No. 17-493

In The

Supreme Court of the United States

KIMBERLY MICHELE SHEPARD,

Petitioner,

v.

FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Florida Supreme Court properly held that Canon 7A(3)(e)(ii) of the Florida Code of Judicial Conduct, which provides that a candidate for judicial office "shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent," is facially constitutional under the First Amendment.

2. Whether the Florida Supreme Court properly held that Canons 7A(3)(e)(ii) and 7A(3)(b) of the Florida Code of Judicial Conduct are constitutional *as applied* to Petitioner where the court found by clear and convincing evidence that Petitioner had published a knowing misrepresentation of fact in her judicial campaign advertisement.

PARTIES TO THE PROCEEDINGS

Petitioner, Kimberly Michele Shepard, was the respondent in the proceedings before the Florida Supreme Court. Respondent in this proceeding, the Florida Judicial Qualifications Commission, was the petitioner before the Florida Supreme Court.

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OPINIONS AND ORDERS BELOW

The opinion sought to be reviewed, *In re Shepard*, 217 So. 3d 71 (Fla. 2017), is appended at A-1 of Petitioner's Appendix.

The Findings of Fact, Conclusions of Law, and Recommendation of the Hearing Panel, Florida Judicial Qualifications Commission, is appended at A-28 of Petitioner's Appendix.

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1257, which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege or immunity is . . . claimed under the Constitution . . . of . . . the United States."

The JQC acknowledges that Petitioner's Petition for Writ of Certiorari was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Code of Judicial Conduct, Canon 7A(3)(e)(ii):

A candidate for a judicial office shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Florida Code of Judicial Conduct, Canon 7A(3)(b):

A candidate for a judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity, and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.

STATEMENT OF THE CASE

BACKGROUND

The Florida Constitution confers upon the Florida Judicial Qualifications Commission ("JQC") the jurisdiction to investigate and make recommendations to the Florida Supreme Court regarding the discipline of judges. *See* Art. V, § 12(a)(1), *Fla. Const.* Pursuant to the state constitution, the JQC is divided into two separate panels, an investigative panel and a hearing panel. *See* Art. V, § 12(b). "The investigative panel is vested with the jurisdiction to receive or initiate complaints, conduct investigations, dismiss complaints and . . . submit formal charges to the hearing panel." *Id.* After receiving charges from the investigative panel, the hearing panel is authorized to conduct a trial on the charges, make findings of fact, and recommend appropriate discipline to the Florida Supreme Court. *Id.*

Upon receipt of findings and a recommendation of discipline from the hearing panel, the Florida Supreme Court is authorized to accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the hearing panel. *See* Art. V, § 12(c). The Florida Supreme Court "reviews the findings of the JQC to determine whether they are supported by clear and convincing evidence and reviews the recommendation of discipline to determine whether it should be approved." *In re Andrews*, 875 So. 2d 441, 442 (Fla. 2004). If the Florida Supreme Court determines that the hearing panel's findings are supported by clear and

convincing evidence, the court may impose discipline. Constitutionally authorized sanctions range from a public reprimand and fine to suspension or removal from office. *See* Art. V, § 12(a)(1). It is from the Florida Supreme Court's opinion approving the Hearing Panel's findings and recommendation of discipline that the present Petition for Certiorari has its genesis. *In re Shepard*, 217 So. 3d 71 (Fla. 2017).

FACTS

Petitioner, Judge Michele Shepard, was elected to the circuit court bench in Orange County, Florida, in August 2014, following a contested election with another lawyer, Norberto Katz. On September 24, 2015, the Investigative Panel of the JQC filed a Notice of Formal Charges against Petitioner. Thereafter, on January 8, 2016, the JQC filed its Amended Notices of Formal Charges ("Charges"). *See* Petitioner's Appendix at A-55.

