No. 17-___

IN THE

Supreme Court of the United States

IN THE MATTER OF: THE HONORABLE STEPHEN O. CALLAGHAN, JUDGE-ELECT OF THE TWENTY-EIGHTH JUDICIAL CIRCUIT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves First Amendment protection for a campaign flyer in a hotly contested judicial election. As the challenger, Petitioner approved a flyer connecting two independent facts: that the incumbent attended an event at the White House and that, at the same time, his county reportedly lost coal jobs due to President Obama's policies. On the flyer's front were pictures of President Obama and the incumbent superimposed on a black background, surrounded by computer-animated streamers.

West Virginia's Judicial Disciplinary Counsel contacted Petitioner, claiming that the flyer violated the rules for judicial and attorney conduct. Disciplinary Counsel proposed remedial measures to address any alleged violations, and Petitioner promptly took all of those measures.

Nevertheless, after he won the election, Petitioner was charged with rules violations. The West Virginia Supreme Court acknowledged that the statements in the flyer would be protected speech if read literally. Yet, it held that the flyer was unprotected as "false" speech, because of that court's subjective interpretation of the flyer in "context." Petitioner has been suspended from his judicial post for two-years, fined $15,000, and reprimanded.

This case implicates a growing split of authority in the federal courts of appeals and state courts of last resort over protected speech in judicial elections. Consistent with this Court's decisions, some courts protect speech when it can reasonably be interpreted as true, whether read literally or in-context. The West Virginia Supreme Court joined several courts

that flip that analysis on its head, holding that speech is unprotected when it could potentially be interpreted literally or in-context as "false." Other courts inconsistently apply variations of these rules.

The question presented is: Whether speech that is literally or substantially true can nonetheless be punished as "false speech" where a court determines that the context or "gist" of the communication could be interpreted as "false."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Honorable Stephen O. Callaghan respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 796 S.E.2d 604. Pet. App. 1a–82a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on February 9, 2017. On May 2, 2017, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including July 9, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

West Virginia Code of Judicial Conduct 4.1 provides in pertinent part:

> (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . .
>
> > (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement; . . .

> (B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

West Virginia Code of Judicial Conduct 4.2 provides, in pertinent part:

> (A) A judge or candidate subject to public election shall:
>
> > (1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary; . . .
> >
> > (3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination;
> >
> > (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1; and
> >
> > (5) take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials.

West Virginia Rule of Professional Conduct 8.2 provides, in pertinent part:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning

> the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
>
> (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

STATEMENT OF THE CASE

A. Challenger Stephen Callaghan and Incumbent Judge Gary Johnson

This case involves judicial campaign speech in the May 2016 election for West Virginia's 28th Judicial Circuit Court. That court serves the rural area of Nicholas County, West Virginia.

1. Judge Stephen O. Callaghan is a third-generation Nicholas County attorney. Hr'g Tr. 62:7-13. He lives in Summersville in Nicholas County with a population of 3,572, in the 2010 census.

For over 22 years, Judge Callaghan actively practiced law in Nicholas County. Pet. App. 144a. Judge Callaghan served as the municipal judge of Summersville for around seven years until 2015 and as the City Attorney for the Richwood in Nicholas County for several years until 2016. Hr'g Tr. 9:24-10:21. Yet, Judge Callaghan had never run for public office before the 2016 election. *Id.* 60:3-9.

2. Judge Gary L. Johnson was Judge of the 28th Judicial Circuit Court from January 1, 1993 until December 31, 2016, Pet. App. 146a, including serving on West Virginia's Judicial Hearing Board for six years. Hr'g Tr. 105:16-18. Starting in 2001, Judge Johnson was Chair of West Virginia's Court

Improvement Program ("CIP") Oversight Board. Pet. App. 8a-9a. In the summer of 2015, West Virginia's CIP was receiving three grants from the Administration for Children and Families ("ACF"), a federal executive agency. *Id.*

B. Judge Johnson Attends the Event "at the White House"

1. In June 2015, Judge Johnson attended a CIP meeting and Child Trafficking Conference in Washington, D.C. Pet. App. 8a. West Virginia was required to send at least three representatives to these events, one for each federal grant. *Id.* at 9a. ACF co-hosted the events and "encouraged the States to send their highest level representative." *Id.* Contemporaneous reports indicate that President Obama was in the White House that day but not whether he attended the conference. Hr'g Tr. 74:8-76:18; *Obama guidance, press schedule, June 10, 2015* (June 9, 2015), available at http://chicago.suntimes.com/news/obama-guidance-press-schedule-june-10-2015-biden-carter/.

The child trafficking event was "***at the White House***," as described on official government websites by Valerie Jarrett, then-Senior Advisor and Assistant to the President, and ACF's then-Acting Assistant Secretary.[1] The West Virginia Supreme Court's press release also said Judge Johnson "joined

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[1] Valerie Jarrett, Working Together to End Human Trafficking (June 11, 2015), available at https://obamawhitehouse.archives.gov/blog/2015/06/11/working-together-end-human-trafficking (emphasis added); Mark Greenberg, ACF Creates New Office on Trafficking in Persons (June 10, 2015) (available at http://www.nchcw.org/news.html (emphasis added)).

other West Virginia and national leaders ***at the White House*** on Wednesday, June 10." Pet. App 101a (emphasis added).

After that event, there was an open house for attendees a few blocks away that included "light hors d'oeuvres and refreshments" but not alcohol. Pet App. 150a. The record below indicates that neither Judge Johnson nor President Obama attended the open house. *Id.*

2. Separately in June 2015, media reported the loss of 558 coal jobs in Nicholas County between 2011 and 2015. Pet. App. 9a. Those lost coal jobs "had been widely associated with President Barack Obama's policies," who had a 72% percent disapproval rating in West Virginia in 2015. *Id.* at 8a & n.1.

C. Judge Callaghan's Campaign

1. After filing pre-candidacy papers in May 2015, Pet. App. 7a, Judge Callaghan read the Code of Judicial Conduct, and then strove to comply with it Hr'g Tr. 61:12-23. He campaigned vigorously, including posting on his personal and campaign Facebook pages, running a weekly newspaper ad, and attending community events. *Id.* 60:14-61:11.

2. In late January 2016, at his campaign consultant's recommendation, Judge Callaghan commissioned and approved an automated survey of potential voters. At the outset of the survey, the 485 respondents' intended votes were: 44.74 percent for Judge Johnson and 39.18 percent for Judge Callaghan. Pet. App. 157a-58a. The survey also sought reactions to a positive statement about Judge

Johnson's work with children that appealed to 64 percent of respondents. Pet. App. 159a.

Then, the survey sought reactions to a negative statement about Judge Callaghan and three about Judge Johnson, asking respondents whether each statement caused "major concern," "some concern," "no real concern," or "don't know." The first negative statement about Judge Johnson mentioned the county's drug crisis, that specialized drug courts were available for over six years and that Judge Johnson only recently established such a court. Pet. App. 157a-158a. Almost 70 percent of respondents had major or some concern regarding that statement. *Id.* at 160a.

