17-1255

In the Supreme Court of the United States

MARK FRENCH,
Petitioner,

v.

BLAIR JONES, in his capacity as Chairman of the Montana Judicial Standards Commission, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Institute for Free Speech in Support of Petitioner

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QUESTION PRESENTED

The court below concluded that this Court's narrow decision in *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656 (2015), marked a clear shift in favor of state regulations of judicial campaign speech, allowing a restriction on judicial candidates from seeking, accepting, or using political party endorsements. Other courts have likewise read *Williams-Yulee* as authorizing restrictions that are much broader than those upheld in that case. Is this broad reading of *William-Yulee* in error?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education. The Institute has filed amicus briefs in important free speech cases and is the nation's largest organization dedicated solely to protecting First Amendment political liberties.

SUMMARY OF ARGUMENT

In *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1662 (2015), this Court upheld a restriction on judicial candidates' soliciting money in person. This Court stressed that the restriction affected only "a narrow slice of speech," *id.* at 1670. And this Court's opinion did not purport to deviate from the decision in *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002), which struck down a rule barring judicial candidates from announcing their views on disputed legal or political issues. Indeed, the restriction in *White* was struck down because it limited speech on political issues, 536 U.S. at 776, while the restriction in *Williams-Yulee* was upheld because it "le[ft] judicial candidates free to discuss any issue with any person at any time," 135 S. Ct. at 1670.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to the filing of the brief.

Yet the court below concluded that *Williams-Yulee* did in fact diverge sharply from *White*, "mark[ing] a palpable change in the approach to state regulations of judicial-campaign speech," and permitting broad restrictions that would have previously been seen as unconstitutional. Pet. 15a. Relying on this conclusion, the court below upheld a rule prohibiting judicial candidates from "seek[ing], accept[ing], or us[ing] endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate." Mont. Code of Judicial Conduct Rule 4.1(A)(7); Pet. 3a. In the process, the court below also suggested that *Williams-Yulee* marked a sharp change in how this Court treats underinclusiveness when conducting a strict scrutiny analysis—even though *Williams-Yulee* did not suggest any such change, and even though any such change could have vast effects on free speech cases far outside the area of judicial campaign speech.

Like the rule in *White*, and unlike that in *Williams-Yulee*, this rule restricts candidates from discussing information that is important to many voters. Many voters find party endorsements helpful because such endorsements (1) are a useful shorthand for a candidate's position on many important issues, and (2) show that the political party finds the candidate credible. Nevertheless, the court below concluded that *Williams-Yulee* rendered unpersuasive these arguments—the very arguments used to invalidate similar restrictions in the "pre-*Williams-Yulee* world," *e.g.*, *Sanders County Republican Central Committee* v. *Bullock*, 698 F.3d 741, 747 (9th Cir. 2012). Pet. 13a.

Other courts have also mistakenly concluded that *Williams-Yulee* allows for broad restrictions on judicial candidate speech. The Sixth Circuit upheld a restriction on all judicial campaign solicitations, including by campaign committees, outside a specified time window. *O'Toole* v. *O'Connor*, 802 F.3d 783, 791 (6th Cir. 2015). The Sixth Circuit repeatedly cited *Williams-Yulee* for support, *see id.*, even though the rule in *Williams-Yulee* was upheld in part because it did not prohibit campaign committees from soliciting contributions. *Williams-Yulee*, 135 S. Ct. at 1668. Similarly, the Kentucky Supreme Court upheld a rule preventing judicial candidates from acting as political party spokespeople or hosting events for a political party. *Winter* v. *Wolnitzek*, 482 S.W.3d 768, 777-78, 780-81 (Ky. 2016).

At the same time, some lower court opinions continue to read *Williams-Yulee* narrowly. For example, in *Winter* v. *Wolnitzek*, 834 F.3d 681, 689-91 (6th Cir. 2016), the court relied on pre-*Williams-Yulee* cases, including *White*, in invalidating a prohibition on candidates from making speeches "for or against a political organization."

This Court should grant certiorari to clarify the effect of *Williams-Yulee*, reaffirm the narrowness of that decision, protect judicial campaign speech, and prevent the erosion of the longstanding strict scrutiny framework, which is critical to protecting free speech more broadly.