The gravamen of the Charges against Petitioner was that she violated several provisions of the Florida Code of Judicial Conduct by purposefully circulating an advertisement during her judicial campaign that gave the misleading impression she had been endorsed in her judicial campaign by the *Orlando Sentinel* newspaper when the newspaper had actually endorsed her opponent.

Specifically, in its Amended Notice of Formal Charges, the JQC alleged as follows:

1. During your contested 2014 judicial campaign both you and your opponent sought the endorsement of the Orlando Sentinel newspaper. The Orlando Sentinel chose to endorse your opponent, Norberto Katz. In their endorsement they highlighted his experience. They also noted that Mr. Katz had been suspended from the Florida Bar in 1995 for misconduct. They noted that he had diligently worked to rebuild his reputation and had become chair of the Bar's family law section and had been endorsed by 18 past Orange County Bar presidents, a clear indication that he had regained his good standing within the legal community.

2. Prior to the Orlando Sentinel formally selecting Mr. Katz, you circulated a campaign advertisement that stated:

> "*Ms. Shepard has done well. She has kept her promises. She has worked hard. She has maintained her integrity*." – The Orlando Sentinel. [See Judge Shepard's campaign advertisement attached hereto as JQC Exhibit 1]

3. This quotation was deceptive because it was actually an endorsement you received during a 1994 campaign for reelection to the Florida House. Compounding the mendacity, your use of this quote on the advertisement did not include the

> date that the Sentinel had actually endorsed you.
>
> 4. In defending your undated use of this 20-year-old endorsement you stated that you were attempting to show that you had been in public service before, and had previously earned the public's trust. However, nowhere on this advertisement is there a reference to your prior public service as a member of the Florida House. In fact, in quoting the prior endorsement, you purposefully excluded parts of the original endorsement that made reference to your legislative service. [Orlando Sentinel endorsement from 1994 included as JQC Exhibit 2].
>
> Your use of misleading campaign materials was inappropriate, and unsuitable for a candidate seeking judicial office. Additionally, your actions constitute a breach of Canons 1, 2A, 7A(3)(b), 7A(3)(c), 7A(3)(d), and 7A(3)(e)(ii). In addition to the aforementioned Canons, your conduct also violated Rule 4-8.2(b) of the Rules Regulating the Florida Bar.

See Petitioner's Appendix at A-55.[1]

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[1] Due to inadvertence, copies of Exhibits 1 and 2 were not attached to the JQC's Amended Notice of Formal Charges. Exhibits 1 and 2 to the Amended Notice of Formal Charges are the same as Exhibits 1 and 2 to the JQC's original Notice of Formal Charges. *See* Petitioner's Appendix at A-64-A-66.

Judge Shepard answered the Amended Formal Charges, denying that her advertisement was "either intentionally or actively deceptive or violative of the cited canons. . . ." She denied that she attempted to knowingly mislead anyone, asserting that her use of the *Orlando Sentinel's* 20-year-old endorsement was appropriate because "[t]here [was] no indication that [her] integrity or character underwent a fundamental transformation in the intervening years since being recognized and praised by the Orlando Sentinel. . . ." Judge Shepard also raised a number of defenses in her Answer, including the fact that Canon 7A(3)(e)(ii) is unconstitutional on its face, and as applied, under the First Amendment to the United States Constitution.

The case was tried before the Hearing Panel of the JQC on April 8, 2016. On June 9, 2016, the Hearing Panel issued its Findings of Fact, Conclusions of Law and Recommendations. *See* Petitioner's Appendix at A-28. Among other things, the Hearing Panel found that:

> By knowingly deleting the 1994 date of the *Orlando Sentinel's* endorsement, and all references to her legislative service, Judge Shepard made it appear that she had received the *Orlando Sentinel's* current endorsement, which is patently untrue. The Hearing Panel believes that judicial endorsements by local newspapers can and do have significant impact on the electorate, and the outcome of judicial races. Voters, often unable to discern the differences between judicial candidates, rely on local editorial boards to steer them in the

> right direction. Active and intentional manipulation of these endorsements represents both a strategic understanding of how important those endorsements are, and a willingness to mislead for personal gain. The Hearing Panel finds Judge Shepard's behavior in this respect to be offensive and disturbing.

