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Williams-Yulee v. Florida Bar135 S. Ct. 1656 (2015)

Eric J. Ambos

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Student Case Notes

Williams-Yulee v. Florida Bar
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I. INTRODUCTION

Determining the extent of judicial candidates' free speech rights under the First Amendment has been an infrequent area of contention before the Supreme Court of the United States, with the Court issuing its first decision on the topic thirteen years ago in *Republican Party of Minnesota v. White*.[1] However, the Court's issuance of 5-4 decisions in both *White* and *Williams-Yulee v. Florida Bar*[2] demonstrates that the issue of judicial speech evokes passionate responses from the Court's justices.[3] The protection of judicial speech springs forth from the First Amendment to the United States Constitution, which prohibits laws "abridging the freedom of speech . . . ."[4] However, the Court has previously determined that certain restrictions on the speech of judicial candidates can be upheld if they meet strict scrutiny.[5] Strict scrutiny can be established "only if the restriction is narrowly tailored to serve a compelling interest."[6]

In *Williams-Yulee*, the petitioner asserted that Canon 7C(1) of Florida's Code of Judicial Conduct restricted her First Amendment right to free speech.[7] Canon 7C(1) provides:

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1. 536 U.S. 765 (2002).
2. 135 S. Ct. 1656 (2015).
3. *See* Floyd Abrams, *Symposium: When Strict Scrutiny Ceased to be Strict*, SCOTUSBLOG (Apr. 30, 2015, 9:47 AM), http://www.scotusblog.com/2015/04/symposium-when-strict-scrutiny-ceased-to-be-strict/.
4. U.S. CONST. amend. I.
5. Williams-Yulee v. Fla. Bar, 135 S. Ct. at 1665 (citing Republican Party of Minn. v. White, 536 U.S. at 774).
6. *Id*.
7. *Id*. at 1664.

> 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.[8]

Finding both that the Canon was narrowly tailored and that the State had a compelling interest in upholding the integrity of its judiciary, the Court determined that Canon 7C(1) survived strict scrutiny and therefore upheld its constitutionality.[9] However, this decision was not made without passionate statements from dissenting justices who determined that the finding of strict scrutiny was questionable at best.[10] While the long-term impact of the Court's decision in *Williams-Yulee* is difficult to determine,[11] it is undoubted that *Williams-Yulee* "will have a significant effect in judicial election campaigns and will create great uncertainty as to the constitutionality of other restrictions of speech by candidates for elected judicial offices."[12]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2009, Lanell Williams-Yulee (hereinafter "Yulee") filed paperwork to run for a position on the bench in Hillsborough County, Florida.[13] Yulee subsequently penned a letter to her potential supporters announcing her decision to run for judicial office.[14] In her letter, Yulee wrote:

> An early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams–Yulee Campaign for County Judge[,]' will help raise the initial funds needed to launch the campaign and get our message out to the public.

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8. *Id*. at 1663 (quoting FLA. JUDICIAL CONDUCT CODE § 7C(1) (2014)).
9. *Id*. at 1666.
10. *See* Josh Wheeler, *Symposium: "Seem Familiar?" and Other Random Musings on Williams-Yulee*, SCOTUSBLOG (May 4, 2015, 3:41 PM), http://www.scotusblog.com/2015/05/symposium-seem-familiar-and-other-random-musings-on-williams-yulee/.
11. *Id*.
12. Erwin Chemerinsky, *Are Judges Politicians? SCOTUS Renews the Question*, A.B.A. J. (June 4, 2015, 8:30 AM), http://www.abajournal.com/news/article/chemerinsky_scotus_renews_question_of_whether_judges_are_politicians.
13. *Williams-Yulee*, 135 S. Ct. at 1663.
14. *Id*.

> I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support.[15]

Yulee not only mailed the letter to voters in her area, but also posted the letter on her website.[16]

The Florida Bar determined that Yulee's letter violated Canon 7C(1)'s restriction on the solicitation of funds by judicial candidates and consequently filed a complaint against her.[17] In her defense, Yulee "argued that the Bar could not discipline her for [her] conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election."[18] Finding that Canon 7C(1) furthered a compelling interest[19] and that Canon 7C(1) was narrowly tailored under the First Amendment,[20] the Florida Supreme Court adopted the recommendations of an appointed referee and found that Yulee was guilty of the violation.[21] The Supreme Court of the United States granted certiorari to determine whether the First Amendment allows judges and judicial candidates to personally ask others for campaign funds.[22]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Chief Justice Roberts

Chief Justice Roberts delivered the opinion of the Court and was joined fully by Justices Breyer, Sotomayor, and Kagan.[23] Justice Ginsburg joined in the majority opinion, but wrote separately to take exception with Part II of the opinion.[24] In Part II, the Chief Justice noted that one of the primary issues in the case involved determining "the level of scrutiny that should govern our review."[25] He clarified that the Court has traditionally used exacting (or strict) scrutiny to uphold restrictions on speech "only if they are narrowly tailored to serve a compelling interest."[26] Chief Justice Roberts

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15. Petition for a Writ of Certiorari at 32a, app. D, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) (No. 13-1499).
16. *Williams-Yulee*, 135 S. Ct. at 1663.
17. *Id*. at 1663-64.
18. *Id*. at 1664.
19. *Id*.
20. *Id*. (quoting Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 883 (2007)).
21. *See Williams-Yulee*, 135 S. Ct. at 1664 (citing Fla. Bar v. Williams-Yulee, 138 So. 3d 379 (2014) [hereinafter *Williams-Yulee II*]).
22. *Id*. at 1662.
23. *Id*. at 1661.
24. *Id*.
25. *Id*. at 1664.
26. *Williams-Yulee*, 135 S. Ct. at 1664-65 (citing Riley v. Nat'l Fed'n of Blind of N.C., Inc., 497 U.S. 781, 798 (1988) (Rehnquist, C.J., dissenting)).

