No. 15-35990

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK FRENCH,
Plaintiff-Appellant,

v.

BLAIR JONES, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
The Honorable Sam E. Haddon
Case No. 4:14-cv-00057-GF-SEH

BRIEF OF CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Rule 26.1 Disclosure Statement

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All parties have consented to the filing of this *amicus* brief.

Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

Interest of *Amicus Curiae*

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.[1]

Summary of Argument

Few things matter as much to voters as a party's endorsement of a candidate. A sign saying "John Smith for Judge" communicates only that someone named John Smith is running for judge. But adding "Endorsed by the Republican Party" communicates something much more important: The party has determined that Smith is well qualified and shares the party's judicial philosophy.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

By barring candidates from saying that they have been endorsed by a party—and by barring candidates from asking the party to offer such endorsements—Rule 4.1(A)(7) of Montana's Judicial Code violates candidates' First Amendment rights. It violates voters' First Amendment rights to receive information. It interferes with the democratic process, by blocking one of the few tools that unknown candidates can use to effectively challenge incumbents and political veterans. And it interferes with judges' freedom of association, by barring them from soliciting party endorsements and from associating themselves with such endorsements even if they are freely offered.

The Montana Rule is thus much broader than the narrow restriction on solicitation of contributions by a candidate that the Supreme Court upheld in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). In *Williams-Yulee*, the Supreme Court stressed that the restriction "[b]y any measure" "restrict[ed] a narrow slice of speech," *id.* at 1670, because it left candidates free to say through their campaign committees what they could not say directly, and left them free to discuss any and all substantive issues. The Montana Rule applies both to candidates and to

campaign committees, and covers not just solicitation of money but a substantive matter: a party's support for the candidate.

And the Montana Rule deals with speech that is much more central to a candidate's campaign than the speech that this Court said could be limited in *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (en banc). In *Wolfson*, this Court upheld a ban on judicial candidates' endorsing or campaigning for other political candidates, because such speech concerns "the political views and aspirations of another candidate," rather than being "relat[ed] to [the judicial candidate's] own campaign." *Id.* at 1185. But statements that a party has endorsed a judicial candidate are directly related to the candidate's own campaign, rather than to another candidate's.

The Montana Rule thus restricts a great deal of highly valuable political speech, and consequently cannot be narrowly tailored to a properly-constrained government interest. This Court should therefore find that the Rule violates the First Amendment.

Argument

I. The Rule Gravely Burdens Speech

Rule 4.1(A)(7), which bars judicial candidates from "seek[ing], accept[ing], or us[ing] endorsements from a political organization," is a content-based restriction on speech that "is at the core of our First Amendment freedoms"—speech about the qualifications of candidates for public office, including judicial office. *Republican Party v. White*, 563 U.S. 765, 774 (2002). *White* made clear that "'[d]ebate on the qualifications of candidates'" remains a protected part of "'the core of our electoral process and of the First Amendment freedoms,'" *id.* at 781 (citation omitted), even when the debate is about the qualifications of judicial candidates and the debater is the candidate himself. "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Id.* "'[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance.'" *Id.* at 788 (approvingly quoting Justice Marshall's dissent in *Renne v. Geary*, 501 U.S. 312, 349 (1991), which expressly defends the First Amendment protection for partisan endorsements of judges).

A party endorsement may be among the most relevant facts that a candidate can communicate to the public about his qualifications. An endorsement tells voters that a party has vetted the candidate's qualifications and judicial philosophy. Many voters may be skeptical about a candidate's own claims about such matters, because they might worry that the candidate is just telling voters what they want to hear. But voters might generally trust a political party, perhaps because they know that the party is a repeat political player and has a lot to lose by endorsing ill-qualified candidates.

And the endorsement is an especially efficient fact, one that voters can use even if they lack the time to delve closely into each candidate's views, or lack the expertise to evaluate complicated debates about judicial philosophy. If voters had unlimited leisure time and the inclination to follow closely each judicial race, they might be able to carefully investigate each candidate's credibility and make effective judgments based solely on the candidate's statements about specific issues. But lacking such a luxury, voters may need the convenient summary of a candidate's views provided by a party endorsement. Here, as in *White*, states

should not be able to impose "voter ignorance" with regard to this important information.