See Petitioner's Appendix at A-49.

Accordingly, the Hearing Panel found Petitioner violated Canon 7A(3)(e)(ii) "by knowingly misrepresenting 'other facts' concerning her candidacy" and Canon 7A(3)(b) "by acting in a manner inconsistent with [the] integrity of the judiciary by [her] knowing misrepresentations." *See* Petitioner's Appendix at A-50. The Hearing Panel also found Judge Shepard guilty of violating Rule 4-8.2(b) of The Rules Regulating the Florida Bar, which provides that, "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct." *See* Petitioner's Appendix at A-50. With respect to discipline, the Hearing Panel recommended that the Florida Supreme Court impose the following discipline on Judge Shepard: (1) a public reprimand; (2) a ninety-day suspension without pay; and (3) payment of investigative costs and costs of the proceedings.[2] *See* Petitioner's Appendix at A-52.

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[2] The Hearing Panel found Judge Shepard not guilty of violating Canons 1, 2A, 7A(3)(c) and 7A(3)(d). Hence, those canons will not be discussed in this Response.

By Order dated June 10, 2016, the Florida Supreme Court ordered Petitioner to show cause why the Hearing Panel's recommendations should not be accepted. After both Petitioner and the JQC responded to the Show Cause Order, the case was submitted to the Florida Supreme Court without oral argument. The Florida Supreme Court issued its decision on May 4, 2017. *In re Shepard*, 217 So. 3d 71 (Fla. 2017); *see* Petitioner's Appendix at A-1. In sum, the Court unanimously approved the Hearing Panel's finding that Petitioner "knowingly misrepresented the Orlando Sentinel's 1994 endorsement in her advertisement, which made it appear that she received the Orlando Sentinel's 2014 endorsement." *Shepard*, 217 So. 3d at 83. The Florida Supreme Court also approved the Hearing Panel's recommended sanction. *Id.*

Thereafter, Petitioner filed an application for extension of time to file a petition for writ of certiorari in this Court, which was granted, and her time to file was extended through October 1, 2017. Petitioner timely filed her Petition for Writ of Certiorari on September 29, 2017.

SUMMARY OF ARGUMENT

The Florida Supreme Court's decision rests upon a thoughtful and reasoned application of this Court's decisions in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656 (2015). Contrary to Petitioner's

argument, this case is not a referendum on how "courts are having great difficulty understanding and applying a consistent test for when, and how extensively, states may regulate the speech of candidates for judicial office." *See* Respondent's Petition for Writ of Certiorari at 3 ("Petition"). Although Petitioner derides the Florida Supreme Court for allowing the "Judicial Qualifications Commission to function as a Ministry of Truth for th[e] state's judicial candidates," *id.* at 3, her criticism rings hollow. A cursory review of the court's decision reveals that the Florida Supreme Court meticulously applied the requisite strict scrutiny standard to the state's efforts to regulate Petitioner's campaign speech.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the ***misapplication of a properly stated rule of law***." *See* United States Supreme Court Rule 10 (emphasis added). Forced to acknowledge that the Florida Supreme Court did apply strict scrutiny to her campaign speech, Petitioner attempts to circumvent Rule 10's application by arguing that "[w]hile paying *lip service* to strict scrutiny, the Florida Supreme Court . . . applied a standard of review that falls far short of that demanding test." *See* Petition at 17 (emphasis added). The Florida Supreme Court's application of strict scrutiny to Petitioner's campaign advertisement was based on strict guidelines enunciated by this Court in *White* and *Williams-Yulee*. Irrespective of whether Petitioner's certiorari petition is grounded in her belief that the Florida Supreme Court misapplied

the correct rule of law or, more likely, her disappointment in the court's decision, she has failed to set forth a basis for certiorari relief.