The second negative statement about Judge Johnson was: "Gary Johnson is lockstep with Barack Obama's policies. While Nicholas County was losing coal jobs to Obama's policies, Johnson was the only West Virginia judge invited to the Obama White House to participate in a junket highlighting issues of importance to President Obama." Pet. App. 8a. Approximately 67% of the 149 respondents to this statement had major or some concern. *Id.*; Pet. App. 103a-104a.

The third negative statement about Judge Johnson related to a specialized teen court and "about 72 percent" of respondents had major or some concern. Pet. App. 160a. Concerns with the drug and teen court issues were higher than with the White House event.

Following participation in the survey, responding participants favored Judge Johnson only by "just about 2 percent." Pet. App. 161a. Judge Callaghan's

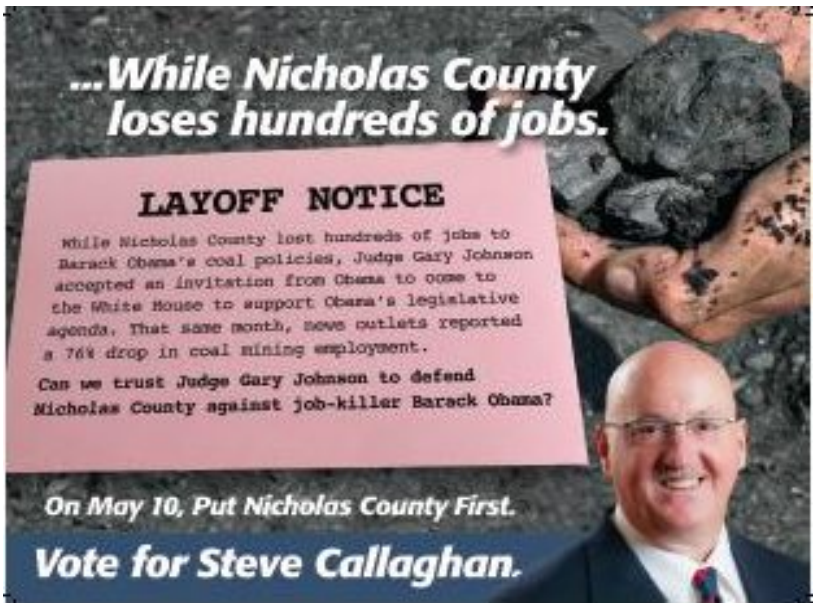
impression was that the "race is winnable" and that he should continue campaigning. Hr'g Tr. 31:24-32:4.

3. After that, Judge Callaghan approved five direct-mail flyers created by his consultant. Pet. App. 9a. The flyer at issue in this case—the "White House Mailer," pasted in-full on the next page—addressed the White House event. The front has a headshot of President Obama holding a glass of beer Photoshopped on a black background next to a smiling portrait of Judge Johnson, with a header stating Judge Johnson and President Obama "part[ied]" at the White House. Pet. App. 77a-78a. The back relays facts regarding the event at the White House and the simultaneous report of lost coal jobs in Nicholas County, including a mock "Layoff Notice" that says:

> While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment. **Can we trust Gary Johnson to defend Nicholas County against job-killer Barack Obama?**

Id.


Barack Obama & Gary Johnson
Party at the White House…


…While Nicholas County
loses hundreds of jobs.
LAYOFF NOTICE
While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets reported a 76% drop in coal mining employment.
Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?
On May 10, Put Nicholas County First.
Vote for Steve Callaghan.

The White House Mailer was mailed once to Nicholas County voters and received on or around May 5, 2016, five days before the election. Pet. App. 10a. As is common in such elections, Judge Callaghan sent all five flyers in the election's final days, sending the White House Mailer sent second to last. Hr'g Tr. 91:4-9. The other flyers addressed drug abuse, drug courts, and teen courts. Pet. App. 10a n.4.

Meanwhile, Judge Callaghan continued actively campaigning, including going door-to-door with volunteers. Hr'g Tr. 95:5-6.

D. West Virginia Judicial Disciplinary Counsel Contacts Judge Callaghan, Who Takes Every Requested Remedial Step

1. On the evening of May 5, 2016, West Virginia Judicial Disciplinary Counsel Teresa Tarr contacted Judge Callaghan, claiming that the White House Mailer was inappropriate and demanding that Judge Callaghan take remedial steps on Facebook and in radio ads. Pet. App. 10a-11a; *id.* at 150a; Hr'g Tr. 52:7-15, 53:5-14. Disciplinary Counsel stated that if Judge Callaghan complied, she would not initiate a judicial complaint. Pet. App. 10a n.5. The deadline to complete the remedial actions was 4:30 p.m. the next day.

Within hours, Judge Callaghan took every remedial step requested by Disciplinary Counsel. Hr'g Tr. 63:16-21. He replaced the Facebook posts on his personal and campaign pages with the following retraction and apology:

> My campaign committee recently produced a mail advertisement

> depicting a visit to the White House by Judge Gary Johnson. The specific characterization contained in the mail piece may be inaccurate and misleading. The mailer should not have been sent containing this inappropriate information. I apologize personally for any misunderstanding or inaccuracies.

Pet. App. 106a. Also within hours, Judge Callaghan arranged to run a substantially similar retraction and apology ad on local radio eight times over the three-day period before the election, Pet. App. 10a-11a; Hr'g Tr. 52:16-24, and emailed Disciplinary Counsel that her requested remedial actions had been completed.

E. Campaign Conclusion and Election

1. The Johnson campaign called Judge Callaghan a liar for the White House Mailer. Hr'g Tr. 65:3-6. Judge Johnson's campaign Facebook page also shared Judge Callaghan's retraction, and Judge Callaghan was criticized in the comments. *Id.* 65:6-12. Shortly before the election, Judge Johnson attended a "meet the candidate" forum, where he had the opportunity to address the White House Mailer. *Id.* 65:19-66:4.

A May 8, 2016 article in the regional newspaper, Charleston Gazette-Mail, criticized Judge Callaghan for the White House Mailer.[2] The article described

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[2] Phil Kabler, Statehouse Beat: Politics more unpredictable than usual this year (May 8, 2016), available at

several campaigns that connected opponents to President Obama. It criticized the White House Mailer at length, explaining that Judge Johnson had received "an invitation to a prestigious White House conference," on children and youth, "where Johnson was one of 50 judges from across the country invited to participate because of his national reputation for his work in addressing child abuse and neglect." *Id.* That article is the only cited source indicating that President Obama "was not in Washington during the conference." *Id.*

2. Judge Callaghan ultimately defeated Judge Johnson by 227 votes, receiving 3,472 to Judge Johnson's 3,245. Pet. App. 11a & n.6.

Judge Callaghan testified that, in hindsight, "I think I would've beat Judge Johnson by more votes without that flier because of the negative reaction that it got and the negative comments that were created from it." Hr'g Tr. 65:15-18. He expressed regret for causing Judge Johnson outrage. *Id.* 66:5-67:1.