acknowledged that the Court previously applied the strict scrutiny standard in *White*, which also dealt with restricting the First Amendment speech of judicial candidates.[27] However, The Florida Bar argued for a less restrictive standard, stating that Canon 7C(1) need only "be 'closely drawn' to match a 'sufficiently important interest'" in accordance with the Court's holding in *Buckley v. Valeo*.[28] Chief Justice Roberts distinguished *Buckley* by stating that the present case dealt with the right to free speech while *Buckley* dealt with the right to free association.[29] Therefore, Chief Justice Roberts concluded Part II by stating that the strict scrutiny standard applied in *White* was applicable to the case at bar as well.[30]

In Part III of his opinion, Chief Justice Roberts acknowledged that "[t]he Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in 'protecting the integrity of the judiciary' and 'maintaining the public's confidence in an impartial judiciary.'"[31] Referencing *Caperton v. A.T. Massey Coal Co.*,[32] Chief Justice Roberts agreed that the Court has previously recognized the strong interest a state has in protecting the integrity of its elected judges.[33] In justifying this precedent, he reasoned that "[t]he judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions."[34] Therefore, Chief Justice Roberts reaffirmed the principle acknowledged in *Caperton*: "[P]ublic perception of judicial integrity is 'a state interest of the highest order.'"[35]

Importantly, Chief Justice Roberts noted that the Court's decisions restricting campaign spending in political elections have little applicability to cases involving judicial elections.[36] In making this distinction, he referred to the Court's holding in *White* to explain that "[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."[37] Chief Justice Roberts further explained that while politicians are expected to respond to the desires of their supporters, judges must be fair and impartial in dealing with both their best friends and their greatest critics.[38] Therefore,

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27. *Id*. at 1665 (citing *White*, 536 U.S. at 774).
28. *Id*. (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).
29. *Id*. (citing *Buckley*, 424 U.S. at 24-25).
30. *Id*.
31. *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Williams-Yulee II*, 138 So. 3d at 385).
32. 556 U.S. 868 (2009).
33. *Williams-Yulee*, 135 S. Ct. at 1666 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. at 889).
34. *Id*.
35. *Id*. (quoting *Caperton*, 556 U.S. at 889).
36. *See id*. at 1667.
37. *Id*. (citing *White*, 536 U.S. at 783 (Ginsburg, J., dissenting)).
38. *Williams-Yulee*, 135 S. Ct. at 1667 (citing McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1462 (2014)).

since the mere appearance of judicial impropriety could cause the public to question the credibility of the judicial branch, the Court determined that Canon 7C(1)'s role in preserving the integrity of the Florida judiciary serves a compelling state interest.[39]

Next, Chief Justice Roberts addressed Yulee's argument that Canon 7C(1) is unconstitutional because it allows judicial campaign committees to solicit funds and judicial candidates to write thank-you notes to donors.[40] Yulee asserts that these forms of speech, like personal solicitation by candidates, are "equally damaging to judicial integrity."[41] While Chief Justice Roberts recognized that the idea of the Canon being deemed unconstitutional because it abridges "*too little* speech"[42] is counterintuitive, he noted that the Court has previously stated that underinclusiveness can cause individuals to "raise 'doubts about whether the government is in fact pursuing the interest it invokes . . . .'"[43] Despite this, Chief Justice Roberts noted that the Court has previously upheld laws under strict scrutiny "that conceivably could have restricted even greater amounts of speech in service of their stated interests."[44] However, he stated that underinclusivity only becomes a First Amendment issue when states regulate one portion of a problem while failing to regulate a different portion of the problem "that affects its stated interest *in a comparable way*."[45] Relating this to the Canon in question, Chief Justice Roberts noted that Florida's ban on personal solicitation by judicial candidates "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates."[46] Furthermore, Chief Justice Roberts went to great lengths to clarify that "personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees."[47] Therefore, reasoning that direct solicitation by a judicial candidate has a different effect than solicitation by a judicial candidate's campaign, the majority held that any underinclusiveness present in Canon 7C(1) is constitutional under the First Amendment.[48]

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39. *Id*. at 1667-68.
40. *Id*. at 1668.
41. *Id*.
42. *Id*.
43. *Williams-Yulee*, 135 S. Ct. at 1668 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740 (2011)).
44. *Id*. (citing Burson v. Freeman, 504 U.S. 191, 207 (1992)).
45. *Id*. at 1670 (citing Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989)).
46. *Id*. at 1668.
47. *Id*. at 1669.
48. *See Williams-Yulee*, 135 S. Ct. at 1668-69.