Lastly, Petitioner's strained attempt to manufacture a basis for certiorari review by claiming that the Florida Supreme Court's decision "directly conflicts" with the Sixth and Eleventh Circuit Courts of Appeals' decisions in *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016) and *Weaver v. Bonner*, 309 F.2d 1313 (11th Cir. 2002), is equally unavailing. *See* Petition at 19. When the judicial canons at issue in *Winter* and *Weaver* are juxtaposed with Florida Canon 7A(3)(e)(ii), it is readily apparent that the Sixth and Eleventh Circuits' decisions actually bolster the Florida Supreme Court's holding that Canon 7A(3)(e)(ii) is constitutional, both facially and as applied to Petitioner.

ARGUMENT

INTRODUCTION

This Court has long cautioned that speech concerning public issues and the qualifications of candidates for public office commands the highest level of First Amendment protection. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 109 S. Ct. 1013 (1989). This Court has addressed speech restrictions on judicial candidates in two prior decisions: *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656 (2015). In *White*, the Court assumed,

and the parties did not dispute, that strict scrutiny applied to determine the constitutionality of restrictions on judicial campaign speech. *White*, 536 U.S. at 774-75. Thereafter, in *Williams-Yulee*, this Court formally pronounced what it merely assumed to be the case in *White*; namely, that "[a] State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S. Ct. at 1665.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848, 98 S. Ct. 1535 (1978) (Stewart, J., concurring). As this Court underscored in *Williams-Yulee*:

> The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government.
>
> . . .
>
> Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such "responsiveness is key to the very concept of self-governance through elected officials." In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge must instead "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience."

Id. at 1667 (citations omitted) (quoting Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830, p. 616 (1830)). The Court continued that while "[t]he concept of public confidence in judicial integrity is not easily defined, nor . . . lend itself to proof by documentary record . . . [,] ***no one denies that it is genuine and compelling***." *Id*. (emphasis added).

I. CANON 7A(3)(e)(ii) IS FACIALLY CONSTITUTIONAL

A. Florida Has A Compelling State Interest In Preserving Public Confidence In The Integrity Of Its Judiciary

Florida's Canon 7A(3)(e)(ii) is unambiguous and provides:

> A candidate for judicial office . . . shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

In the decision under review, the Florida Supreme Court held that "Canon 7A(3)(e)(ii) furthers Florida's compelling state interest in preserving public confidence in the integrity of the judiciary." *Shepard*, 217 So. 3d at 78. That holding was not aberrational, but rather follows a long line of cases in which the Florida Supreme Court has recognized Florida's compelling state interest in preserving public confidence in the integrity of its judiciary. *See*, *e.g.*, *Florida Bar v. Williams-Yulee*, 138 So. 3d 379, 385 (Fla. 2014)

("Florida has a compelling interest in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary. . . ."); *In re Dempsey*, 29 So. 3d 1030, 1033 (Fla. 2010) ("Canon 7A3(e)(ii) is intended to preserve the integrity of the judiciary and maintain the public's confidence in a fair, impartial, and independent judiciary."). Thus, the pivotal question becomes whether Canon 7A(3)(e)(ii) is narrowly tailored to meet that compelling state interest.

B. Canon 7A(3)(e)(ii) Is Narrowly Tailored To Serve A Compelling State Interest

In order to be deemed narrowly tailored, this Court must find that the Canon 7A(3)(e)(ii) does not "unnecessarily circumscribe[e] protected expression." *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S. Ct. 1523 (1982). *Cf. Weaver v. Bonner*, 309 F.3d 1312, 1319-20 (11th Cir. 2002) ("Therefore, to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or reckless disregard as to whether the statement is false – i.e., an actual malice standard. Restrictions on negligently made false statements are not narrowly tailored under this standard and consequently violate the First Amendment.").