ARGUMENT

I. *Williams-Yulee* does not mark a "clear shift" in this Court's jurisprudence and does not allow for broad restrictions on judicial candidate speech

A. *Williams-Yulee* does not overrule this Court's prior decision in *White*

The decision below upholds Mont. Code of Judicial Conduct Rule 4.1(A)(7), which prohibits judicial candidates from "seek[ing], accept[ing], or us[ing] endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate." The court below upheld this rule because it believed that "[t]he strict First Amendment framework of [*Republican Party of Minnesota* v. *White*] underwent significant changes with the Supreme Court's decision in *Williams-Yulee*." Pet. 12a. The First Amendment arguments against the constitutionality of this Rule, the court below held, were part of the "pre-*Williams-Yulee* world," Pet. 13a, and "no longer carry the day" the way they might have under *White*, *id.* at 22a.

But nothing in *Williams-Yulee* suggests that it reformed strict scrutiny doctrine, or sharply lessened judicial candidates' rights to speak about political topics that are important to voters. Rather, the analysis in *Williams-Yulee* differed from that in *White* because this Court was considering two very different restrictions:

- In *Williams-Yulee*, this Court found that a restriction on in-person solicitation was narrowly tailored in part because it "le[ft] judicial candidates free to discuss any issue with any person

at any time." 135 S. Ct. at 1670. Candidates could "otherwise communicate their electoral messages in practically any way." *Id.* at 1672.

- In *White*, on the other hand, this Court struck down a rule that prohibited judicial candidates from "announc[ing] his or her views on disputed legal or political issues," 536 U.S. at 768, 788—a much broader speech restriction.

Indeed, *Williams-Yulee* repeatedly cited *White* with approval. *See, e.g.*, *Williams-Yule*e, 135 S. Ct. at 1659, 1665-67.

The court below acknowledged that the solicitation restriction upheld in *Williams-Yulee* was narrower than the endorsement restriction in this case, Pet. 16a, but nevertheless concluded that *Williams-Yulee* marked a "palpable change in the approach to state regulations of judicial-campaign speech," *id.* at 15a. Indeed, the court below held that *Williams-Yulee* lessens the standards used in *White* for many aspects of strict scrutiny: the inquiry into underinclusiveness, *id.* at 16a, into overinclusiveness, *id.* at 17a, into material advancement of the interest, *id.* at 22a, 28a-29a, and into the presence of less restrictive means, *id*. at 28-29a. That is an unjustified overreading of *Williams-Yulee*.

B. The Montana Rule is unconstitutional under both *Williams-Yulee* and *White*

Like the restriction in *White*, the Montana Rule does not leave "judicial candidates free to discuss any issue with any person at any time," *Williams-Yulee*, 135 S. Ct. at 1670. A restriction on soliciting or disclosing party endorsements does interfere with voters'

ability to determine where the candidate stands on various issues: Party endorsements serve as a shorthand for a candidate's general ideological position, which voters can quickly consider without having to do detailed research on the candidate's more specific views. Endorsements also communicate that a candidate has been vetted by a political party and has been found to be qualified and trustworthy.

The Montana Rule also selectively limits candidates' ability to report endorsements that have a particular content—*e.g.*, "The Republican Party has endorsed me"—but not those that have other contents, such as "The National Rifle Association has endorsed me" or "Well-known environmental activist Jane Smith has endorsed me." *See* Mont. Code of Judicial Conduct Rule 4.2(B)(5). Yet if the state believes that political endorsements undermine judicial integrity, endorsements by interest groups and private individuals would do so about as much, or perhaps even more.

Groups like a local Association of Prosecuting Attorneys, the Sheriffs' Association, or Trial Lawyers Association may represent specific interests that routinely come before the court, perhaps even in every criminal case or every personal injury case. Yet Montana judicial candidates may communicate such groups' endorsements, but not endorsements from political parties, whose interests come before judges (especially trial judges) much less often.

This renders the Montana rule unconstitutionally underinclusive, even under *Williams-Yulee*: "Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that

affects its stated interest in a comparable way." *See Williams-Yulee*, 135 S. Ct. at 1670; *see also Sanders County*, 698 F.3d at 744 (striking down a selective ban on endorsements of judicial candidates by political parties, because it unconstitutionally distinguished between such endorsements and endorsements by other groups).

And the rule cannot be saved by arguing, as did the court below, that, "[i]f judicial candidates, including sitting judges running for reelection, regularly solicit and use endorsements from political parties, the public might view the judiciary as indebted to, dependent on, and in the end not different from the political branches." Pet. 21a. First, the government cannot restrict speech on the grounds that the speech will lead the public to view the speakers in a particular way that the government views as inappropriate. Second, if soliciting and publicizing endorsements creates such an unacceptable risk of indebtedness and dependency, that risk would also be present for endorsements sought from sheriffs' associations, prosecutors' associations, or trial lawyers' associations, and not just for endorsements sought from parties. After all, the "structurally independent judiciary" that Montana is said to value, Pet. 20a, must mean structural independence from sheriffs and prosecutors and not just from parties and their members in the political branches.

