No. 17-54

In The Supreme Court of the United States

STEPHEN O. CALLAGHAN,

Petitioner,

v.

WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

The First Amendment Coalition is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. The Coalition's mission is to protect and promote freedom of expression and the people's right to know. The Coalition is committed to the principle that government is accountable to the people, and strives through education, public advocacy, litigation, and other efforts to prevent unnecessary government secrecy and to resist censorship of all kinds.[1]

SUMMARY OF ARGUMENT

Political campaign speech is at the core of the protections afforded by the First Amendment. As this Court often has emphasized, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this *amicus curiae* brief, and their written consent is submitted to the Clerk concurrently with this brief. This brief was not authored in whole or in part by counsel for a party, and no counsel or party – or any other person other than the *amicus curiae* and its counsel – made any monetary contribution intended to fund the preparation or submission of this brief.

401 U.S. 265, 272 (1971))). While the bulwark against government suppression of speech provided by the First Amendment gives way slightly when the political speech arises in the context of campaigns for judicial office, this Court reiterated just two years ago, in another case involving judicial campaigns, "speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665 (2015) (plurality). Among other things, this means that states may not restrict campaign speech, including judicial campaign speech, that is substantially true unless the restriction survives strict scrutiny. *See, e.g.*, *id.* at 1665-66; *cf. Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861-62 (2014).

In service of its goal of policing judicial campaign speech, the court below – like a number of state courts but in conflict with others, Pet. 20-32 – ignored these principles and imposed the severe sanction of a two-year suspension from elected office on a judicial candidate who, the court found, had made true statements, the "gist" of which, when "taken as a whole," were false. Pet. App. 48a. This ruling turns the longstanding "substantial truth" standard on its head and allows a state to suppress truthful political campaign speech in violation of well-established First Amendment principles. What is more, in addition to punishing a candidate for pure political speech, West Virginia imposed a grave sanction on the recipients of that speech – the voters whose franchise was infringed when their chosen candidate was precluded from taking office. The Court

should grant the petition to reaffirm the centrality of First Amendment protections to political speech and to confirm that such protections apply to judicial campaign speech.

REASONS FOR GRANTING THE PETITION

I. Political Campaign Speech Is at the Heart of the First Amendment and Deserves the Greatest Protection from Government Suppression.

The First Amendment ensures that political campaigns include robust debates regarding issues of concern to the electorate, as well as the qualifications of political candidates. But what is more, it ensures that the members of that electorate are not shielded from information that might aid their exercise of the franchise and selection of their elected officials. As this Court has noted, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . ." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. Indeed, political speech "is indispensable to decisionmaking in a democracy." *Id.* at 349 (internal quotation omitted).

The West Virginia Code of Judicial Conduct and West Virginia Rules of Professional Conduct regulate

political campaign speech of candidates for judicial office in that state, including petitioner Stephen Callaghan. Those rules prohibit such a candidate from knowingly, or with reckless disregard for the truth, making any false or misleading statement, including with regard to the qualifications or integrity of a judge or a candidate for judicial office. Pet. App. 153a-154a. Thus, they incorporate the standard for regulating speech first articulated by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Liability for speech governed by the *Sullivan* standard requires proof of the speech's "material falsity"; substantially true statements are not encompassed within the narrow category of sanctionable speech. *See Hoeper*, 134 S. Ct. at 861-62.

The Supreme Court of Appeals of West Virginia acknowledged as much, noting, for example, that "prohibitions on false statements must still contain sufficient proof requirements to avoid infringing on protected speech." Pet. App. 36a. Yet, the court went on to hold that Judge Callaghan could be punished for his statements because the "gist" of those statements, "taken as a whole," was false, even if they may have been substantially true on an individual basis. Pet. App. 48a. This ruling, and similar ones from other state courts (Pet. 23-29), risk chilling political campaign speech by broadening the category of punishable speech to encompass substantially true statements that normally enjoy protection under *Sullivan*'s actual-malice standard. *See also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may

deter the[] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions.").

These rulings also contravene the well-established principle that "political speech [is] speech that is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329. This Court's precedents make clear that courts and other regulatory bodies must err on the side of allowing more campaign speech rather than imposing more restrictive rules to limit or punish such speech. *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 60-61 (1982); *Eu*, 489 U.S. at 222-29. As in other areas of heated debate, the proper antidote to contested campaign speech is not censorship (or, as occurred here, severe punishment), but more speech. "If there is concern about principled, decent, and thoughtful discourse in election campaigns, the First Amendment provides the answer. That answer is more speech." *Williams-Yulee*, 135 S. Ct. at 1684 (Kennedy, J., dissenting) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Indeed, this Court has repeatedly affirmed that even false statements enjoy First Amendment protection because such statements "are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality) (citing *Sullivan*, 376 U.S. at 271). Even in the case of false statements, the proper remedy is not suppression (or, as here, punishment), but truthful speech. "The remedy

for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 727.

