussing issues of public policy on its behalf—that is, by freely associating within a political party in concert with other concerned individuals.

Voters care about electing candidates whose values and opinions align with their own. And rightly or wrongly, they often use a person's leadership position in a party as shorthand to assess whether that person is genuinely committed to the philosophical perspective for which that party stands. A candidate's role as party strategist or spokesperson (a form of speech or expressive association) can quickly communicate that the candidate's values and opinions on legal issues align with the party and likely align with other members of that party.

The Kentucky restriction thus impairs candidates' ability to discuss issues with their fellow party members, and with voters. And here again an appellate court has purported to apply *Williams-Yulee* without acknowledging the speech-protective limitations that this Court set forth as a necessary part of its opinion.

III. This Court Should Reaffirm the Narrowness of Its Decision in *Williams-Yulee*

The decision to run for judicial office should not also be a decision to give up broad First Amendment rights during the campaign. "Debate on the qualifications of candidates" must remain a protected part of "the core of our electoral process and of the First

Amendment freedoms," even when the debate is about the qualifications of judicial candidates and the debater is the candidate himself. *Republican Party* v. *White*, 563 U.S. 765, 781 (2002). In *Williams-Yulee* a majority of this Court reaffirmed *White*, 135 S. Ct. at 1665, but found that narrow restrictions on judicial speech might be permitted precisely because they are so narrow. Yet lower courts have been reading *Williams-Yulee* as a charter for restricting judicial candidates' speech more broadly.

"If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process * * * the First Amendment rights that attach to their roles." *White*, 563 U.S. at 788 (quoting *Renne* v. *Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). This Court should step in to reaffirm the narrowness of its holding in *Williams-Yulee* and to provide lower courts with direction in applying its jurisprudence on this issue.

CONCLUSION

Only a year after this Court's deliberately narrow decision in *Williams-Yulee*, lower courts have extended its holding to support a variety of much broader speech restrictions. This Court should grant certiorari and reaffirm the narrowness of the *William-Yulee* decision.

Respectfully submitted,

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