Moreover, once voters see the party's endorsement of a candidate, they may pay more attention to the candidate's substantive message. A party endorsement is thus critical to helping a candidate get heard and establish public credibility. A party has a well-established First Amendment right "to spread its message" by endorsing candidates. *Eu v. San Francisco County Democratic Cent. Comm.* 489 U.S. 214, 223 (1989); *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744-45 & n.2 (9th Cir. 2012) (applying this principle to party endorsements of judicial candidates). Likewise, candidates, in exercising their rights to "tirelessly . . . advocate for [their] own election," *Buckley v. Valeo*, 424 U.S. 1, 52 (1976), have the First Amendment right to spread their messages by citing a party's endorsement.

A. The Rule Burdens Speech More Than Did the Speech Restriction in *Williams-Yulee v. Florida Bar*

1. The Rule Leaves No Alternatives for Judicial Candidates to Communicate Virtually the Same Message

The Rule restricts both candidates and campaign committees. Mont. Code of Jud. Conduct Rule 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 include "seek[ing], accept[ing], or us[ing] endorsements from a political organization."). It thus lacks the saving grace that caused the Supreme Court to uphold a much narrower restriction in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

In upholding a ban on judicial candidates directly soliciting campaign contributions, the *Williams-Yulee* Court stressed that the ban covered, "[b]y any measure," "a narrow slice of speech." *Id.* at 1670. The ban left "judicial candidates free to discuss any issue with any person at any time." *Id.* And though candidates "cannot say, 'Please give me money,'" they could "direct their campaign committees to do so." *Id.* Thus, the burden on the judicial candidates' speech in *Williams-Yulee* was minimal.

But the Montana Rule totally bars both candidates and campaign committees from soliciting and using party endorsements. Candidate Mark French cannot discuss that issue—for instance, that he is the only candidate in the race whose judicial philosophy the state Republican Party trusts—with voters. Nor can he discuss with party officials the re-

lated issue of whether the party should speak out in favor of his campaign. And his campaign committee is also barred from discussing these issues.

As the Supreme Court stressed, the restriction in *Williams-Yulee* only slightly altered candidates' requests for campaign donations, moving them from candidates' mouths to their campaign committee members'. But the Montana Rule completely forbids a candidate's use of party endorsements, gravely burdening the candidate's free speech.

2. Party Endorsements Do Not Create the Same Concerns About Impropriety That Campaign Donations Do

Campaign donations pose a more direct challenge to judicial independence than that presented by party endorsements. In rare cases, judges' decisions might be improperly influenced when a particular contributor appears before them. But political parties are infrequently involved in litigation. *Siefert v. Alexander*, 608 F.3d 974, 982 (7th Cir. 2010) (noting that "nothing in the record suggests that political parties themselves" are especially "frequent litigants"). Parties are generally no more involved in litigation than any other nonprofit organizations, whose endorsements judicial candidates are free to solicit and use.

Mont. Code of Jud. Conduct Rule 4.1(A)(7) (limiting the prohibition to "political organization[s]" and political officials and candidates); *id.* at Terminology (defining "political organization" as limited to "political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office"). Indeed, many nonprofit organizations exist chiefly to litigate—such as the ACLU, the NAACP Legal Defense & Education Fund, the Western Environmental Law Center, or the Mountain States Legal Foundation—and yet candidates are permitted to seek and report their endorsements.

B. The Rule Burdens More Speech Than Did the Speech Restriction in *Wolfson v. Concannon*

By preventing candidates from using party endorsements in their campaign, the Rule dramatically limits what judicial candidates can say about their own values and qualifications. The Rule burdens speech substantially more than a prohibition on speaking about other candidates, which this Court upheld in *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (en banc).

In *Wolfson*, this Court stressed that the prohibition had little to no effect on the message that candidates could communicate about them-

selves; candidates were only restricted from communicating about the candidacy *of others*. *Wolfson* expressly noted that the prohibition that it upheld did "not prevent judicial candidates from announcing their views on disputed legal and political subjects. Instead, Arizona simply makes the distinction that a judicial candidate may do so only in relation to his or her own campaign." *Id.* at 1185 (internal citation omitted).