Against that backdrop, the JQC readily acknowledges that for purposes of regulating campaign speech, "protected speech" includes negligently made false

statements. The Florida Supreme Court understood that point as well, emphasizing in its decision:

> Canon 7A(3)(e)(ii) prohibits the ***narrowest*** form of judicial campaign speech necessary to safeguard the public's confidence in the honesty of its judiciary: ***a judicial candidate's knowing misrepresentation of any fact concerning the candidate or an opponent***. Canon 7A(3)(e)(ii) does not unconstitutionally "chill" a judicial candidate's speech ***because it does not punish negligent misrepresentations of fact concerning the candidate or an opponent***.

Shepard, 217 So. 3d at 78-79 (emphasis added).

Faced with the reality that the Florida Supreme Court not only understood, but actually applied, strict scrutiny when determining whether Canon 7A(3)(e)(ii) is narrowly tailored to serve a compelling state interest, Petitioner chooses to attack a strawman by falsely claiming that "Canons 7A(3)(e)(ii) and 7A(3)(b) subject *all* statements of judicial candidates to oversight and potential regulation." *See* Petition at 14 (emphasis in original). That argument, of course, is completely specious as the Florida Supreme Court specifically found that Canon 7A(3)(e)(ii) prohibits only ***knowing*** misrepresentations of fact made by judicial candidates, as opposed to "all" statements by judicial candidates. *Id.*

Building upon her mischaracterization of the Florida Supreme Court's holding, Petitioner then posits that:

> The question in this case is whether the Florida Supreme Court erred in reading *Williams-Yulee* to permit the government to oversee ***all*** campaign speech by judicial candidates under a more relaxed form of strict scrutiny.

See Petition at 15 (emphasis added). Again, Petitioner's mischaracterization of the "question presented" is premised upon her distortion of the Florida Supreme Court's adoption of a relaxed form of strict scrutiny. Simply stated, the Florida Supreme Court did not hold that ***all*** judicial campaign speech should be regulated under a relaxed form of strict scrutiny. To the contrary, the Florida Supreme Court recognized that:

> The chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. Canon 7A(3)(e)(ii)'s "other fact" clause only prohibits a judicial candidate from ***knowingly making a misrepresentation of fact concerning the candidate or an opponent***.

Shepard, 217 So. 3d at 79 (quoting *Brown*, 456 U.S at 61) (citations omitted). Accordingly, the Florida Supreme Court held that "Canon 7A(3)(e)(ii) is narrowly tailored because it safeguards the public's confidence in the honesty of its judiciary while maintaining sufficient 'breathing space' for judicial candidates to exercise their First Amendment rights." *Id.*

II. CANON 7A(3)(e)(ii) IS CONSTITUTIONAL AS APPLIED TO PETITIONER

Petitioner also asserts that Canon 7A(3)(e)(ii) is unconstitutional *as applied* to her judicial campaign advertisement. *See* Petitioner's Appendix at A-64. Attempting to draw a parallel to a successful *as applied* challenge to the constitutionality of a Kentucky canon in *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016),[3] Petitioner contends that when viewed in its full context, nothing about her campaign literature was false or misleading. *See* Petition at 22. Petitioner goes on to trivialize "[t]he rule adopted by the Florida Supreme Court . . . [as] imposing liability on a candidate for the misuse of punctuation." *Id.*

In rejecting Petitioner's contention that her campaign advertisement was literally true because four statements in her advertisement regarding her character and integrity were true,[4] the court reasoned:

> Judge Shepard claims that she cannot be punished for distributing four true statements regarding her reputation for character

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[3] The Sixth Circuit's decision in *Winter* is discussed more extensively, *infra*, at pp. 20-24.

[4] The four statements Petitioner lifted from the *Orlando Sentinel's* endorsement of her 1994 legislative campaign and reprinted in her judicial advertisement were:

(1) Ms. Shepard has done well.

(2) She has kept her promises.

(3) She has worked hard.

(4) She has maintained her integrity.