Although attacking Canon 7C(1) from an underinclusiveness standpoint proved unsuccessful for Yulee, she also attempted to demonstrate that the Canon was unconstitutional by positing that it was too restrictive and "not narrowly tailored to advance the State's compelling interest through the least restrictive means."[49] Specifically, Yulee argued that the materials she distributed (which included a mass mailing and a letter posted online) were sent to a broad audience in a manner that would not affect the public's confidence in judges and judicial candidates.[50] Chief Justice Roberts first responded to this by noting that the Canon's restriction was narrow because candidates are "free to discuss any issue with any person at any time" outside of asking individuals for campaign funds.[51] He also stated that the candidates may use their campaign committees as a proxy to directly solicit campaign funds.[52] Because of this, Chief Justice Roberts rejected the notion that Canon 7C(1) is a "'wildly disproportionate restriction upon speech.'"[53] He also discarded Yulee's argument regarding the broad nature of her solicitation efforts, stating that if Yulee was to send the mass mailing to a group of attorneys with cases pending before the candidate, the communication would still "create an appearance of impropriety" despite the medium used to transmit its contents.[54]

In regard to Canon 7C(1) being narrowly tailored, Chief Justice Roberts wrote that "[t]he First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be 'perfectly tailored.'"[55] He further explained that perfect tailoring was extremely difficult when dealing with a compelling state interest "as intangible as public confidence in the integrity of the judiciary."[56] Therefore, Chief Justice Roberts determined that "because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case."[57] In closing, Chief Justice Roberts summarized the coexistence between a judicial candidate's First Amendment rights and a state's compelling interest in preserving the integrity of its judiciary.[58] He wrote:

> Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling

49. *Id*. at 1670 (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)).
50. *See id*. at 1671.
51. *Id*. at 1670.
52. *Id*.
53. *Williams-Yulee*, 135 S. Ct. at 1670 (quoting *id*. at 1676 (Scalia, J., dissenting)).
54. *See id* at 1671.
55. *Id*. (quoting *Burson*, 504 U.S. at 209).
56. *Id*.
57. *Id*. at 1672.
58. *Williams-Yulee*, 135 S. Ct. at 1673.

> interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.[59]

B. Concurring Opinion by Justice Breyer

Justice Breyer concurred in the majority's opinion.[60] He wrote separately only to reiterate that he views the Court's "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied."[61]

C. Concurring Opinion by Justice Ginsburg

Justice Ginsburg, with whom Justice Breyer joined in part, concurred with Chief Justice Roberts' opinion except for Part II, where she wrote separately to reaffirm the arguments she put forth in her dissenting opinion in *White*.[62] Justice Ginsburg's opinion focused largely upon her belief that states should be given a great deal of latitude to enact judicial campaign finance rules because of the stark contrast between judicial elections and political elections.[63] She noted that the Court's recent political campaign finance cases (*Citizens United v. Federal Election Commission*[64] and *McCutcheon v. Federal Election Commission*[65]) should be sparingly applied to judicial campaign finance cases because "'[f]avoritism' . . . if inevitable in the political arena, is disqualifying in the judiciary's domain."[66]

Justice Ginsburg proceeded to highlight a number of situations where a large amount of advertising dollars were spent to oppose the reelection of judges who rendered decisions that were publically unpopular.[67] She cited polls and surveys indicating that spending disproportionate amounts of money "to influence court judgments threatens both the appearance and actuality of judicial independence."[68] Therefore, instead of being forced to

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59. *Id*.

60. *Id*. (Breyer, J., concurring).

61. *Id*. (citing United States v. Alvarez, 132 S. Ct. 2537, 2551-53 (2012) (Breyer, J., concurring in judgment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400-03 (2000) (Breyer, J., concurring)).

62. *Id*. (Ginsburg, J., concurring in part and concurring in the judgment) (citing *White*, 536 U.S. at 803 (Ginsburg, J., dissenting)).

63. *Williams-Yulee*, 135 S. Ct. at 1673.

64. 558 U.S. 310 (2010).

65. 134 S. Ct. at 1434.

66. *Williams-Yulee*, 135 S. Ct. at 1674 (Ginsburg, J., concurring in part and concurring in the judgment) (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)).

67. *Id*. at 1674-75.

68. *Id*. at 1675.

choose between "either equating judicial elections to political elections, or . . . abandoning public participation in the selection of judges altogether,"[69] Justice Ginsburg argued that states should be able to "'balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.'"[70]

D. Dissenting Opinion by Justice Scalia

Justice Scalia, with whom Justice Thomas joined, filed a dissenting opinion to express his view that the majority failed to faithfully follow established First Amendment principles.[71] Justice Scalia first addressed the majority's opinion by noting that Court precedent states that speech is fully protected by the First Amendment unless the speech has been historically regulated.[72] He noted that until the early 1970s, there were no rules or regulations preventing judges from soliciting campaign funds.[73] As a result, Justice Scalia argued that Canon 7C(1) violates the First Amendment because it "restricts fully protected speech on the basis of content . . . ."[74] Accordingly, Justice Scalia argued that the Canon could only be upheld if it met the requirements of strict scrutiny.[75]

However, instead of applying strict scrutiny, Justice Scalia stated that the majority reached their decision "by applying the *appearance* of strict scrutiny."[76] He first attacked the majority by stating that they failed to demonstrate that Florida's interest in the case was compelling.[77] Comparing the present case to *White*, where "the Court did not allow a [s]tate to invoke hazy concerns about judicial impartiality in justification of an ethics rule . . .,"[78] Justice Scalia argued that Florida's compelling interest in maintaining the integrity of its judiciary was not clearly defined.[79] He also noted that the majority used halfhearted phrases such as "*possible* temptation . . ." and "*might* lead . . ." in order to find that the solicitation of campaign funds by judicial candidates was a compelling state interest in the present case.[80] Therefore, because of this imprecise language, and because the majority failed to apply the standard in a consistent fashion, Justice Scalia opined