The Montana approach leaves the dangers posed by interest group endorsements to the political process: Elected judges remain accountable to the voting public, and voters are free to reject any candidates whom they view as unduly indebted to endorsing

groups, or as unduly lacking in independence. But the same remedy should be equally available for endorsements by the particular interest groups that we call political parties.

"If the state chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process * * * the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788. "It may be, of course, that Montana reasonably believes that restricting political endorsements of judicial candidates enhances the independence of its judiciary; but such supposed 'best practices' are not remotely sufficient to survive strict scrutiny." *Sanders County*, 698 F.3d at 746.

C. Other lower court decisions have similarly misunderstood the scope of *Williams-Yulee*

The opinion below is not alone in its overbroad misreading of *Williams-Yulee*. *Wolfson* v. *Concannon* made the same mistakes in upholding a Arizona ban on (among other things) judicial candidates' endorsing candidates for other offices. 811 F.3d 1176, 1179-80 (9th Cir. 2016) (en banc).

The Arizona rule lacked the saving features that this Court relied on in *Williams-Yulee*. The Florida rule in *Williams-Yulee* left candidates "free to discuss any issue" at any time, 135 S. Ct. at 1670; the Arizona rule barred candidates from discussing issues such as whether Donald Trump or Hillary Clinton should be President.

Likewise, *Williams-Yulee* stressed that the Florida rule did not prohibit solicitation by campaign committees, *id*. at 1669, but the Arizona rule did bar speech by campaign committees. *See* Ariz. Code of Judicial Conduct Rule 4.1(B). Yet the Ninth Circuit ignored these distinctions and claimed that the reasoning in *Williams-Yulee* made the Arizona rule constitutional. *Wolfson,* 811 F.3d at 1183.

The Sixth Circuit similarly upheld a rule that restricted candidates or their committees from collecting campaign contributions 120 days before an election. *O'Toole*, 802 F.3d at 791. The Sixth Circuit reasoned that, "[w]hile the concerns raised by a judicial campaign committee's solicitation may be more attenuated than those raised by direct candidate solicitation, the close connection between judicial candidates and their campaign committees * * * implicates many of the same concerns regarding judicial integrity and propriety." *Id.* at 789-90. Yet, like the *Wolfson* court, the Sixth Circuit ignored the fact that the rule in *Williams-Yulee* was upheld in part because it left campaign committees free to solicit funds. *Williams-Yulee*, 135 S. Ct. at 1668; *see also id.* at 1669 (reasoning that "[w]hen the judicial candidate himself asks for money, the stakes are higher for all involved").

D. Still other lower court decisions continue to rely on *White* and to read *Williams-Yulee* narrowly

Unsurprisingly, such overreading of *Williams-Yulee* creates a disagreement between the decisions

cited above (including the court below) and other decisions that continue to read *Williams-Yulee* narrowly, and continue to rely on *White*.

For instance, in *Carey* v. *Wolnitzek*, 614 F.3d 189, 201 (6th Cir. 2010), decided before *Williams-Yulee*, the Sixth Circuit relied on *White* to invalidate a Kentucky rule prohibiting judicial candidates from disclosing their party affiliation "when speaking to a gathering." The Sixth Circuit held that the rule was overinclusive with respect to the government's interest in judicial integrity since it prohibited candidates from speaking on issues that are important to voters. *Id.* at 201-02.

And the Sixth Circuit then reaffirmed this approach after *Williams-Yulee*. Kentucky had by then adopted a new rule prohibiting a judicial candidate from campaigning "as a member of a political organization." *Winter*, 482 S.W.3d at 775. The Kentucky Supreme Court construed the regulation as still prohibiting candidates from representing themselves as the "endorsed judicial nominee of a political party," *id.* at 776, and concluded that this interpretation was constitutional. Though this holding contradicted *Carey*, the Kentucky court decided that "our tailoring comports with the standard prescribed in *Williams-Yulee*." *Id.* at 781.

But the Sixth Circuit disagreed with the Kentucky Supreme Court, invalidating the newly construed rule, as well as a related canon barring candidates from making speeches "for or against a political organization." *Winter*, 834 F.3d at 689. The Sixth Circuit noted no practical difference for First Amendment purposes between stating "I am a Republican," the

speech covered by the restriction in *Carey*, and "I am for Republicans." *Id.* at 688-89.

The Sixth Circuit's decision rightly concluded that *White* and *Carey* were controlling, even after *Williams-Yulee*, on the question of a restriction on speech about political affiliation.[2] This understanding is contrary to that of the Ninth Circuit, as demonstrated by both *Wolfson* and the decision below.