On the other hand, the Montana Rule directly affects what judicial candidates can say about *themselves*. Candidates are prohibited from using a party endorsement to communicate to voters that (1) a particular party has vetted them and (2) they share the party's values and its views on legal issues. Yet communicating such an endorsement is an important means of credibly conveying to the public one's "views on disputed legal and political subjects"; an endorsement can help show skeptical voters that the candidate's claimed views really are what the candidate says they are. *See supra* p. 5. And, as *Wolfson* acknowledged, both "'speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection,'" *Wolfson*, 811 F.3d at 1180 (favorably quoting the *Williams-Yulee* plurality); *see also Republican Party v. White*, 536 U.S. at 774 (conclud-

ing that "speech about the qualifications of candidates for public office," including judges' speech about themselves, merits full protection). The endorsement of a respected political organization is one important "qualification[] of [a] candidate[] for elected office."

Indeed, in *Wolfson*, this Court favorably quoted the Seventh Circuit's statement that the government interest in impartiality "does not justify forbidding judges from identifying as members of political parties." *Siefert*, 608 F.3d at 984. Likewise, *Wolfson* does not justify upholding a law forbidding judges from accurately reporting that a political party has endorsed them.

II. The Rule Burdens Voters' Right to Hear Speech About Judicial Candidates' Qualifications

"The endorsement of a political party quickly conveys information to voters about a judicial candidate and gives voters a general picture of what kind of values the candidate takes seriously," *Carey v. Wolnitzek*, 614 F.3d 189, 201-02 (6th Cir. 2010). It is "an aggregation of political and legal positions, a shorthand way of announcing one's views on *many* topics of the day." *Id.*

When candidates use party endorsements, they signal that their judicial philosophy aligns with that party. "The prospect that voters

might be persuaded by party endorsements is not a *corruption* of the democratic process; it is the democratic process." *Sanders County Republican Cent. Comm.*, 698 F.3d at 747 (emphasis in original). Without this shorthand, many voters who are unwilling to conduct time-consuming research on down-ballot races will end up either not voting on those races or voting without complete information.

This is why the Sixth Circuit struck down a statute that banned judicial candidates from stating their party affiliation, and why this Court in *Sanders County* struck down a statute that banned parties from endorsing candidates. *Carey*, 614 F.3d at 204; *Sanders County*, 698 F.3d at 746. Such restrictions "deprive [voters] of the full and robust exchange of views to which, under the Constitution, they are entitled." *Id.* at 744. Just as a prohibition on parties' endorsing primary candidates "hamstrings voters seeking to inform themselves about the candidates and the campaign issues," *Eu*, 489 U.S. at 223, so a prohibition on judges' reporting that a party has endorsed them hamstrings voters seeking to inform themselves about judicial candidates and issues of judicial philosophy.

If this Court upholds the Rule, the holding of *Sanders County* will become practically irrelevant, and this Court will create a split between this Circuit and the Sixth, *see Carey*, 614 F.3d at 201-02. Party endorsements are most likely when judicial candidates (or the candidates' campaign committees) ask the party for such an endorsement, and explain their credentials and philosophies to the party. Denying parties this important source of information in choosing whom to endorse undermines the parties' right to convey such endorsements. *See ACLU v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (concluding that denying speakers the ability to gather information—in that case, by videorecording—violates their First Amendment rights by interfering with "an integral step in [their] speech process"); *Glik v. Cunniffe*, 655 F.3d 78, 79-81 (1st Cir. 2011) (same).

And party endorsements are only useful when voters are aware that a party has endorsed a candidate. Candidates have much more incentive than political parties to spend time, effort, and money to convey this information in a way that voters are likely to hear and remember. And they also have many more opportunities to convey this information, like at campaign events or in door-to-door canvassing. Given the recog-

nition in *Sanders County* that voters can benefit from party endorsement of candidates, it is even clearer that voters can benefit from candidates' communication of those endorsements.

To be sure, the State may argue that it does not want voters to rely on party support in choosing judges. *See* Dist. Ct. Op. 8 (concluding that "The State has a compelling interest in preserving the nonpartisan nature of its judicial elections.").[2] But "[a] state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U.S. at 228 (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 221 (1986)). It should be for voters, not for the State, to decide whether to rely on partisan endorsements.