69. *Id*.
70. *Id*. (quoting *White*, 536 U.S. at 821 (Ginsburg, J., dissenting)).
71. *See Williams-Yulee*, 135 S. Ct. at 1675-76 (Scalia, J., dissenting).
72. *Id*. at 1676 (citing *Entm't Merchs.*, 131 S. Ct. at 2733-34).
73. *Id*.
74. *Id*.
75. *Id*.
76. *Williams-Yulee*, 135 S. Ct. at 1677 (Scalia, J., dissenting) (emphasis added).
77. *See id*. at 1677-79.
78. *Id*. at 1677 (citing *White*, 536 U.S. at 775).
79. *Id*.
80. *Id*.

that the majority had no grounds to find a compelling state interest in the present case.[81]

Justice Scalia further added that Florida must not only establish that it has a compelling interest in restricting judicial candidates from personally asking for campaign funds, but that it must also "meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective."[82] He noted that in the present case, the majority found that strict scrutiny was met because allowing judicial candidates to personally solicit individuals "will make litigants worry that 'judges' decisions may be motivated by the desire to repay campaign contributions.'"[83] However, Justice Scalia clarified that the primary issue in *Williams-Yulee* was not focused upon whether Yulee had the right to receive funds from others, but was instead focused upon whether Yulee had the right to *solicit* funds from others.[84] He further added that Florida could only meet its burden by "showing that banning *requests* for lawful contributions" would significantly increase the public's confidence in judges.[85] Justice Scalia argued that both the majority and The Florida Bar provided no evidence that would be sufficient to meet this strong burden.[86] To the contrary, Justice Scalia noted that no one had "suggest[ed] that public confidence in judges" is worse in the nine states[87] that allow judicial candidates to solicit campaign funds than elsewhere.[88] Therefore, Justice Scalia would have found that Florida did not meet its required burden of demonstrating that the restriction on judicial candidates' speech "substantially advance[d] its objective."[89]

Justice Scalia continued his analysis by considering whether Canon 7C(1) was narrowly tailored to achieve its purpose.[90] He opined that the Canon "falls miles short" of meeting the narrowly tailored standard, especially since Canon 7C(1)'s broad restrictions prevent Yulee (and all judicial candidates) from calling their closest relatives or friends to ask them for a campaign contribution.[91] Furthermore, Justice Scalia stated that the

81. *See Williams-Yulee*, 135 S. Ct. at 1677-78 (Scalia, J., dissenting).
82. *Id*.
83. *See id*. at 1678 (quoting *id*. at 1667 (majority opinion)).
84. *Id*. (emphasis added).
85. *Id*.
86. *Williams-Yulee*, 135 S. Ct. at 1678 (Scalia, J., dissenting).
87. *Id*. at 1676. *See* Brief for American Bar Association as Amici Curiae Supporting Respondent at 1a-20a, app., Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) (No. 13-1499) (noting that the following nine states allow judicial candidates to personally solicit campaign funds: Alabama, California, Georgia, Kansas, Maryland, Montana, New Mexico, North Carolina, and Texas).
88. *Williams-Yulee*, 135 S. Ct. at 1678 (Scalia, J., dissenting).
89. *Id*. at 1678-79.
90. *Id*. at 1679.
91. *Id*.

Florida Supreme Court has previously accommodated judges and allowed them to personally ask individuals to join civic clubs if the individuals are "not 'likely ever to appear before the court on which the judge serves.'"[92] Examining these factors as a whole, Justice Scalia determined that the speech restricted by Canon 7C(1) was much greater than necessary.[93]

Justice Scalia concluded his dissent by examining the majority's argument on underinclusiveness.[94] Although Justice Scalia applied the same rule as the majority in regards to this issue, he did not reach the same result.[95] He highlighted that under Canon 7C(1), Yulee could not ask an individual for money to help fund her campaign, but could ask the same individual for a personal loan unrelated to her campaign efforts.[96] Justice Scalia argued that although both communications by Yulee comparably impair the State's compelling interest in the present case, Florida has only chosen to regulate the personal solicitation of campaign funds by judicial candidates.[97] Because of this, Justice Scalia determined that Canon 7C(1)'s underinclusiveness "violates the First Amendment."[98]

E. Dissenting Opinion by Justice Kennedy

Justice Kennedy stated that Justice Scalia's opinion provided a full explanation as to why the majority's opinion violated the First Amendment.[99] However, Justice Kennedy wrote separately to highlight the ironies in the Court's decision.[100] He first observed that the Court's ruling was ironic because it concluded that the free speech principles judges are required to uphold are "lessened when a judicial candidate's own speech is at issue."[101] He also noted that the Court's restriction of free speech in judicial elections is ironic because elections provide an opportunity to engage in a number of freedoms (including speech) that are emblematic of a free society.[102] Justice Kennedy opined that the majority based its speech restriction on two incorrect premises: 1) that "the public lacks the necessary judgment to make an informed choice," and 2) that judicial elections "can

92. *Id*. (quoting FLA. JUDICIAL CONDUCT CODE § 4D(2) (2014)).
93. *See Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting).
94. *See id*. at 1680-82.
95. *See id*. at 1680.
96. *Id*.
97. *See id*. at 1681.
98. *Williams-Yulee*, 135 S. Ct. at 1681 (Scalia, J., dissenting) (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975)).
99. *Id*. at 1682 (Kennedy, J., dissenting).
100. *Id*.
101. *Id*.
102. *See id*.

be subject to certain content-based rules that would be unacceptable in other elections" because of the integrity that accompanies the judiciary.[103]