F. Charges Against Judge Callaghan

1. In May 2016, Judge Johnson's son filed complaints against Judge Callaghan regarding the White House Mailer with the Lawyer Disciplinary Board and the Judicial Investigation Commission. Pet. App. 10a n.5; *id.* at 146a. He alleged that the Mailer violated West Virginia Rule of Professional Conduct ("Professional Rule") 8.2 and Code of

(continued…)

http://www.wvgazettemail.com/article-/20160508/statehouse-beat-politics-more-unpredictable-than-usual-this-year.

Judicial Conduct Rule ("Code Rule") 4.1(A)(9). N. Johnson Complaint, May 16, 2016. Although he challenged the accuracy of aspects of the Mailer, he acknowledged that "Judge Johnson did indeed ***visit the White House***." *Id.* (emphasis added).

2. In July 2016, the Judicial Investigation Committee issued a Formal Statement of Charges against Judge Callaghan. Pet. App. 11a; *id.* at 144a. The Statement alleged that Judge Callaghan violated eight rules of conduct, four of which are at issue here:[3]

- Code Rule 4.1(A)(9), which prohibits "knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement;"
- Code Rule 4.2(A)(1), which requires "act[ing] at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;"
- Code Rule 4.2(A)(4), which requires "reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities . . . that the candidate is prohibited from doing by Rule 4.1;" and
- Professional Rule 8.2(a), which prohibits "a statement that the lawyer knows to be

[3] The other four provisions are not at issue because Disciplinary Counsel "voluntarily dismissed" Code Rule 4.2(A)(3), the Board found Judge Callaghan did not violate Code Rule 4.2(A)(5), and the Board found Code Rule 4.1(b) and Professional Rule 8.2(b) were redundant. Pet. App. 113a, 114a & n.13, 127a.

> false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

Id. at 11a n.7; *id.* at 147a. The only charged conduct was sending the White House Mailer. Pet. App. at 147a-50a.

G. Judicial Hearing Board Proceedings

The charges against Judge Callaghan were initially before West Virginia's Judicial Hearing Board, which "conducts hearings" on such formal complaints" and makes "recommendations to the Supreme Court of Appeals regarding [their] disposition." W.Va. Jud. Disciplinary R. 3.

1. Judge Callaghan moved to dismiss all charges. As relevant here, he challenged Code Rule 4.1(A)(9) and Professional Rule 8.2(a)—prohibiting "false or misleading" speech or false speech, respectively—as unconstitutional both "on their face and as applied" to the White House Mailer. Order re Constitutionality at 1 (Nov. 18, 2016).

The Board denied that motion, upholding the prohibitions on "false" statements. *Id.* at 5-6, 12-13. Although "the Board agree[d] that 'misleading' judicial campaign advertising which is not 'false' is clearly protected by the First Amendment," it did not strike down the prohibition on "false ***or*** misleading" statements, holding instead that the statements must be "both false ***and*** misleading (or, in other words, material)." *Id.* at 6-11 (emphasis added).

2. The evidence at the Board's hearing consisted of stipulations, 32 exhibits, and testimony from Judge Callaghan, his campaign consultant, and Judge Johnson. During closing arguments, Disciplinary Counsel said that "most of the charges except mitigation charges all piggyback on the violation of Code of Judicial Conduct, Rule 4.1(a)(9) and Rule of Professional Conduct 8.2(a) in that the Respondent knowingly made false statements. That's our position." Hr'g Tr. 123:14-19. Disciplinary Counsel requested a two-year suspension—one-year each for violating the Code Rules and the Professional Rules, to run consecutively. Pet. App. 12a.

3. The Board concluded that Judge Callaghan violated Code Rules 4.1(A)(9), 4.2(A)(1), and 4.2(A)(4) as well as Professional Rule 8.2(a). Pet. App. 12a. It recommended a one-year suspension from both serving as a judge and practicing as a lawyer for each of the four violations, to run concurrently, as well as a censure, a reprimand, a $5,000 fine per Judicial Code violation, and the payment of costs. *Id.*; Pet. App. 143a.

H. West Virginia Supreme Court Proceedings

Judge Callaghan objected to the West Virginia Supreme Court, arguing that the White House Mailer was constitutionally protected speech. Pet. App. 12a. Disciplinary Counsel objected to the one-year suspension, requesting a two-year suspension. *Id.*

1. The Court initially scheduled argument for January 10, 2017. On January 4, a majority of

Justices voted to hire Judge Johnson as the Court's interim Administrative Director. Pet. App. 88a. The next day, Justice Davis recused herself from the case. *Id.* Justice Davis had abstained from voting but believed she had to recuse, because "my impartiality in this case might reasonably be questioned" and "Judge Callaghan should have his fate decided by someone whose impartiality could not be questioned." *Id.*

The other Justices did not recuse themselves, claiming "no personal bias or prejudice against" Judge Callaghan, and that Judge Johnson's new position "is purely an administrative matter and [neither] he, nor any member of his family, will be affected by any outcome of this case." Disclosure (Jan. 5, 2017). Senior Justice Thomas McHugh was then assigned to the case. Administrative Order (Jan. 5, 2017).

On January 9, 2017, Judge Callaghan moved to disqualify the remaining Justices. Later that day, the remaining Justices voluntary disqualified themselves "out of an abundance of caution," even though they determined that disqualification was not required. Pet. App. 85a. Justice McHugh then assigned four circuit court judges to the case. Oral Argument was re-scheduled for, and held, on January 24, 2017.

2. On February 9, 2017, the Court issued its opinion finding four violations and increasing the suspension's length to two years. The Court quoted its Chief Justice's "book about West Virginia election corruption" that said West Virginia's judicial elections have included "lying about candidates as a matter of tradition and expected behavior." Pet.

App, 29a n.17 (quoting Allen H. Loughry, II, "Don't Buy Another Vote, I Won't Pay for a Landslide," 498 (McClain Printing Co. 2006)). The Court also said that it was issuing "substantial discipline" specifically to have a "devastatingly chilling effect on" similar speech. *Id.* at 72a.

3. The Court rejected Judge Callaghan's facial First Amendment challenge to the violations. It held that there was a compelling interest in restricting the speech of judicial candidates to protect the courts' integrity and that a prohibition on "false" statements is narrowly tailored because such statements do not have First Amendment protection. Pet. App. 28a-33a. The Court did not analyze Judge Callaghan's facial challenge to the ban on "misleading" speech, because Judge Callaghan "was not charged with, nor does the Board base its recommendation on, any alleged 'misleading' statement." *Id.* at 33a n.18. But, it "note[d] that such provisions in similar Rules have been widely found to be facially unconstitutional." *Id.* (citing cases).