Here, the state court not only restricted campaign speech but thwarted the will of the electorate, barring a duly-elected judge from taking his seat on the bench for two years on the basis of nothing more than words. Thus, in addition to impinging on the First Amendment rights of Judge Callaghan (and possibly of future candidates who must steer far clear of the line demarcating permissive from punishable campaign speech), the West Virginia court burdened the First Amendment rights of the electorate that freely chose Judge Callaghan for an elected judicial position. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005) ("the First Amendment, among other things, protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views" (internal quotation omitted)).

The Free Speech Clause not only protects a speaker's right to speak, but provides "the public access to discussion, debate, and the dissemination of information and ideas." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); *see also McConnell v. FEC*, 540 U.S. 93, 335-36 (2003) (Kennedy, J., concurring and dissenting) (discussing First Amendment's role in ensuring that voters hear political speech). "[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press,

and political freedom." *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality). "The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000). As this Court repeatedly has emphasized, by "protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986) (plurality). By suppressing Judge Callaghan's campaign speech, the court below restricted the First Amendment rights of the voters as well, precluding them from receiving the vital political speech that is "at the heart of the First Amendment." *McConnell*, 540 U.S. at 336 (Kennedy, J., concurring and dissenting).

Finally, the result here is even more troubling, given the severity of the sanction for pure speech. The First Amendment's protections not only are most robust when applied to campaign speech, but are most powerfully implicated when the state seeks to punish such speech and not simply regulate it. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 318 n.6 (1979) (Brennan, J., concurring and dissenting) ("it does not follow that because the First Amendment permits certain speech to be regulated, it must also permit such speech to be punished"). This case thus presents the Court with an opportune vehicle to reiterate that campaign speech – *all* campaign speech – "lies at the heart of the protection provided by the First Amendment," *Williams-Yulee*,

135 S. Ct. at 1685 (Alito, J., dissenting), and that states may not impose draconian punishment on political speakers in the name of preserving the integrity of judicial elections.

II. Although This Court Has Relaxed Slightly the First Amendment Protections Provided to Political Campaign Speech in the Context of Judicial Campaign Fundraising, Pure Judicial Campaign Speech Deserves the Greatest Protection from Government Suppression.

Fifteen years ago, in another case involving restrictions on judicial campaign speech, this Court reiterated the principles outlined above regarding the heightened importance of First Amendment protections for campaign speech: "Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (internal quotation omitted). More recently, in a case involving restrictions on judicial candidates' personal solicitation of campaign donations, this Court held that "a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." *Williams-Yulee*, 135 S. Ct. at 1662. Yet, the restrictions imposed by Florida in *Williams-Yulee* and this Court's approval of those restrictions were based in large part on "the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity"

and the fear that the "integrity of the judicial system [would be] compromised" if litigants were forced "to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." *Id.* at 1667-68 (internal quotation omitted).

No such concerns are implicated here, where what is at issue is pure campaign speech in the form of a flyer criticizing a judicial candidate for his association with the policies of another elected official. Moreover, one "need not equate judges with politicians to see that the electoral setting calls for all the more vigilance in ensuring observance of the First Amendment." *Id.* at 1676 (Scalia, J., dissenting). "Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal." *Id.* at 1683 (Kennedy, J., dissenting). This is all the more true in the present context, which, again, involves pure campaign speech and not personal fundraising by judicial candidates.

Many states continue to choose at least some of their judges through popular elections. Like it or not – and good arguments abound for and against such methods of selecting judges – elections, even of jurists, are "a paradigmatic forum for speech and a process intended to protect freedom in so many other manifestations." *Id.* at 1682. As Justice Kennedy noted in *Williams-Yulee*, "Whether an election is the best way to choose a judge is itself the subject of fair debate. But once the people of a State choose to have elections, the

First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate." *Id.* at 1684.

If states such as West Virginia and the other jurisdictions with similar rules are allowed to punish judicial candidates – and even bar them from taking elected office and fulfilling the will of the electorate – on the basis of nothing more than comments made in the heat of a political campaign, the core protections of the First Amendment will be threatened and could eventually wither away. A regime that restricts and even punishes campaign speech is demonstrably inconsistent with the original purpose and core protections of the First Amendment. "There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, including discussions of candidates." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (internal quotation and alterations omitted). "The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate." *Id.* at 757 (Kagan, J., dissenting).

The speech at issue here was judicial campaign speech, but it was political speech nonetheless. And the result here – a two-year ban on taking the judicial position to which a candidate was elected and the concomitant frustration of the voters' will – has the substantial potential to chill a much wider swath of First Amendment protected speech, including by candidates for non-judicial offices. The Court should grant

the petition and clarify the high standard states must apply in seeking to regulate judicial campaign speech consistently with the First Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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