Justice Kennedy posited that the entire purpose of a candidate's fundraising efforts is to further political speech.[104] He wrote that when a candidate's right to free speech is abridged, "the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced."[105] Justice Kennedy believed that any concerns arising from campaigns could be remedied with more speech instead of less speech.[106] He also rebuked the notion that the nation's electorate is incapable of making informed choices at the polls, stating that the modern technologies available to the public today (such as the Internet) provide voters with ample opportunities to be informed.[107] He suggested that increased public disclosure laws for candidates could prevent corruption and provide a remedy that is more favorable than restricting speech.[108]

Justice Kennedy closed by faulting the majority's application of strict scrutiny in the present case.[109] He stated that Canon 7C(1) was "nowhere close to being narrowly tailored,"[110] and warned that the Court's decision in the present case created "a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes."[111]

F. Dissenting Opinion by Justice Alito

Justice Alito wrote briefly to take issue with the Court's finding of strict scrutiny in the present case.[112] Speaking directly to whether Canon 7C(1) was narrowly tailored, Justice Alito wrote that "this rule is about as narrowly tailored as a burlap bag" because it applies to all solicitations made by judicial candidates in any medium.[113] Like Justice Kennedy, Justice Alito questioned the current state of the strict scrutiny standard, stating that if Canon 7C(1) is narrowly tailored, "then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired."[114]

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103. *Williams-Yulee*, 135 S. Ct. at 1683 (Kennedy, J., dissenting).
104. *Id*.
105. *Id*.
106. *Id*. at 1684.
107. *Id*.
108. *Williams-Yulee*, 135 S. Ct. at 1684-85 (Kennedy, J., dissenting).
109. *Id*. at 1685.
110. *Id*.
111. *Id*.
112. *See id*. (Alito, J., dissenting).
113. *Williams-Yulee*, 135 S. Ct. at 1685 (Alito, J., dissenting).
114. *Id*.

IV. ANALYSIS

A. Introduction

The Court previously spoke on the issue of whether judicial candidates should be subjected to First Amendment speech restrictions in *Republican Party of Minnesota v. White*.[115] In *White*, which was the Court's only prior case to address speech restrictions on judicial candidates, the Court "assumed that strict scrutiny applied."[116] Similarly, seven of the Court's nine justices agreed that strict scrutiny was the proper level of review to apply in *Williams-Yulee*.[117] Despite this, the majority and dissenting opinions reached starkly different conclusions regarding the definitions of "narrowly tailored" and "compelling government interest."[118] A review of the Court's decision in *Williams-Yulee* in comparison to previous Court decisions demonstrates that the majority's application of strict scrutiny not only contradicts the Court's holding in *White*, but also lacks factual authenticity in its reasoning.[119] Accordingly, this analysis examines the Court's application of strict scrutiny by reviewing *White* and similar subsequent Court decisions in order to: 1) analyze the strength of the majority's argument in finding a compelling state interest in *Williams-Yulee*; 2) determine whether the narrowly tailored standard has loosened after *Williams-Yulee*; and 3) forecast the impact that *Williams-Yulee* will have on future judicial elections.[120]

B. Discussion

1. Establishing a Compelling State Interest in Williams-Yulee

Chief Justice Roberts acknowledged that "'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest."[121] However, he identified *Williams-Yulee* as one of those rare cases because of Florida's "compelling interest in preserving public confidence in the integrity of the judiciary."[122] Chief Justice Roberts

115. *White*, 536 U.S. at 768.

116. *Williams-Yulee*, 135 S. Ct. at 1665.

117. Abrams, *supra* note 3 (noting that Justice Ginsburg and Justice Breyer determined that strict scrutiny should not apply).

118. *See Williams-Yulee*, 135 S. Ct. at 1666; *id*. at 1677 (Scalia, J., dissenting).

119. *See* Vikram David Amar, *The Significance of the Supreme Court's Williams-Yulee Decision Upholding Florida's Regulation of Judicial Elections*, JUSTIA (May 22, 2015), https://verdict.justia.com/2015/05/22/the-significance-of-the-supreme-courts-williams-yulee-decision-upholding-floridas-regulation-of-judicial-elections.

120. *See infra* Parts IV.B.1-3.

121. *Williams-Yulee*, 135 S. Ct. at 1665-66 (quoting *Burson*, 504 U.S. at 211).

122. *Id*. at 1666.

further stated that the idea that judges (who are tasked with being neutral arbiters) cannot solicit individuals for campaign funds without "diminishing public confidence in judicial integrity" is an intuitive principle that has been a part of history since the time of the Magna Carta.[123] Looking to the present day, Chief Justice Roberts argued that Canon 7C(1)'s compelling interest is also supported by contemporary precedent.[124] Citing the Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, Chief Justice Roberts stated that the Court has "recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'"[125]

Justice Scalia responded to the majority's argument by questioning the finding of a compelling state interest in the present case.[126] He asserted that The Florida Bar must not only demonstrate a compelling interest,[127] but that it must also demonstrate "that banning *requests* for lawful contributions will improve confidence in judges . . . significantly, because 'the Government does not have a compelling interest in each marginal percentage point by which its goals are advanced.'"[128] Examining Justice Scalia's arguments in light of *Caperton* demonstrates that the majority improperly found a compelling state interest in *Williams-Yulee*.[129]