4. The Court then analyzed Judge Callaghan's as-applied challenge. It rejected Judge Callaghan's contention that the White House Mailer's statement that "Barack Obama & Gary Johnson party at the White House" is protected hyperbole. Pet. App. 9a. The Court held that the statement could be interpreted as an actual fact—and therefore is not hyperbole—because it is possible that Judge Johnson "partied" with President Obama. *Id.*

The Court then analyzed the "falsity" of the White House Mailer. It acknowledged Judge Callaghan's argument that "each particular phrase in isolation"

was "either substantially or objectively true." Pet. App. 44a. It then went through Judge Callaghan's explanation for each statement: that the event was "while Nicholas County loses hundreds of jobs" is "substantially true"; that the job losses were due "to Barack Obama's coal policies" is protected "opinion"; that the event was to support President Obama's legislative agenda "is true because the conference occurred a couple of weeks after Obama signed the Justice for Victims of Trafficking Act of 2015, which was a part of Obama's legislative agenda"; that the statistics on job losses were "objectively true" based on the news reports from June 2015; and that the question about trusting Judge Johnson "is merely a rhetorical question." *Id.* at 45a. The Court did not dispute those arguments, except quibbling that the job losses had occurred over a period of time. *Id.* & n.22.

The Court also did not dispute that the White House Mailer would be protected if each statement were analyzed individually. *Id.* at 45a. Instead, the Court evaluated the White House Mailer's "context" or "gist" under the "converse of the substantial truth doctrine." *Id.* at 47a. The "substantial truth" doctrine protects inaccurate statements if "'the substance, the gist, the sting' of the communication, taken as a whole," is true. *Id.* The Court reversed that test, holding that true individual statements are unprotected when "'the substance, the gist, the sting' of the communication, taken as a whole, is patently false." *Id.* The Court concluded that the "gist" of the White House Mailer was "materially false," explaining that "Judge Johnson's attendance at the meeting and conference is exaggerated, repurposed

and mischaracterized to the point that it is rendered patently untrue." *Id.* at 48a-49a.

5. The Court modified the Board's recommended discipline to a suspension without pay from serving as a judge for two years of his eight year term and a $15,000 fine for the Code Rules violations. Pet. App. 7a. It reprimanded Judge Callaghan for the Professional Rule violation and ordered him to pay costs. *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

The West Virginia Supreme Court's decision deepens an existing split among the circuits and state courts of last resort over First Amendment protection for false or misleading judicial campaign speech. It is also contrary to this Court's precedent on this fundamental issue.

1. Eleven circuit courts and state courts of last resort are split over the standard to determine what speech in judicial elections is unprotected as untrue, reaching irreconcilably inconsistent results.

In six courts, this split is outcome determinative for judicial candidate statements that are true individually but can be read as "false" in context. Such statements are protected from sanctions in the Sixth Circuit and Michigan. *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016) (Sutton, J.); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000) ("*Chmura I*"); *In re Chmura*, 626 N.W.2d 876 (Mich. 2001) ("*Chmura II*"). Yet, West Virginia holds they are sanctionable, joining Florida, Ohio, and the

reasoning of the Indiana Supreme Court. *Matter of Callaghan*, 796 S.E.2d 604 (W.Va. 2017); *Inquiry Concerning a Judge (Kinsey)*, 842 So. 2d 77 (Fla. 2003) (per curiam); *Disciplinary Counsel v. Tamburrino*, __ N.E.3d ___, 2016 WL 7116096 (Ohio Dec. 7, 2016); *In re Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam).

In five other courts, there is greater uncertainty because the Justices are split over this issue, *Wisconsin Judicial Commission v. Gableman*, 784 N.W.2d 605 (Wis. 2010) (Abrahamson, C.J., Bradley and Crooks, JJ.) ("Abrahamson Justices"); *Wis. Judicial Comm'n v. Gableman*, 784 N.W.2d 631, 645-651 (Wis. 2010) (Prosser, Roggensack and Ziegler, JJ.) ("Prosser Justices"), or the court has not established the governing rule. *Butler v. State Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001); *Winter v. Wolnitzek*, 482 S.W.3d 768, 778-81 (Ky. 2016); *Att'y Grievance Comm'n v. Stanalonis*, 126 A.3d 6 (Md. 2015); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

2. The decision below is inconsistent with this Court's precedent that the First Amendment bars punishment of a statement when there is a "rational interpretation" that is protected. *See, e.g. Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014). Additionally, the decision below found speech unprotected as false without conducting the required "materiality" analysis. *See, e.g.*, *id.* at 863-67; *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

3. These fundamental and recurring questions warrant this Court's attention. Increasingly restrictive regulations and a proliferation of charges threaten fundamental First Amendment rights in

judicial elections. That chills protected speech. The chilling is compounded by the lower courts' inconsistent and unpredictable tests. This Court's intervention is needed to clarify judicial candidates' Free Speech rights and prevent widespread chilling of protected speech.

I. THE WEST VIRGINIA SUPREME COURT'S DECISION DEEPENS A SPLIT OVER WHEN JUDICIAL CANDIDATE SPEECH IS UNPROTECTED

Thirty-six states select judges in contested elections that prescribe core political speech. Such speech is protected by the First Amendment, unless the states can satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

Eleven circuits and state courts of last resort agree that "unprotected" speech can be regulated in judicial elections. But they are deeply divided over the standard to determine whether such speech is unprotected, reaching irreconcilable results.

A. The Sixth Circuit And Michigan Supreme Court Protect Speech That Is Reasonably Interpreted As True, Individually Or In-Context.

The Sixth Circuit and Michigan Supreme Court hold that judicial candidate speech is protected if reasonably interpreted as true, either "literally" or "substantially." *Winter*, 834 F.3d 681 (6th Cir. 2016); *Chmura I*, 608 N.W.2d 31 (Mich. 2000); *Chmura II*, 626 N.W.2d 876 (Mich. 2001).

1. The Sixth Circuit holds that judicial candidates' statements can be banned as "false" only when not "readily capable of a true interpretation." *Winter*,

834 F.3d at 693-94 (Sutton, J.). There, an appointed incumbent's campaign materials used the phrase "re-elect." The court held that Kentucky's prohibition on "materially false statements by judicial candidates survives strict scrutiny—at least facially." *Id.* at 693 (citing *Williams-Yulee*). But it found that the statement was not false, because it could be "readily" interpreted as true: "[a]pplied 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." *Id.*

Additionally, the Sixth Circuit held that "technically true" statements could not be false, even by implication or inference. Specifically, the court struck down, on its face, Kentucky's ban on misleading statements that prohibited "statements that, while technically true or ambiguous create false implications or give rise to false inferences." *Winter*, 834 F.3d at 694. It held that such statements are not false, and that "only a ban on conscious falsehoods satisfies strict scrutiny." *Id.* Allowing some "[e]rroneous statement[s]" in judicial campaigns is essential to "free debate" and to prevent "chilling" protected speech. *Id.*

2. The Michigan Supreme Court holds that a judicial candidate's statement is protected when either "literally true" (individually) or "substantially true" (in-context). *Chmura II*, 626 N.W.2d at 887. In *Chmura I*, the court re-interpreted the bar on false or misleading speech by judicial candidates to bar only "false" speech, holding that a broader prohibition would violate the First Amendment. 608 N.W.2d at 535-42.