See Petitioner's Appendix at A-64 and A-66.

and integrity and correctly attributing those statements to the *Orlando Sentinel*. But the so-called "four true facts" were distorted and misrepresented because they were taken out of context. Judge Shepard violated Canon 7A(3)(e)(ii)'s "other fact" clause by "knowingly misrepresent[ing] facts" surrounding the *Orlando Sentinel's* 1994 endorsement in her judicial campaign advertisement. . . . Then-attorney Shepard "knowingly" . . . and "deliberately" deleted from the advertisement "the intervening sentence . . . of the paragraph of the [*Orlando Sentinel's* 1994] endorsement . . . without any indication. . . . That sentence stated: "She has legislated effectively." The advertisement thus falsely purported to quote language from the endorsement verbatim when, in fact, it was "substantially edited to delete all references to [then-attorney] Shepard's legislative service." The record on review further demonstrates that then-attorney Shepard knew how to use, and used, an ellipsis to indicate an omission within a quotation on the opposite side of the same advertisement. Additionally, the 1994 date of the *Orlando Sentinel* endorsement and the end sentence of the paragraph of the endorsement relating to her legislative service were omitted from the advertisement. As explained by the Hearing Panel, "***The Judge's selective editing of the [Orlando Sentinel's] 1994 endorsement, in context, was much more than a matter of inexact punctuation, or a mistake***. . . ." The First Amendment does not protect such knowing misrepresentations

> of fact by candidates for judicial office. Accordingly, Canon 7A(3)(e)(ii) is constitutional as applied to then-attorney Shepard's advertisement.

See Shepard, 217 So. 3d at 79-80 (citations omitted) (emphasis added). Petitioner has set forth nothing in her Petition to merit discretionary review of the Florida Supreme Court's decision other than her generalized attack that the court gave "lip service" to the correct standard of review but simply misapplied it.

III. THE SIXTH CIRCUIT'S DECISION IN *WINTER v. WOLNITZEK*, 834 F.3d 681 (6th Cir. 2016) AND THE ELEVENTH CIRCUIT'S DECISION IN *WEAVER v. BONNER*, 309 F.3d 1312 (11th Cir. 2002) DO NOT PROVIDE A BASIS FOR CERTIORARI REVIEW

Citing *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) and *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016), Petitioner argues that "[t]he Florida Supreme Court's decision directly conflicts with holdings of the Eleventh and Sixth Circuits." *See* Petition at 19. Petitioner continues that "[r]eview by this Court is necessary to clear up the inconsistency in how states regulate speech of judicial candidates and ***to rectify the split between the Florida Supreme Court and the United States Courts of Appeal for the Sixth and Eleventh Circuits***." *Id*. at 21 (emphasis added).

As elaborated upon, *infra*, the so-called conflict between the Florida Supreme Court's decision and the

Sixth and Eleventh Circuits' decisions in *Winter* and *Weaver*, respectively, is wholly imaginative. The decisions in *Winter* and *Weaver* are premised upon specific language in the canons reviewed in those cases. The language which the Sixth and Eleventh Circuits found incompatible with the First Amendment in those cases is not contained in Florida Canon 7A(3)(e)(ii). When viewed in their proper context, the decisions in *Winter* and *Weaver* may be easily harmonized with the Florida Supreme Court's decision and actually support the court's rationale.

A. The Florida Supreme Court's Decision Does Not Conflict with *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016)

In *Winter*, the Sixth Circuit Court of Appeals addressed the constitutionality of several provisions of the Kentucky Code of Judicial Conduct. One of the provisions reviewed was a clause in Canon 5B(1)(c) of the Kentucky Code of Judicial Conduct known as the "false statements" clause. That clause prohibits a "judge or judicial candidate from 'knowingly' or 'with reckless disregard for the truth' making any "false [] statements" during a campaign." *Winter*, 834 F.3d at 693. The second clause under review, known as the "misleading speech" clause, forbade judicial candidates from making any misleading statements either "knowingly or with reckless disregard for the truth." *Winter v. Wolnitzek*, 186 F. Supp. 3d 673, 699 (E.D. Ky. 2016).