In *Caperton*, a West Virginia trial court issued a $50 million jury verdict in favor of the petitioners.[130] In the interim period between the issuance of the verdict and the filing of the appeal, the respondent's CEO (who knew that West Virginia's high court would consider the case) donated approximately $3 million to a candidate for the Supreme Court of Appeals of West Virginia.[131] The candidate won the election and subsequently denied the petitioner's motion to disqualify the candidate, who was now a justice on the court.[132] West Virginia's high court then reversed the $50 million verdict by a vote of 3-2, with the justice in question voting to reverse.[133] After the justice in question again denied a motion to recuse himself, the Supreme Court of Appeals of West Virginia granted a rehearing

123. *Id*.
124. *Id*.
125. *Id*. (quoting *Caperton*, 556 U.S. at 889).
126. *See Williams-Yulee*, 135 S. Ct. at 1678 (Scalia, J., dissenting).
127. *See id*.
128. *Id*. (quoting *Entm't Merchs.*, 131 S. Ct. at 2741).
129. *See* Michael E. DeBow & Brannon P. Denning, *Williams-Yulee v. The Florida Bar, the First Amendment, and the Continuing Campaign to Delegitimize Judicial Elections*, 68 VAND. L. REV. 113, 117 (2015).
130. *Caperton*, 556 U.S. at 872.
131. *Id*. at 873.
132. *Id*. at 873-74.
133. *Id*. at 874.

in the case.[134] The rehearing ended with the same result: a 3-2 decision in favor of reversing the $50 million verdict, with the justice in question voting to reverse.[135] The Court granted certiorari to determine whether the Fourteenth Amendment's Due Process Clause was violated when the justice denied the recusal motion.[136]

In holding that the Due Process Clause was violated,[137] the Court acknowledged that "this is an exceptional case."[138] The Court further explained its reasoning by stating that there is a great risk of judicial bias "when a person with a personal stake in a particular case ha[s] 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."[139] This language used by the Court in setting forth the rule of law is very specific, which implies that the Court's use of language must be specific (as opposed to vague) in order to establish a compelling state interest.[140]

An article comparing the similarities between *Williams-Yulee*, *Caperton*, and *White* stated that "[a]t the very least, the Court should demand some proof from Florida that its sweeping ban addresses a real problem, as opposed to simply being a solution in search of one."[141] However, examining *Caperton* in comparison to *Williams-Yulee* creates doubt as to the validity of Florida's compelling interest in the present case.[142] As Justice Scalia noted, the majority used vague language (which identified that the restriction on speech would prevent any "'*possible* temptation' that '*might* lead' the judge . . . ." towards impropriety) that strained to establish a compelling interest in the present case.[143] While Florida may have an interest in prohibiting judicial speech in this matter, the wavering language used by the *Williams-Yulee* Court is insufficient to meet the specificity standard exhibited in *Caperton*.[144] Additionally, the Court indicated in *Caperton* that it was "an exceptional case."[145] As a result, the Court noted that its decision would only require judges to abridge their

134. *Id*. at 874-75.
135. *Caperton*, 556 U.S. at 875.
136. *Id*. at 872.
137. *See id*.
138. *Id*. at 884.
139. *Id*; *see also* DeBow & Denning, *supra* note 129, at 117.
140. *See* DeBow & Denning, *supra* note 129, at 117.
141. *Id*.
142. *See id*.
143. *See Williams-Yulee*, 135 S. Ct. at 1677-78 (Scalia, J., dissenting) (quoting *id*. at 1667 (majority opinion)).
144. *See* DeBow & Denning, *supra* note 129, at 117.
145. *Caperton*, 556 U.S. at 884.

speech by recusing themselves in rare situations.[146] In contrast, however, the rule of law set forth in *Williams-Yulee* restricts every judicial candidate in thirty states from personally soliciting others for campaign funds during every future election cycle.[147] The broad-based scope of the Court's decision in *Williams-Yulee* demonstrates that the majority failed to follow the Court's precedent in *Caperton* and, in so doing, failed to properly establish a compelling state interest in the present proceeding.[148]

The Court's majority also failed to properly establish that banning campaign solicitations by judicial candidates will significantly increase the public's confidence in judges as required by the Court's prior precedents and as noted by Justice Scalia in his dissent.[149] The Florida Bar did not present any case law to the Court demonstrating that "in jurisdictions where judges *are* allowed personally to solicit donations, public confidence in the integrity of the judiciary is diminished compared with those jurisdictions where the practice is banned."[150] The Florida Bar may have failed to include any evidence to this effect because the evidence does not support its conclusion.[151] For example, in North Carolina, where judicial candidates are allowed to personally solicit individuals for campaign funds,[152] a public-opinion survey was conducted to gauge individuals' attitudes towards judicial elections.[153] The survey "revealed that 84% of likely voters surveyed were 'concerned about how judges raise money for their elections.' Nearly three-quarters of the respondents (74%) believed that campaign contributions 'influence judicial decisions.' Still, 81% of these same respondents favored judicial elections."[154] Although this survey only

146. *See id*. at 890.

147. *See* Adam Liptak, *Supreme Court Upholds Limit on Judicial Fund-Raising*, N.Y. TIMES (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/us/supreme-court-rules-in-williams-yulee-florida-judicial-fund-raising-case.html?_r=0; *see also* Brief for American Bar Association as Amici Curiae, *supra* note 87, at 1a-20a, app. (noting that the following thirty states do not allow judicial candidates to personally solicit campaign funds: Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

148. *See* DeBow & Denning, *supra* note 129, at 117.

149. *Williams-Yulee*, 135 S. Ct. at 1678 (Scalia, J., dissenting) (quoting *Entm't Merchs.*, 131 S. Ct. at 2741).