In *Chmura II*, the court defined falsity, applying a two-part test. The first step analyzes each statement individually. 626 N.W.2d at 887. A statement that is "literally true," is protected and does not violate the ban on "false" speech. *Id.* At this step, the "substantial truth" doctrine does not apply. *Id.*

If the communication "conveys an inaccuracy," the second step analyzes the statement in context for "substantial truth." 626 N.W.2d at 887. Under this "substantial truth" test, the inaccurate communication is analyzed "as a whole . . . to determine whether 'the substance, the gist, the sting' of the communication is true despite the inaccuracy." *Id.* This step cannot punish literally true statements, so, "as is arguably true in the present case, even potentially misleading or distorting statements may be protected." *Id.* at 886.

3. In these courts, Judge Callaghan's White House Mailer would be protected from the sanctions issued here. First, the statements in the Mailer would be protected if read individually, as the West Virginia Supreme Court did not dispute. Pet. App. 46a-47a.

Second, the White House Mailer is substantially true. Judge Johnson was invited to attend an event at the White House that supported an agenda item of President Obama's Administration, and the Administration was separately, contemporaneously associated with coal policies that were credited with causing the loss of jobs in Nicholas County. All of that is true and could be significant to voters who support or oppose a President's policies, wholly independent of the event's content. Indeed, even champion athletes have recognized that mere

attendance at White House ceremonies can convey support for a President's other agenda priorities.

4. There is also a tangential split regarding whether misleading speech is protected. Eight courts hold that only false speech is unprotected but misleading speech is protected. *Winter*, 834 F.3d at 694; *Chmura I*, 626 N.W.2d at 887; *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114, 1126 (Ohio 2014); *Gableman*, 784 N.W.2d at 611 (Abrahamson Justices); 784 N.W.2d at 650 (Prosser Justices); *Butler*, 802 So. 2d at 218; *Weaver*, 309 F.3d at 1319-22; *Winter*, 482 S.W.3d at 778-81; *Stanalonis*, 126 A.3d at 12-16. Only the Florida Supreme Court expressly holds that non-false speech is unprotected. *Inquiry Concerning a Judge No. 14-488 (Shepard)*, 217 So. 3d 71, 78-79 (Fla. 2017) (per curiam); *see also Bybee*, 716 N.E.2d at 959-60 ("believ[ing]" Florida is correct without deciding the issue). Because the White House Mailer is literally and substantially true, it should be protected in any jurisdiction that holds only false speech is unprotected. The standards below that do not protect the Mailer, however, expand the definition of falsity to include misleading speech.

B. The West Virginia And Florida Supreme Courts Hold And The Indiana Supreme Court "Believe[s]" That Context Or Implications Can Remove First Amendment Protection From Individually True Statements.

The West Virginia and Florida Supreme Courts hold that judicial campaign statements can be false from context or implication, even if there is a reasonable basis to interpret them as true. Pet. App.

1a; *Kinsey*, 842 So. 2d 77 (Fla. 2003). The Indiana Supreme Court agrees, but has not definitively reached the issue. *Bybee*, 716 N.E.2d 957 (Ind. 1999) (per curiam).

1. Here, the West Virginia Supreme Court held that context can render literally true speech unprotected. The Court did not dispute Judge Callaghan's argument that the White House Mailer is protected when reading each statement individually and that "[m]inor inaccuracies do not amount to falsity." Pet. App. 46a. Indeed, it recognized that its contextual analysis is outcome determinative. *Id.* at 47a.

Under that Court's so-called "converse of the substantial truth doctrine," the speech is unprotected, even when the individual statements are true, if "'the substance, the gist, the sting,' of the communication, taken, as a whole, is patently false." *Id.* at 47a. The Court specifically recognized that its test inverted the outcome: "[t]ypically this so-called 'substantial truth doctrine' inures to the benefit of the accused, *i.e.* if something is 'substantially' true in overall effect, minor inaccuracies or falsities will not create falsity. However, in this particular instance, it works to Judge-Elect Callaghan's detriment[.]" *Id.*

Applying that test, the Court concluded that the White House Mailer was unprotected as false. *Id.* at 48a. Without disputing that the statements would be protected if read individually, the Court found from the Mailer's context that, "Judge Johnson's attendance at the meeting and conference is exaggerated, repurposed and mischaracterized to the point that it is rendered patently untrue." *Id.* at 48a-49a. As a result, the Court held "that the First

Amendment does not serve to shield Judge-Elect Callaghan from discipline as a result of the subject flyer." *Id.* at 49a.

2. The Florida Supreme Court similarly allows punishment of judicial candidates' speech when it creates an "impression" or "implication" that is an "intentional misrepresentation." *Kinsey*, 842 So. 2d 77. There, the advertisement was factually accurate – a defendant attempted to strangle his wife, was ultimately charged with attempted murder, and the incumbent released him on bond. *Id.* The ad created an inaccurate "impression," however, because the incumbent released the defendant on bond without knowing about the attempted strangling and murder charge. *Id.* Based on that "implication," the court found a sanctionable "intentional misrepresentation." *Id.* at 90. The Court rejected a First Amendment challenge to that rule, though its analysis focused on other issues. *Id.* at 85-87; *see also Inquiry Concerning a Judge (Renke)*, 933 So. 2d 482, 488 (Fla. 2006) (per curiam) (judge removed from office entirely for, *inter alia*, "intentional misrepresentations," without the statements being found false).

This is consistent with the Florida Supreme Court's holding, regarding a separate Code provision, that "[t]he First Amendment does not protect . . . knowing misrepresentations of fact by candidates for judicial office." *Shepard*, 217 So. 3d at 80. The court did not protect the ad, even though it contained "four true statements," finding those facts "were distorted and misrepresented because they were taken out of context." *Id.* at 79.

3. The Indiana Supreme Court has indicated that it would agree with Florida, if presented with the issue. *Bybee*, 716 N.E.2d at 959-60. Although the issue was not squarely presented, the court said it "believe[s]" strict scrutiny is satisfied by its state rule barring a judicial candidate from "knowingly misrepresent[ing]" certain information about the candidate or opponent. *Id.*

4. These courts require an unprecedented level of accuracy for First Amendment protection. For example, the *Callaghan* Court quibbled that the White House Mailer inaccurately stated the event was "***at the White House***," finding that "while conference meetings were held at buildings within the White House compound, Judge Johnson ***did not actually go to the White House***." Pet. App. 10a (emphasis added); *id.* at 78a (Matish, J., concurring in part and dissenting in part) ("Judge Johnson ***did not go to the White House***.") (emphasis added)]. But everyone from Judge Johnson's son (in the Complaint) to Valerie Jarrett concedes that these events were "***at the White House***." *See supra* at 4. Even the West Virginia Supreme Court contemporaneously claimed this event was "***at the White House***." *See id.* at 4-5. No legitimate standard allows that same Court to hold this statement is unprotected as "false" when repeated by a judicial candidate during an election.