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[2] The district court erred in finding a compelling state interest in preserving nonpartisan judicial elections as such. This Court has concluded that nonpartisan elections may serve the state's compelling interest in maintaining public confidence in an impartial judiciary. *Wolfson*, 811 F.3d at 1183 & n.9. But in that analysis, the nonpartisan nature of the election is a means to an end, not an end in itself. Banning speech, not because that speech may itself harm the independence of the judiciary, but rather because it may marginally undermine the nonpartisan nature of an election, is "a prophylaxis-upon-prophylaxis approach to regulating expression [that] is not consistent with strict scrutiny." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.,* 551 U.S. 449, 479 (2007) (Roberts, C.J., lead op.).

III. The Rule Interferes with Democratic Self-Government and Democratic Accountability, by Helping Entrench Incumbents

Judicial candidates who are new to the political process already face an uphill battle in competition against incumbents. *See* Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Courts*, 33 Am. Pol. Res. 818, 834, 835 tbl.5 (2005) (estimating probability of an incumbent being reelected to the state supreme court at 91.7%); Martin Shapiro, *Judicial Independence: New Challenges in Established Nations*, 20 Ind. J. Glob. Leg. Stud. 263, 264-65 (2013) ("even in the most electorally-oriented state systems within the United States, voters nearly always reelect incumbent judges and do so not because they know anything about the incumbents or the challengers, or even recognize their names, but because the incumbents are incumbent"). Especially in down-ballot races, on which many voters do little research, incumbents—with the weight of their existing office—have a distinct advantage. Party endorsements are a key tool for upstart candidates to overcome that advantage.

But when judges' campaign speech is restricted, "incumbent judges" are among the main beneficiaries, because the restriction leaves voters

with "minimal information about the individuals running for judicial positions." David Barnhizer, *On the Make*, 50 Cath. U. L. Rev. 361, 405-06 (2001). That is especially true when voters are denied the important information that party endorsement can provide.

By thus making it more difficult for outsiders to compete effectively against well-known incumbents, the Rule gravely burdens democratic self-government and democratic accountability. Even contribution restrictions, which are judged under a less demanding standard of review than speech restrictions, may violate the First Amendment when they "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall v. Sorrell*, 548 U.S. 230, 241, 248-49 (2006) (Breyer, J., lead op., for three Justices) (concluding that); *id.* at 271 (Thomas, J., joined by Scalia, J., concurring in the judgment) (taking the same view). Outright speech restrictions that make it hard for challengers to overcome incumbents' name recognition should likewise be unconstitutional.

IV. The Rule Burdens Expressive Association

"Association . . . is itself an important form of speech, particularly in the political arena." *Republican Party v. White*, 416 F.3d 738, 754 (8th Cir. 2005). When candidates publicly associate with a group, they communicate that they share the group's message. Likewise, groups control their message by affiliating with some individuals and not with others. "Because the exercise of these basic First Amendment freedoms traditionally has been through the media of political associations, political parties as well as party adherents enjoy rights of political expression and association." *Sanders County*, 698 F.3d at 745. Just as "[b]arring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association," *Eu*, 489 U.S. at 224, so barring the candidates from seeking and publicizing such endorsements restricts the candidates' freedom to associate with the parties.

In this case, French wants to publicly associate with the Sanders County Republican Party, thereby communicating to the public that he shares the party's political views and values. The Rule unconstitutionally denies Sanders this important right.

Conclusion

Montana's Rule 4.1(A)(7) gravely burdens judicial candidates' speech and the voters' right to hear that speech. By entrenching incumbents, it harms democratic self-government. And it seriously interferes with judicial candidates' right to associate. It is thus much more speech-restrictive than the narrow laws upheld in *Williams-Yulee* and *Wolfson*, and it is too broad to be constitutional.

Respectfully Submitted,

s/ Eugene Volokh

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,276 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Century Schoolbook.

Dated: April 18, 2016

s/ Eugene Volokh
Attorney for *Amicus Curiae*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2016.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: April 18, 2016

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