150. DeBow & Denning, *supra* note 129, at 116.

151. *See* Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections after Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 16 (2011).

152. Jane Porter, *SCOTUS Ruling Allowing States to Bar Judges from Soliciting Campaign Money May Have Implications in N.C.*, INDY WK. (May 4, 2015, 12:11 PM), http://www.indyweek.com/news/archives/2015/05/04/scotus-ruling-allowing-states-to-bar-judges-from-soliciting-campaign-money-may-have-implications-in-nc.

153. Rotunda, *supra* note 151, at 16.

154. *Id*. (quoting J. Barlow Herget, Op-Ed, *It's Time for Judicial Reform*, CHARLOTTE OBSERVER, May 31, 2002, at 14A).

examined the public's perception of judicial elections in North Carolina, it provides a strong indication that voters "do not regard *judicial* campaign finance with any more disdain than fundraising in connection with legislative or executive branch races."[155] This further reaffirms the proposition that the majority's stated governmental interest is not compelling enough to withstand the rigors of strict scrutiny.[156]

2. The Loosening of the Narrowly Tailored Standard

Chief Justice Roberts found that Canon 7C(1) was narrowly tailored because it "leaves judicial candidates free to discuss any issue with any person at any time."[157] He further stated that the Canon's only restriction prevents judicial candidates from directly asking another person to donate money to their campaign.[158] Citing *White*, Chief Justice Roberts reasons that this restriction is necessary because "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary."[159] However, instead of fully addressing whether Yulee's solicitations were constitutional because they were displayed to a broad audience, Chief Justice Roberts responded that the Court "decline[d] to wade into this swamp" because the First Amendment need only be narrowly tailored and not "'perfectly tailored.'"[160]

Justice Scalia,[161] Justice Kennedy,[162] and Justice Alito[163] each took turns heavily disputing this fact, with Justice Alito making the bold assertion that Canon 7C(1) "is about as narrowly tailored as a burlap bag."[164] Justice Scalia noted that the majority "seem[ed] to accept Florida's claim that solicitations erode public confidence by creating the perception that judges are selling justice to lawyers and litigants."[165] However, he further argued that the Canon prohibits judicial candidates from soliciting funds from *any* person, regardless of whether or not they are a lawyer or litigant.[166] Justice Scalia also posited that the Canon could have been more narrowly tailored to include online solicitations, for example, because they would avoid the direct exchange of funds between lawyers and judicial candidates and

155. *See* DeBow & Denning, *supra* note 129, at 117.
156. *See id*.
157. *Williams-Yulee*, 135 S. Ct. at 1670.
158. *See id*.
159. *Id*. at 1667 (quoting *White*, 536 U.S. at 790 (O'Connor, J., concurring)).
160. *Id*. at 1671 (quoting *Burson*, 504 U.S. at 209).
161. *Id*. at 1679 (Scalia, J., dissenting).
162. *Williams-Yulee*, 135 S. Ct. at 1685 (Kennedy, J., dissenting).
163. *Id*. (Alito, J., dissenting).
164. *Id*.
165. *Id*. at 1679 (Scalia, J., dissenting).
166. *Id*. (emphasis added).

would not pressure individuals into donating to the candidate's campaign.[167] Weighing the justices' arguments by examining both *White* and the Court's recent developments in regards to the definition of "narrowly tailored" demonstrates that this standard was traditionally quite restrictive.[168] However, with the Court's decision in *Williams-Yulee*, this strong standard has been greatly loosened.[169]

In *White*, the Court considered whether a Minnesota canon preventing judicial candidates from "'announc[ing] his or her views on disputed legal or political issues'" was constitutional.[170] The Court held that the canon was unconstitutional under the First Amendment.[171] Relevantly, the Court determined that the clause was "not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense."[172] The Court noted that "[i]n order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.'"[173] Taking this into consideration, the Court reasoned that the clause in question was not narrowly tailored because it restricted speech regarding particular issues instead of speech regarding particular parties.[174] This demonstrates that narrowly tailored laws have a need for specificity not found in Chief Justice Roberts' justification of the Court's holding in *Williams-Yulee*.[175] In addition, the burden that must be met in establishing that a law is narrowly tailored has only continued to strengthen in the years since the Court's consideration of *White*.[176] A recent law review article identified that "[i]n recent cases . . . the Supreme Court has required the government to prove that its regulation of speech 'be 'actually necessary' to achieve its interest . . . . There must be a direct causal link between the restriction imposed and the injury to be prevented."[177]

Despite the existence of these strong standards, it is evident in the present case that the Court did not follow the approach it took in *White* because it failed to "wade into th[e] swamp" and specifically identify Canon

167. *Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting).
168. *See* DeBow & Denning, *supra* note 129, at 118.
169. Abrams, *supra* note 3.
170. *White*, 536 U.S. at 768 (quoting MINN. JUDICIAL CONDUCT CODE § 5(A)(3)(d)(i) (2000)).
171. *Id*. at 788.
172. *Id*. at 776.
173. *Id*. at 775 (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).
174. *Id*. at 776.
175. *See Williams-Yulee*, 135 S. Ct. at 1670. While Chief Justice Roberts acknowledges that Canon 7C(1) only prohibits judicial candidates from directly asking others for campaign funds, he does not address Justice Scalia's argument that the Canon could be more narrowly tailored by allowing candidates to make personal solicitations online, for example. *See id*. at 1679. Thus, Justice Scalia's example demonstrates that Canon 7C(1) could be tailored in a more focused manner in order to meet the specificity standard set in *White*. *See White*, 536 U.S. at 776.
176. *See* DeBow & Denning, *supra* note 129, at 118.
177. *Id*. (quoting *Alvarez*, 132 S. Ct. at 2549).