In finding that the "false statements" clause was facially constitutional, the Sixth Circuit noted that "Kentucky has a 'vital state interest' in safeguarding the public's confidence in the honesty of its judiciary," *Winters*, 834 F.3d at 693 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)) and that:

> The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. . . . Given the ***mens rea*** requirement, a judicial candidate will necessarily be conscious of violating this canon.

Winter, 834 F.3d at 693 (emphasis added). The Sixth Circuit continued that "[h]owever much or however little truth-bending the public has come to expect from candidates for political jobs, '[j]udges are not politicians,' and a 'State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.'" *Id.* (quoting *Williams-Yulee*, 135 S. Ct. at 1662). Inasmuch as Florida Canon 7A(3)(e)(ii) contains the same specie of "mens rea" requirement which the Sixth Circuit approved in *Winter*, *Winter* actually supports the decision below as opposed to being in conflict with it.

The Sixth Circuit did find, however, that Kentucky's "false statements" clause was unconstitutional *as applied*. In *Winter*, an incumbent judge published an advertisement asking voters to "re-elect" her, a phrase the Kentucky Supreme Court found was a

"materially false statement . . . calculated to mislead and deceive the voters," since the incumbent had *initially* been appointed to her position as opposed to elected. *Winter*, 834 F.3d at 693 (quoting *Winter v. Wolnitzek*, 482 S.W. 3d 768, 779 (Ky. 2016)). Finding that such a narrow reading of the term "re-elect" did not afford the incumbent the necessary "breathing space" required by the First Amendment, the Sixth Circuit held the canon did not pass strict scrutiny as applied. In so holding, the court reasoned:

> [T]he term ["re-elect"] fairly could also mean "to elect to another term in office," precisely what [Judge] Jones was seeking. *Webster's Third New International Dictionary* 1907. Applied to a statement such as "re-elect," readily capable of a true interpretation here, the ban outstrips the Commonwealth's interest in ensuring candidates don't tell knowing lies and thus fails to give candidates the "breathing space" necessary to free debate.

Winter, 834 F.3d at 693.

The Sixth Circuit's decision upholding the *as applied* challenge in *Winter* provides no basis for certiorari relief here because as previously stated, the Florida Supreme Court found that the so-called four "true" facts in Petitioner's campaign advertisement were not true as they "were distorted and misrepresented because they were taken out of context." *Shepard*, 217 So. 3d at 79. As opposed to a statement capable of a true interpretation, the Florida Supreme Court agreed with the Hearing Panel's finding that

Petitioner knowingly and deliberately used the verbiage from the *Orlando Sentinel's* 1994 endorsement of her legislative campaign in her judicial advertisement completely out of context and that her efforts were not "a matter of inexact punctuation, or a mistake." *Shepard*, 217 So. 3d at 82.

Although the Sixth Circuit did find Kentucky Canon 5B(1)(c)'s ban on misleading statements did not satisfy strict scrutiny, that holding is also inapposite here. As to misleading statements, the Sixth Circuit noted there is a clear distinction between "conscious falsehoods" and "negligent misstatements":

> If "misleading" adds anything to "false," it is to include statements that, while technically true or ambiguous, create false implications or give rise to false inferences. **But only a ban on conscious falsehoods satisfies strict scrutiny**. . . . "Negligent misstatements," in contrast to knowing misstatements, "must be protected in order to give protected speech the 'breathing space' it requires," even in judicial elections. ***Unknowing lies*** do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement "more than offsets the danger of a misinformed electorate." This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment.

Winter, 834 F.3d at 694 (citations omitted) (emphasis added).

In contrast to a ban on misleading statements, Florida's Canon 7A(3)(e)(ii) does not ensnare "unknowing lies" within its grasp; it prohibits only knowing misrepresentations. Hence, the Sixth Circuit's invalidation of Kentucky's ban on misleading speech in judicial campaigns also has absolutely no bearing on the constitutionality of Canon 7A(3)(e)(ii).

