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PERSPECTIVE

Judicial campaign rules go to court

By Blaine H. Evanson and Lali Madduri

Next month, the U.S. Supreme Court will hear argument in *Williams-Yulee v. Florida State Bar* — an appeal from a decision upholding a Florida state bar regulation prohibiting judicial candidates from personally soliciting campaign contributions. The question before the court is whether Florida's anti-solicitation rule violates the First Amendment's protection of free speech.

The petitioner, Williams-Yulee, was a candidate for a county court judgeship in Florida and signed a letter personally soliciting campaign contributions. The Florida bar alleged that she violated the state's anti-solicitation rule, and the Florida Supreme Court upheld the rule as constitutional. The Supreme Court granted certiorari and is set to hear oral argument Jan. 20, 2015.

Thirty-nine states hold judicial elections, and 30 states have anti-solicitation rules similar to Florida's. (California holds judicial elections for superior court judges, but permits personal campaign solicitations.) Two federal circuit courts and the high courts of every state to rule on the issue have upheld bans on judicial solicitation of funds, largely on the theory these bans preserve the integrity and impartiality of the judiciary and help maintain the public's confidence in the judicial system. On the other side of the ledger, four circuit courts that cover 23 states have struck down such bans, holding that the bans violate the First Amendment's protection of free speech.

The U.S. is unique in its practice of electing members of the judiciary. As in any election, campaign contributions create a risk that once a candidate is elected he or she will be beholden to those who contributed to the campaign. And with a judge, there is a perceived risk he or she will not equally and faithfully apply the law. According to Justice Sandra Day O'Connor, "three out of four Americans believe that campaign contributions affect courtroom decisions." The Florida bar's brief to the Supreme Court relies on a study of 2,428 state judges, in which 46 percent of those surveyed believe contributions made to judges influence their decisions in some way.

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Because of these risks, many states that hold judicial elections have sought to regulate judicial campaign contributions. But as the 9th U.S. Circuit Court of Appeals noted recently, "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." State limits on speech in judicial elections run right into the Roberts court's line of cases striking down various restrictions on campaigns and campaign finance under the First Amendment.

Most notably, in *Citizens United v. Federal Election Commission*, the Supreme Court in 2010 held that the government could not suppress political speech on the basis of the speaker's corporate identity. The court determined that a categorical ban on corporate political speech was not narrowly tailored to preventing quid pro quo corruption. Similarly, in *Republican Party of Minnesota v. White*, the court struck down a provision of Minnesota's Code of Judicial Conduct that prohibited a candidate for judicial office from discussing his or her views on a political issue. There too, the court held that curtailing the judicial officer's speech was not a narrowly tailored means of protecting against political corruption.

Citizens United and *White* seem to forecast invalidation of the Florida bar's rule. Even where a state has a compelling interest in protecting against corruption or bias, the Supreme Court has not hesitated in striking down overbroad restrictions on speech-based campaign restrictions. And the Florida rule is not tailored narrowly: It forbids personal solicitations, but it does not prevent judicial candidates from learning the identity of donors, seeking volunteer support, or writing thank you notes to contributors. It also covers activity (such as signing a mass mailing letter) that in no way leads to actual or perceived bias.

The hope for Florida is a 2009 decision that sharply criticized the role of money in judicial decision-making. In *Caperton v. A.T. Massey Coal Co*., the court held that due process requires recusal of a judge "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The Florida bar argues that its ban on judicial solicitation of funds is necessary to protect against the risks the court articulated in *Caperton*.

But the tension between the First Amendment and *Caperton* is more apparent than real. It is perfectly consistent to allow judges to personally solicit money in support of their election campaigns, but to then require recusal if a major donor is before the judge as a party.

States could easily remedy any concern relating to judicial impartiality by abolishing elections. As Justice O'Connor noted in her concurring opinion in *White*, "if the state has a problem with judicial impartiality, it is largely one that the state brought upon itself by continuing the practice of popularly electing judges."

The U.S. Constitution permits states to elect, rather than appoint, members of the state judiciary. But as Justice Anthony Kennedy put it in *White*, "[t]he state cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech."

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