7C(1)'s boundaries as required by *White*.[178] As a result, the Court has created doubt regarding the current definition of this constitutional standard.[179] As referenced above, Chief Justice Roberts made no efforts to respond to Justice Scalia's assertion that online solicitation could be an acceptable method of circumventing the negative aspects of personal solicitation.[180] Rather, he responded by merely stating that the Court "decline[d] to wade into this swamp."[181] However, by failing to answer directly, Chief Justice Roberts does not address the relevant considerations that run counter to the majority's argument that Canon 7C(1) is narrowly tailored.[182]

For example, Ohio also applies a ban on the solicitation of campaign funds by judicial candidates.[183] Despite this, Ohio has made a number of exceptions to the rule so that "[j]udicial candidates may make a general request for campaign contributions when speaking to an audience of twenty or more people, and may sign letters or send emails personally soliciting campaign contributions . . ." if the letter clarifies that the contributions go to the candidate's committee as opposed to the candidate personally.[184] Although this example only highlights the practices of one state, it demonstrates that tailoring Canon 7C(1) more narrowly is not a mere ambitious goal, but is rather a reality that other states with similar canons have already accomplished.[185] Consequently, since Chief Justice Roberts declined to respond to this matter, he did not demonstrate: 1) that the law does not "'unnecessarily circumscrib[e] protected expression'" in accordance with *White*,[186] and 2) that there was "a direct causal link between the restriction imposed and the injury to be prevented" in accordance with the Court's more recent interpretation of what "narrowly tailored" means.[187] Furthermore, the narrowly tailored standard has also not been established because, as stated in the discussion regarding Florida's compelling state interest, there is existing data suggesting that there is no

178. *See Williams-Yulee*, 135 S. Ct. at 1671; *White*, 536 U.S. at 776; *see also* Ronald Collins, *Foreword: Are Elected State Judges Now "Above the Political Fray"?*, SCOTUSBLOG (Apr. 29, 2015, 7:46 PM), http://www.scotusblog.com/2015/04/foreword-are-elected-state-judges-now-above-the-political-fray/.

179. Collins, *supra* note 178.

180. *See Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting).

181. *Id*. at 1671.

182. *See* Marianna Brown Bettman, *Commentary: Are Judicial Elections Different After All? Williams-Yulee v. The Florida Bar*, LEGALLY SPEAKING OHIO (May 6, 2015), http://www.legallyspeakingohio.com/2015/05/commentary-are-judicial-elections-different-after-all-williams-yulee-v-the-florida-bar/.

183. *Id*.

184. *Id*.

185. *Id*.

186. *White*, 536 U.S. at 775 (quoting *Hartlage*, 456 U.S. at 54).

187. DeBow & Denning, *supra* note 129, at 118 (quoting *Alvarez*, 132 S. Ct. at 2549).

direct link between the public's confidence in the judiciary and the personal solicitation of campaign funds by judicial candidates.[188] Therefore, the majority in *Williams-Yulee* was incorrect in finding that Canon 7C(1) was narrowly tailored, and consequently created confusion as to the current state of the narrowly tailored standard.[189]

3. Williams-Yulee's Impact on Future Judicial Elections

Although the Court's consideration was limited to Canon 7C(1) of Florida's Code of Judicial Conduct, the Court's decision in *Williams-Yulee* essentially upheld similar rules and laws restricting judicial candidates from personally soliciting campaign funds in Florida and twenty-nine other states.[190] In addition to having a large geographical reach across the country, the Court's decision in *Williams-Yulee* also "has the potential to severely restrict not only the speech rights of judges in contexts other than the solicitation of campaign funds, but also the First Amendment rights of all Americans."[191] As noted by an observer of the Court, the application of strict scrutiny in times past meant that "one need not read the opinion any further to know that the government action at issue was held to be unconstitutional."[192] However, since the Court found that strict scrutiny applied in the present case without conveying specific rationales for its decision, it is difficult to "[p]redict[] the long-term impact of *Williams-Yulee* . . . ."[193] Therefore, aspiring judges, attorneys, and everyday citizens will have to wait for further directive from the Court in order to define the exact parameters of strict scrutiny.[194]

V. CONCLUSION

The Supreme Court's decision in *Williams-Yulee* provided the Court with an opportunity to announce its position on judicial candidates' First Amendment right to free speech for the first time in thirteen years.[195] The Court determined that Florida could restrict judicial candidates from personally soliciting others for campaign funds because the requisites needed to survive strict scrutiny were established.[196] However, the majority's determination of what constituted a compelling state interest that is narrowly tailored was arguably much more relaxed than the Court's prior

188. Rotunda, *supra* note 151, at 16 (quoting Herget, *supra* note 154, at 14A).
189. *See* Collins, *supra* note 178.
190. Liptak, *supra* note 147.
191. Wheeler, *supra* note 10.
192. *Id*.
193. *Id*.
194. *See id*.
195. Abrams, *supra* note 3.
196. *Williams-Yulee*, 135 S. Ct. at 1666.

holding in *White*.[197] As a result, the Court has created ambiguity as to the proper application of the strict scrutiny standard that will likely exist until the Court provides further guidance.[198]

ERIC J. AMBOS

197. Collins, *supra* note 178.
198. *See* Wheeler, *supra* note 10.