Indeed, the Montana restriction on political endorsements at issue here is similar to the one invalidated by the Sixth Circuit in *Carey*. Like the restriction on announcing one's political affiliation in *Carey*, a prohibition on candidates "us[ing] political endorsements" limits voters' access to important information on the candidates' political ideologies. Nevertheless, the Ninth Circuit simply discounted the importance of *White* and *Carey* by stating that they were part of the "pre-*Williams-Yulee* world." Pet. 13a.

II. *Williams-Yulee* does not relax the requirement that speech restrictions not be underinclusive with respect to a compelling interest

The principle that speech restrictions fail strict scrutiny if they are underinclusive has been at the

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[2] Likewise, *Attorney Grievance Comm'n of Maryland* v. *Stanalonis*, 126 A.3d 6, 12 (Md. 2015), held that a lawyer running for judicial office could not be sanctioned for his allegedly erroneous statements about his opponent, and relied on *White*'s statement that "speech about the qualifications of candidates for public office [including judicial office]" is "at the core of our First Amendment freedoms," 536 U.S. at 774. The opinion did not cite *Williams-Yulee*.

heart of many of this Court's leading First Amendment precedents. *See, e.g.*, *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015); *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011); *Citizens United* v. *FEC*, 558 U.S. 310, 362 (2010); *Florida Star* v. *B.J.F.*, 491 U.S. 524, 540 (1989); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 232 (1987); *Carey* v. *Brown*, 447 U.S. 455, 465 (1980); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 793 (1978); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975). Undermining this principle would undermine speech protections far outside judicial campaign speech.

This Court's application of the underinclusiveness analysis in *Williams-Yulee* was doubtless not meant to sharply redefine the meaning of underinclusiveness. Rather, the *Williams-Yulee* analysis should be read as consistent with the Court's past underinclusiveness precedents, including *White*.

While *Williams-Yulee* stated that "the First Amendment imposes no freestanding underinclusiveness limitation," 135 S. Ct. at 1668 (quotations omitted), it did so in the course of explaining the continued vitality of underinclusiveness as a tool for identifying ways in which the law may fail strict scrutiny. Underinclusiveness casts doubt on "whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 1668. It can also show that (1) the alleged interest is not the government's real interest; (2) the interest is not as compelling as claimed, because it leaves a patchwork of exclusions; or (3) that such a patchwork keeps the restriction from materially advancing the interest. *Id*.

The *Williams-Yulee* restriction was not underinclusive, in this Court's view, because the distinction cast no doubt on the government's stated purpose for the restriction. The interest in judicial integrity was implicated "most directly by the candidate's personal solicitation itself." *Id.* at 1669. "[P]ersonal requests for money by judges and judicial candidates," this Court concluded, is the "conduct most likely to undermine confidence in the integrity of the judiciary." *Id.* at 1668.

This Court therefore held that the distinction between personal requests for money and other speech well fit the government's stated interest. This reasoning is consistent with *White*, because in *White* the restriction on announcing one's position on contested issues only during the election campaign—as opposed to before the campaign or after the election—was so "underinclusive as to render belief in that purpose a challenge to the credulous," *White*, 536 U.S. at 779-80, something this Court specifically said was absent in *Williams-Yulee*.

Despite this, the lower court decisions cited in Parts I.A-I.C have concluded that *Williams-Yulee* sharply narrows the underinclusiveness inquiry. *See, e.g.*, Pet. 15a-17a; *Wolfson*, 811 F.3d at 1183-84. For example, as Part I.B notes, the court below rejected the argument that the restriction on communicating political party endorsements—but not on advocacy group endorsements—is underinclusive, Pet. 22a, even though both kinds of endorsements comparably undermine the government interest.

If this misunderstanding of *Williams-Yulee* remains uncorrected, the value of underinclusiveness as

part of the strict scrutiny analysis—a value recognized by this Court in the many cases cited at the start of this section—would be dramatically diminished. And this damage would spread far beyond judicial campaign speech and affect restrictions on other speech as well.

CONCLUSION

State and lower federal courts are confused about the scope of *Williams-Yulee*. The decision below is one example: It relies on *Williams-Yulee* to uphold a speech restriction that lacks the narrowing features the importance of which this Court stressed in *Williams-Yulee* itself. And if left intact, the decision below—which purports to authoritatively summarize this court's judicial candidate speech jurisprudence, Pet. 7a-18a—will likely become influential precedent for other lower courts. This court should grant certiorari and reaffirm the narrowness of its holding in *Williams-Yulee*.

Respectfully submitted,

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