Such a flimsy test is particularly troubling here, because the *Callaghan* Court "sincerely expect[s]" that its decision will chill future speech. Pet. App. 72a. It took comfort that its decision would deter only "false" speech, *id.*, but its malleable test allows courts to turn true statements into unprotected false

speech and will chill substantial amounts of core, protected political speech. To deter false speech without also chilling protected speech, requires a clear, easily applied test that protects any statement that could reasonably be interpreted as true.

C. The Ohio Supreme Court Defines Truth Narrowly And Falsity Broadly.

The Ohio Supreme Court's approach pays lip service to the falsity requirement but construes falsity so broadly and truth so narrowly that it undermines First Amendment protection. *See Tamburrino*, 2016 WL 7116096.

1. The Ohio Supreme Court recognizes that true but misleading judicial campaign statements are protected. In 2014, it upheld a ban on false speech. *O'Toole*, 24 N.E.3d at 1126. It struck down, however, a ban on true but misleading judicial campaign speech, as facially "unconstitutional because it chills the exercise of legitimate First Amendment rights." *Id.* "This portion of the rule does not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive some listeners." *Id.*

2. In 2016, however, the Ohio Supreme Court undermined that ruling by expanding substantially the scope of unprotected "false" speech. *Tamburrino*, 2016 WL 7116096. Punishing two judicial campaign commercials, it analyzed context to find only falsity not truth, considered incomplete statements false, and construed the underlying facts narrowly.

First, the challenger's campaign commercial said the incumbent "won't disclose his Taxpayer Funded Travel Expenses." 2016 WL 7116096, at *1. The

dissent found this statement was protected as substantially true, because the incumbent omitted these expenses when posting others on the court's public website, while the challenger "was campaigning on the issue of posting judges' salaries and expenses on the court's website." *Id.* at *15 (French, J., dissenting).

Yet, the majority held that the statement, "by itself, is false," because "[a]n enormous amount of information would need to be added in order to make the statement true." *Id.* at *9. The court rejected the broader context that made the commercial substantially true and found that the term "disclose" could not mean to post the information on the public website, because "[g]iven the context of a public official, the most readily understandable definition of 'disclose' is to respond to a public-records request." *Id.* *9 n.2. In other words, it held that context can create falsity but not truth and that a statement's "most readily understandable definition" renders it false, even if it could be interpreted as true. *Id.*

Second, an ad claimed that the incumbent "doesn't think teenage drinking is a serious offense." *Tamburrino*, 2016 WL 7116096, at *2. The incumbent concurred in a case that held the misdemeanor of serving alcohol to minors was not an exigent circumstance justifying a warrantless home search. *State v. Andrews*, 895 N.E.2d 585 (Ohio Ct. App. 2008). That concurrence emphasized that this was "a misdemeanor charge," whereas officers could enter a home for "a serious misdemeanor offense." *Id.* at 594 (Cannon, J., concurring).

The ad's statement could reasonably be interpreted as true, because the incumbent's

concurrence specifically distinguished between the "misdemeanor charge" of underage drinking and "a ***serious*** misdemeanor offense." 2016 WL 7116096, at *15 (French, J. dissenting) (emphasis added). "A reasonable reader could conclude that [the incumbent] did not consider the charged offense to be a 'serious misdemeanor offense.'" *Id.* Although the ad did not disclose all of the relevant facts, it was substantially true. *Id.*

Yet, the majority found this commercial "patently false." *Tamburrino*, 2016 WL 7116096, at *7-8. It read the truth of the *Andrews* concurrence narrowly, that it: "indirectly" found no "emergency condition" and "implied that teenage drinking is not an emergency situation that requires immediate action," but "neither stated nor implied that it is not serious." *Id.* at *7. It then read the ad's falsity broadly, holding a full explanation was necessary for the ad to be true. *Id.*

3 The dissent also reiterated the reasons to protect such speech. The dissent "dislike[s] this type of political speech, particularly in a judicial campaign," yet it recognized that "[w]e must protect speech even when—and perhaps, especially when—we dislike it." *Tamburrino*, 2016 WL 7116096, at *16 (French, J., dissenting). For this "core political speech susceptible to a truthful interpretation, the better course is to let the candidates themselves publicly debate the truthfulness of the statement, rather than attempting to act as a truth-declaring forum and penalizing candidates for the exercise of their free-speech rights." *Id.*

D. The Wisconsin Supreme Court Splits 3-3 Over Analyzing Statements Individually Or In-Context.

The Wisconsin Supreme Court split 3-3 over whether to punish campaign statements by the seventh justice that were true individually but found to be false in-context. *Gableman*, 784 N.W.2d 605 (Abrahamson Justices); *Gableman*, 784 N.W.2d at 645-651 (Prosser Justices).

1. In the campaign for that court's seventh seat, the challenger's television commercial claimed that the incumbent had found a "loophole" for a criminal defendant who later committed criminal molestation, which was true. 784 N.W.2d at 610 (Abrahamson Justices). The ad implied incorrectly, however, that the "loophole" lead to an early release, when the defendant actually served his full sentence before committing the molestation. *Id.* at 612; 784 N.W.2d at 646 (Prosser Justices).

The challenger won that election and was charged with violating Wisconsin's false or misleading statement provision. All six justices agreed that the First Amendment would not protect "false" speech. 784 N.W.2d at 611 (Abrahamson Justices); 784 N.W.2d at 650 (Prosser Justices). They split 3-3, however, over whether this ad was rendered "false" based on the context.

2. The Prosser Justices would hold that individually, or "objectively," true statements cannot be punished under the First Amendment. *Gableman*, 784 N.W.2d at 645-651. Because each statement in the ad was objectively true, the statements were protected. *Id.* at 645-51. These

Justices repeatedly rejected a "falsity" standard that would look at the "context" or "the understanding of the hearer," because that "would violate the command of strict scrutiny that the regulation be narrowly construed and applied." *Id.* at 644-45, 653-54, 657. They recognized, though, that, together, the statements "implied" or were "intended to convey" a false impression. *Id.* at 651.

3. In contrast, the Abrahamson Justices would hold that the ad was "objectively false" based on its context. *Gableman*, 784 N.W.2d at 593, 608-09 (Abrahamson Justices). Those Justices analyzed the ad's "over-all meaning" in context, concluding that the only reasonable interpretation was that the incumbent's "loophole" led to the inmate's early release and subsequent crime. *Id.* at 614, 616.

E. The Eleventh Circuit, Alabama Supreme Court, Kentucky Supreme Court, And Court Of Appeals Of Maryland Hold False Speech Is Unprotected But Have Not Defined Falsity.

