No. 17-493

IN THE

Supreme Court of the United States

THE HONORABLE KIMBERLY MICHELE SHEPARD,
CIRCUIT COURT JUDGE,
Petitioner,

v.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Florida

REPLY BRIEF OF PETITIONER

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ARGUMENT

The decision of the Florida Supreme Court confused this Court's First Amendment rulings governing speech by candidates for judicial office by juxtaposing the test for "knowingly false" campaign speech with that for "misleading" speech. The resulting standard subjects almost all campaign speech by judicial candidates to significant government oversight, not just the "narrow slice of speech" at issue in *Williams-Yulee v. Florida State Bar*, 135 S. Ct. 1656, 1670 (2015). Florida Code of Judicial Conduct Canon 7A(3)(e)(ii) empowers the State to punish any "misleading" speech by a candidate that touches on "the identity, qualifications, present position or other fact concerning the candidate or opponent"—in short, just about any campaign statement in a judicial election.

Respondent's brief in Opposition ("Opp.") does not attempt to defend the substantive scope of this restriction under strict First Amendment scrutiny, but claims only that the law is narrowly tailored because the burden of proof requires a showing of "knowledge." This does not address the specific questions presented: (1) Whether Canon 7A(3)(e)(ii), which governs any discussion of a candidate or her opponent's qualifications, imposes a vague and overly broad restriction on speech protected by the First Amendment, and (2) whether Canons 7A(3)(e)(ii) and 7A(3)(b) were unconstitutionally applied to the Petitioner. Respondent unintentionally highlights how the decision below conflicts with rulings of the Sixth and Eleventh Circuits that struck down efforts to regulate "misleading" speech by judicial candidates. Only this Court can clarify

this important question of First Amendment doctrine that potentially affects judicial elections in 39 states.

1. This case presents the Court with the question of the proper First Amendment standard for regulating "misleading" campaign speech, not "false" speech. Canon 7A(3)(e)(ii) prohibits knowingly misrepresenting "the identity, qualifications, present position or other fact concerning the candidate or an opponent," and falsity is not a prerequisite to finding a violation. In this case, it was never alleged that Petitioner, Judge Kimberly Shepard, falsely claimed the *Orlando Sentinel* endorsed her 2014 campaign for judicial office. The Florida Judicial Qualifications Commission acknowledged that her campaign materials included a full copy of a 1994 *Orlando Sentinel* article praising her integrity and legislative service that the flyer for which she was sanctioned quoted in part. App. A-35-35. Nor were there any allegations or findings that the statements in her campaign materials were false. Rather, as the Opposition makes clear, the findings below were that one campaign flyer "gave the misleading impression she had been endorsed." Opp. 4. *See also id.* at 6-8. For First Amendment purposes, there is a vast difference between publishing a knowingly false statement and issuing one that might be misunderstood.

2. Respondent's claim that Canon 7A(3)(e)(ii) is narrowly tailored to serve a compelling state interest illustrates how Florida's Supreme Court employed the wrong First Amendment test and thereby greatly expanded government regulation of campaign speech. The State tries to defend its prohibition on "misleading" campaign speech as being narrowly tailored as if it were no different from a ban on

"knowingly false" campaign speech. It asserts the provision is sufficiently tailored to satisfy strict scrutiny by focusing only on the *mens rea* element—observing that "the Florida Supreme Court specifically found that Canon 7A(3)(e)(ii) prohibits only ***knowing*** misrepresentations of fact made by judicial candidates." Opp. 15 (emphasis in original). The Opposition never attempts to defend the substantive scope of Canon 7A(3)(e)(ii), which expansively covers any discussion of a candidate's identity, qualifications, positions or—most vaguely—any "other fact," whether or not material to the issues.

Quoting the decision below, Respondent claims the state prohibits only "the ***narrowest*** form of judicial campaign speech necessary" to serve its interests, and that "***it does not punish negligent misrepresentations of fact***." *Id.* (emphasis in original). This, however, continues to ignore the Canon's overly broad substantive reach, and erroneously conflates "knowingly false" and "knowingly misleading" campaign speech. Even if Canon 7A(3)(e)(ii) applied to a narrower swath of campaign speech, its coverage of "misleading" statements fails to satisfy strict scrutiny's narrow tailoring requirement, and explains why the Florida Supreme Court's decision here is fundamentally at odds with the Eleventh Circuit in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), and the Sixth Circuit in *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016). Both courts found that restrictions on "misleading" speech were too broad to survive First Amendment scrutiny even if the statements were knowingly made.

a. The Sixth Circuit directly confronted the constitutional distinction between "false" and "misleading" statements, holding that "a ban on

misleading statements fails across the board," and that "only a ban on conscious falsehoods satisfies strict scrutiny." *Winter*, 834 F.3d at 694. That case involved Canon 5(B)(1)(c) of the Kentucky Code of Judicial Conduct, which prohibited candidates from "knowingly, or with reckless disregard for the truth, misrepresent[ing] any candidate's identity, qualifications, present position, or mak[ing] any other false or misleading statements." SCR 4.300 Kentucky Code of Judicial Conduct (Canon 5). The Sixth Circuit upheld the prohibition on knowingly false statements on its face but invalidated it as applied in that case. *Winter*, 834 F.3d at 693. Separately, however, the Court struck down the "misleading statements clause," holding a prohibition on candidates' statements that "create false implications or give rise to false inferences … cannot be squared with the First Amendment." *Id.* at 694.