B. The Florida Supreme Court's Decision Does Not Conflict with *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)

In *Weaver*, the Eleventh Circuit invalidated an idiosyncratic canon of the Georgia Code of Judicial Conduct that prohibited candidates for judicial office from, *inter alia*, using or participating in any form of public communication that the candidate ***knew or reasonably should have known was false, fraudulent, misleading or deceptive***. *Weaver*, 309 F.3d at 1315. In finding that the Georgia canon was not narrowly tailored to serve Georgia's compelling state interest of prohibiting deliberately false speech, the Eleventh Circuit reasoned:

> Canon 7(B)(1)(d) not only prohibits false statements knowingly or recklessly made, it also prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results.

Id. at 1320. Similar to the Sixth Circuit in *Winter*, the Eleventh Circuit concluded that the Georgia canon did not provide the requisite "breathing space" to prevent a chilling effect on protected speech. *Id.* at 1319-20.

Unlike the Georgia canon under scrutiny in *Weaver*, Florida's Canon 7A(3)(e)(ii) under which Petitioner was found guilty, provides that a candidate for judicial office shall not "**knowingly** misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent." Thus, in contrast to the Georgia canon in *Weaver*, Florida's canon is narrowly tailored because it prohibits only deliberately false statements.[5]

[5] Attempting to bolster her claim that *certiorari* should be granted, Petitioner makes a half-hearted argument that the Florida Supreme Court's decision is "also at odds" with two state court decisions, *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001) and *In re Chmura*, 608 N.W. 2d 31 (Mich. 2000). In *Chmura*, the Michigan Supreme Court invalidated a portion of Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct because it prohibited not only knowingly false statements or statements made with reckless disregard for their truth or falsity, but "any statement that the candidate 'reasonably should know is false, fraudulent, misleading, [or] deceptive.' " *Chmura*, 608 N.W. 2d at 41-42. Florida Canon 7A(3)(e)(ii) contains no such "reasonably should know" language. Thus, *Chmura* is easily distinguishable.

In *Butler*, the Alabama Supreme Court, relying upon *Chmura*, found that a portion of Canon 7B.(2) of the Alabama Canons of Judicial Ethics was unconstitutional to the extent that

CONCLUSION

In *Williams-Yulee*, this Court acknowledged the dual interests of judicial candidates' First Amendment right to speak in support of their campaigns and States' compelling interest in preserving public confidence in the integrity of their judiciaries. The Court noted that when a state adopts a narrowly tailored restriction, those interests do not conflict because a state's decision to elect its judges does not require that it do so at the expense of public confidence in the integrity of its judiciary.

Bearing those principles in mind, the Florida Supreme Court properly found that Florida Canon 7A(3)(e)(ii) is narrowly tailored to serve Florida's compelling state interest in preserving public confidence in the integrity of its judiciary because the canon prohibits the narrowest form of judicial campaign speech: knowing misrepresentations of any fact concerning the candidate or an opponent. Concomitantly, the court found that Canon 7A(3)(e)(ii) also provides the requisite breathing space under the First Amendment

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it permitted a candidate for judicial office to be disciplined for publishing "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person." Finding that the " 'deceiving or misleading' portion of Canon 7B.(2) did not allow for erroneous but unintentional or innocent statements," the *Butler* court noted "[w]ithout ***an intent element or falsity requirement***, candidates risk violating the canon for mistaken but innocent dissemination of 'deceiving or misleading information.' " *Butler*, 802 So. 2d at 218 (emphasis added). Again, because Florida Canon 7A(3)(e)(ii) contains an "intent element or falsity requirement," *Butler* is distinguishable.

because it does not prohibit negligent misstatements. As such, the Florida Supreme Court's decision does not conflict with the precedent established in *Williams-Yulee* or *White* and certiorari should be denied.

Respectfully submitted,

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