Deepening the split, four other courts have held that "false" judicial campaign speech can be regulated but have not established a clear standard for determining what speech is "false." *Butler*, 802 So. 2d at 218 (Ala. 2001) (upholding ban on false speech and striking down ban on true but misleading speech); *Weaver*, 309 F.3d at 1319-22 (11th Cir. 2002) (striking down ban on true but misleading speech and limiting restrictions to false statements with actual malice); *Winter*, 482 S.W.3d at 778-781 (Ky. 2016) (upholding restrictions on false statements); *Stanalonis*, 126 A.3d at 12-16 (Md. 2015)

(constitutional avoidance interpretation limiting restriction to false statements).

This Court's intervention would resolve the substantial uncertainty in these jurisdictions as well.

II. THE WEST VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT STATEMENTS ARE PROTECTED BASED ON A RATIONAL INTERPRETATION OR WHEN IMMATERIAL

The decision below is inconsistent with this Court's precedent. Judicial campaign speech is a category of protected political speech that is entitled to great protection. *Williams-Yulee*, 135 S. Ct. at 1665-66; *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (bans on judicial campaign speech "burden[] a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office"). The decision below recognized this but is inconsistent with this Court's applicable precedent.

1. This Court holds that speech susceptible to multiple interpretations cannot be proscribed if one rational interpretation is protected by the First Amendment.

In *Air Wisconsin*, 134 S. Ct. 852, the Court held that an allegedly false statement could not support a defamation action if a rational interpretation of that statement is substantially true. The majority found that a statement expressing concern about the plaintiff's "mental stability," was not a false accusation that the plaintiff was "suffering from serious mental illness[]" because "that is hardly the

only manner in which the label is used." *Id.* at 866. The dissent did not disagree with protecting ambiguous statements, rather, it found that there was no "materially accurate" interpretation of this statement. *Id.* at 869 (Scalia, J., dissenting).

Similarly, in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Court held that an author's imprecise description of sound coming from loudspeakers—as wandering "about the room" as opposed to "across" the wall between the two speakers—was protected by the First Amendment because "the language chosen was 'one of a number of possible rational interpretations'" of the listening experience. *Id.* at 512 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)). The Court held that even if the description was technically inaccurate or reflected a misconception, this choice of language did "not place the speech beyond the outer limits of the First Amendments broad protective umbrella." *Id.* at 513.

As the Court has explained, protecting any "rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991).[4] In contrast, the "rational interpretation" standard does not apply to altered quotations, because quotation marks indicate that the statement is repeated

[4] The *Callaghan* Court cited this case for another proposition, Pet. App. 46a, but ignored the "rational interpretation" entirely.

verbatim, and is not the author's "interpretation." *Id.* at 520.

Here, each statement in the White House Mailer—individually or collectively—can be rationally interpreted as true or otherwise protected. For example, the statement that "Judge Gary Johnson accepted an invitation from Obama" can be readily and reasonably construed as meaning that Judge Johnson was invited by the Obama Administration—a true statement. Likewise, the Mailer's "gist" can rationally mean that Judge Johnson was invited to and willingly attended an event associated with the President's legislative agenda—also true—not only that "Judge Johnson was invited by and socialized with President Obama." Pet. App. 47a.

Similarly, the decision below erroneously held that the White House Mailer's front page—stating that Judge Johnson "part[ied]" with President Obama—is not hyperbole. The court correctly stated that hyperbole means the statement cannot "reasonably be interpreted as stating actual facts about the individual involved." Pet. App. 42a (quoting *Hustler*). But then it found no hyperbole based solely on the hypothetical possibility that President Obama "may choose to ***gather***, ***honor***, or ***entertain***" guests and that Judge Johnson "attend[ed] a ***function*** at the White House." *Id.* at 44a (emphasis added).

But a mere possibility is not a "reasonable" interpretation. This Court has repeatedly protected hyperbole that was theoretically possible *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (affirming jury verdict that cartoon was not reasonably believable); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (calling non-union

employees "traitors"). Indeed, it was protected hyperbole to call a developer's business dealings "blackmail" even though his conflict of interest was clear and that crime possibly occurred. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Here too, it is reasonable to interpret the While House Mailer as saying something other than that Judge Johnson actually "part[ied]" with President Obama, particularly in context of the clearly Photoshopped headshots and exaggerated streamers.

2. The decision below is also contrary to this Court's precedent holding that *immaterial* false statements are protected speech.

In *Alvarez*, the plurality opinion struck down the Stolen Valor Act, because it punished false speech without any showing of harm or materiality. 567 U.S. at 722-23 (it "suppress[ed] all false statements on this one subject in almost limitless times and settings"). The plurality rejected the view that "the interest in truthful discourse alone is sufficient to sustain a ban on speech." *Id.* at 723. Similarly, Justice Breyer's concurrence would hold that harmless falsehoods cannot be punished and that "materiality" provides appropriate protection. *See id.* at 738 (the statute could "insist upon a showing that the false statement caused specific harm or at least was material"); *see also Masson*, 501 U.S. at 516 ("If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.").

The Court also requires independent analysis of "materiality" before speech can be punished as

"false." Applying First Amendment principles, the Court in *Air Wisconsin*, considered "how to determine the materiality of a false statement" in the context of the Aviation and Transportation Security Act (ATSA). 134 S. Ct. at 864-867. The Court held that a falsehood was not material under the ATSA "absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat." *Id.* at 864. It explained that courts should focus on whether the speech had the relevant negative effect on the mind of the relevant audience: for defamation a material statement "affects the subject's reputation in the community" and for ATSA it "affects the authorities' perception of and response to a given threat." *Id.* at 863.[5]

Here, like the statute in *Alvarez*, the disciplinary rules apply to *all* false statements, not just materially false statements. And while it concluded baldly that Callaghan's statements were "materially false," the court below did no analysis whatsoever, let alone of the *Air Wisconsin* factors, to reach that conclusion. Pet. App. 48a Instead, the court below implied that any falsehood by a judge or judicial candidate would be material, regardless of context or content. *Id.* at 38a ("[E]rosion of the public's

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[5] The Court echoed this approach recently in *Maslenjak v. United States*, __ S. Ct. __ [No. 16-309, 2017 WL 2674154, at *9] (U.S. June 22, 2017) (holding naturalized citizenship cannot be revoked for lying unless the lies were material to obtaining citizenship; "a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.").

confidence in the judicial system as an institution … occurs when its candidates spread falsehoods.").

For example, whether Judge Johnson was "invited" by President Obama personally or someone in his Administration, like whether they "part[ied]," is not material under this Court's precedent. If that language in the Mailer is imprecise, it still would not harm the integrity of the judiciary any more than the accurate statement that Judge Johnson was invited to and attended an event promoting President Obama's agenda. Indeed, survey respondents were less concerned with the White House event than with the drug court and teen court issues, which were addressed in campaign flyers that are not charged here. *Supra* at 6.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

The West Virginia Supreme Court's decision conflicts with this Court's precedent, with its sister state courts of last resort, and with the circuits. Without this Court's intervention, the resulting uncertainty and inconsistencies will continue to affect a substantial number of cases involving this fundamental First Amendment right.