Winter is thus diametrically opposed to the Florida Supreme Court's ruling in this case, illustrating why this Court's review is essential. The Opposition claims the Sixth Circuit's as-applied challenge "provides no basis for certiorari relief here," Opp. 22, but this misses the point. The Sixth Circuit independently held that the misleading statements clause, which is much like the Florida provision at issue here, is facially invalid.[1]

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[1] The Opposition block-quotes *Winter*, claiming the holding drew a clear distinction between "conscious falsehoods" and "negligent misstatements," Opp. 23, but the Kentucky provision the Sixth Circuit invalidated applied only to misleading statements made "knowingly, or with reckless disregard for the truth." Canon 5(B)(1)(c). The quoted language discussing "negligent misstatements" came from *Weaver*, not the

Any doubt about the import of *Winter* may be resolved by the court's holding invalidating a different provision of the Kentucky Code, Canon 5(A)(1)(a), which prohibited candidates from portraying themselves "either directly or by implication" as the official nominee of a political party. *Winter*, 834 F.3d at 688. The Court struck down the canon on its face, finding it was too difficult to tell when a candidate's speech might impermissibly imply an endorsement. *Id.* at 688-89. This is directly analogous to the issue presented here, where the Florida Supreme Court concluded that Petitioner misleadingly *implied* she had been endorsed by the *Orlando Sentinel*. As the Sixth Circuit observed, "[i]t's hard to know when a candidate has portrayed himself as an official nominee 'by implication,'" and it thus held the clause was unconstitutionally vague and overbroad. *Id.* at 689. The same analysis applies to Canon 7A(3)(e)(ii) at issue here, except the Florida provision is even broader.

b. In *Weaver*, the Eleventh Circuit likewise struck down a provision of Georgia's Code of Judicial Conduct that barred judicial candidates from making statements "which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading[.]" *Weaver*, 309 F.3d at 1315 (quoting Ga. Code of Judicial Conduct Canon 7(B)(1)(d)). Respondent describes the Georgia

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Kentucky provision, but the Opposition omitted the case citation. Opp. 23.

provision as "idiosyncratic" and falsely claims that Florida Canon 7A(3)(e)(ii) is different because it applies only to "knowing" misrepresentations. Opp. 25.

This is incorrect. The provision struck down in *Weaver* had the same flaws as the Florida Code in that it prohibited not just false statements "knowingly or recklessly made" but also "true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact." *Weaver*, 309 F.3d at 1320. Although the court pointed out the constitutional problem of restricting "negligent misstatements," it explained that restrictions on candidates' misrepresentations or omissions also failed strict First Amendment scrutiny. It found that "by prohibiting false statements negligently made *and* true statements that are misleading or deceptive, Canon 7(B)(1)(d) does not afford the requisite 'breathing space' to protected speech." *Id.* at 1319 (emphasis added). The court found that "Georgia's asserted interests may be compelling," but "Canon 7(B)(1)(d) is not narrowly tailored to serve those interests." *Id.* So too, here.

c. Petitioner's as-applied challenge to Florida Canons 7A(3)(e)(ii) and 7A(3)(b) also provides a basis for review by this Court. *See*, *e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Review granted where "[t]hese cases … present the separate question whether [a valid restriction on campaign speech] may constitutionally be applied to these specific ads."). The Opposition does not argue the point, and instead merely assumes its own conclusion. It claims the Florida Supreme Court found that the campaign speech at issue was misleading and that, because the court said it was applying strict scrutiny, no further inquiry is necessary. Opp.

18-19. But that is the question. Does the First Amendment permit a state to punish a candidate for speech that is not alleged to be false but instead merely "taken out of context?" Opp. 18. The answer to that question is "no," *Winter*, 834 F.3d at 693 (application of judicial canon against misleading statements "outstrips the [state's] interest in ensuring candidates don't tell knowing lies"), and the burden is on the government to show its restriction on particular campaign speech satisfies constitutional scrutiny. *Wisconsin Right to Life*, 551 U.S. at 464-65. Petitioner's as-applied challenge thus provides an independent basis for this Court's review.

3. This case is the right vehicle for addressing the questions that divided the Justices in *Williams-Yulee*: to what extent may states regulate campaigns for judicial office differently from those of other candidates, and does core campaign speech by judicial candidates merit less rigorous constitutional protection? At the time, Chief Justice Roberts wrote that Florida's Judicial Canons would not become "a latter-day version of the Alien and Sedition Acts" because the provision governing direct financial appeals affected only "a narrow slice of speech." *Williams-Yulee*, 135 S. Ct. at 1670. In sharp contrast, this case involves a judicial canon that regulates all candidate speech that relates to a candidate's identity, qualifications, positions or any "other fact." It is difficult to identify even a "narrow slice" of campaign speech Canon 7A(3)(e)(ii) does *not* encompass.

Respondent claims this mischaracterizes the issue, asserting that the Florida judicial canon does not cover all campaign speech, but only knowing misrepresentations of fact. Opp. 16. Once again,

however, the Respondent confuses the substantive reach of the regulation with the burden of proof. There is no question but that Canon 7A(3)(e)(ii) governs speech by candidates on virtually all topics that may arise in a campaign, and under the Florida Supreme Court's ruling, the state may punish candidates not just for false speech, but for any statement that may be considered misleading. This was the kind of government oversight of campaign speech that concerned the *Williams-Yulee* dissenters and that the Sixth and Eleventh Circuits rejected in *Winter* and *Weaver*. Only this Court can clear up the confusion and hold that judicial candidates receive the First Amendment's full protection.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review in this case.

Respectfully submitted,

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