1. The thirty-six states that hold contested judicial elections are increasingly adopting and applying restrictions on campaign speech. In 2001, the Alabama Supreme Court said that only Alabama, Michigan, Georgia, and Ohio had broad prohibitions on judicial campaign statements. *Butler*, 802 So. 2d at 216.

Now, thirty-two states ban judicial campaign speech that would be affected by resolving the Question Presented:

- 2 states have provisions that bar only "false" speech in judicial elections: Louisiana and Oregon. La. Code Jud. Conduct Canon 7(A)(9); Or. Code Jud. Conduct R. 5.1(D).
- 12 states prohibit misrepresentations in judicial elections: Florida, Illinois, Mississippi, New Mexico, New York, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Vermont and Wisconsin.[6]
- 18 states prohibit false or misleading speech in judicial elections: Arizona, Arkansas, California, Connecticut, Idaho, Indiana, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Washington, and West Virginia.[7]

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[6] Fla. Code Jud. Conduct Canon 7(3)(e)(ii); Ill. Sup. Ct. R. 67 Canon 7(A)(3)(d)(ii); Miss. Code Jud. Conduct Canon 5(A)(3)(d)(iii); N.M. Code Jud. Conduct 21-402(A); N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(4)(d)(iii); N.C. Code Jud. Conduct Canon 7(C)(3); N.D. Code Jud. Conduct R. 4.3(A)(3); S.C. App. Ct. R. 501, Canon 5(A)(3)(d)(iii); S.D. Codified Laws § 16-2-appx Canon 5(A)(3)(d)(ii); Tex. Code Jud. Conduct Canon 5(1)(ii); Vt. Sup. Ct. Admin. Order 10, Canon 5(B)(4)(c); Wis. Sup. Ct. R. 60.06(3)(c)

[7] Ariz. Code Jud. Conduct R. 4.3(A); Ark. Code Jud. Conduct R. 4.1(A)(11); Cal. Code Jud. Ethics Canon 5(B)(1)(b); Conn. Code Probate Jud. Conduct R. 4.1(b)(9); Idaho Code Jud. Conduct R.

These rules can easily be interpreted to ban core, protected political speech. Despite paying lip service to the majority view that only false speech is unprotected, West Virginia and Ohio still punish misleading speech by expanding the definition of falsity. *Supra* at 23-25, 27-29. That end-run around First Amendment protections for non-false speech will only expand to other courts that want to regulate speech harshly.

2. At the same time, the number of complaints, amount of litigation, and severity of punishments for judicial campaign statements are increasing.

There is widespread reporting that the number of complaints has increased drastically for judicial election statements. *See, e.g.*, Greg Moran, *Judge Kreep faces discipline from state judicial commission*, San Diego Union Tribune, Oct. 14, 2016. In one area, for example, more complaints had been filed with seven weeks remaining in the 2016 election than in the previous eight election cycles combined. Jane Musgrave, *Complaints about judicial candidates to Bar committee at record high*, Palm Beach Post, July 12, 2016.

(continued…)

4.1(A)(11); Ind. Code Jud. Conduct R. 4.1(A)(11); Kan. Sup. Ct. Rules Re Jud. Conduct, R. 4.1(A)(4); Me. Code Jud. Conduct R. 4.3(C)(3); Md. R. 18-104.4(d)(5); Minn. Code Jud. Conduct R. 4.1(A)(9); Mo. Sup. Ct. R. 2-4.2(A)(5); Mont. Code Jud. Conduct R. 4.1(A)(10); Revised Nev. Code Jud. Conduct R. 4.1(A)(11); Okla. Code Jud. Conduct R. 4.1(A)(11); Pa. Code Jud. Conduct R. 4.1(A)(9); Tenn. Sup. Ct. R. 10, Canon 4, R. 4.1(A)(11); Wash. Code Jud. Conduct R. 4.1(A)(10); W.Va. Code Jud. Conduct R. 4.1(A)(9)

Relatedly, courts are also facing a substantial number of cases litigating these issues. Numerous cases were decided in 2016 alone. *See, e.g.*, *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1139 (D. Mont. 2016) (denying injunction regarding Montana false and/or misleading speech provision for lawyers and judicial candidates); *O'Toole v. O'Connor*, No. 2:15-CV-1446, 2016 WL 4394135 at *11 (S.D. Ohio Aug. 18, 2016) (denying dismissal regarding Ohio's "true but misleading" prohibition on judicial candidate speech). *See also Ponzio v. Biscaglio*, No. 14-3069, 2016 WL 2865187 (Ill. App. Ct. May 16, 2016) (affirming dismissal of defamation claim for protected statements by a judicial candidate).

At the same time, states are also increasing the penalties for these violations. For example, the *Callaghan* Court recognized that it had only issued fines, reprimands and censures for violating the judicial campaign rules from 1993 to 1999, yet it suspended Judge Callaghan for two years, plus a $15,000 fine, reprimand and costs. Pet. App. 65a, 69a, 74a. Similarly, a Florida judge was removed from the bench entirely in 2006, in part for violating a speech prohibition for which a different judge received only a reprimand in 1997. *Renke* 933 So. 2d at 494–95.

3. Finally, the split cases demonstrate that judicial review itself—particularly using malleable "context" based tests—may damage the integrity of the courts more than the campaign statements they are punishing. *See Williams-Yulee*, 135 S. Ct. at 1666 (emphasizing this "'vital state interest'"). When elected justices restrict the speech of their challengers and colleagues, their impartiality is

questioned.[8] The integrity of the Wisconsin Supreme Court, for example, was questioned severely when the Justices split along party lines over a dispute regarding how their colleague won the swing vote seat.[9] The reputational damage was reinforced by the Justices' refusal to follow their "normal" procedure of issuing a per curiam opinion for such a split decision. 784 N.W.2d at 605 (Abrahamson Justices) (calling this "a complete break from our usual practice").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Entanglements appear to be inherent in such litigation. Here, the West Virginia Supreme Court hired Judge Johnson while the case was pending. *Supra* at 15. Also, the disciplinary officers involved in this case, including Disciplinary Counsel, were represented in related litigation by the Bailey & Glasser firm, where Nicholas Johnson—Judge Johnson's son who filed the Complaint with those entities—practices law. *Callaghan v. Wilson*, Dkt. 2:16-cv-10169 (S.D. W.Va.); Attorney Bio, available at http://www.baileyglasser.com/attorneys/detail/biography/101/Nicholas%20S.%20Johnson (last accessed July 7, 2017).

[9] *See, e.g.*, Ryan Foley, *Supreme Court deadlocks in Gableman case*, Wis. State Journal, July 1, 2010 available at http://host.madison.com/wsj/news/local/govt_and_politics/supreme-court-deadlocks-in-gableman-ethics-case/article_059e2f86-8522-11df-83b6-001cc4c03286.html; Lisa Kaiser, *Is a Majority of the Wisconsin Supreme Court Corrupt?*, Shepherd Express, July 14, 2010, available at http://shepherdexpress.com/article-11571-is-a-majority-of-the-wisconsin-supreme-court-corrupt-.html.

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