Case No. 07-14830G

UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

FLORIDA FAMILY POLICY COUNCIL, INC.,
Appellant,

v.

THOMAS B. FREEMAN,
member of the Florida Judicial Qualifications Commission, et al.,
Appellees.

On Appeal From the United States District Court for the
Northern District of Florida Docket No. 4:06-CV-395 RH/WCS

AMICUS CURIAE BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES & RULES

ARTICLES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (FRAP 26; 11TH CIR. R. 26.1-2)

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. discloses that there is no person or entity owning 10% or more of Lambda Legal or any stock thereof. Lambda Legal further certifies that, while there are countless persons who are affected by the outcome of the case, including Lambda Legal and the communities it represents, Lambda Legal knows of no persons with a pecuniary interest in the outcome. Other relevant persons to be identified pursuant to 11th Circuit Rule 26.1-2 are the trial judge, the Honorable Robert L. Hinkle; Appellant Florida Family Policy Council and John Stemberger (as identified by FFPC), its counsel James Bopp, Jr., Anita Y. Woudenberg, Josiah Neeley and the firm of Bopp, Coleson & Bostrom; and Appelles Thomas B. Freeman, Peggy Gehn, Paul L. Backman, David H. Young, Morris Silberman, James R. Wolf, John P. Cardillo, Miles A. McGrane III, Howard C. Coker, Martin L. Garcia, Shirlee P. Bowne, Leonard Haber, Stanley G. Tate, Randolph Bracy, Rick Morales, Donald M. Spangler, Susan V. Bloemendaal, Jan K. Wichrowski, Adria Quintela, and Arelene K. Sankel, and their counsel Michael Green, Amy Drushal, and the firm of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.

INTEREST OF AMICUS CURIAE

As set forth in detail in the accompanying motion for leave of court, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Lambda Legal's primary means of achieving the full recognition of civil rights for its community is through litigation in courts throughout the country. Over the past decade, many of the LGBT community's most significant civil rights successes have come through strategic lawsuits by Lambda Legal and other organizations that have resulted in precedent-setting legal victories. It has been essential to these victories not only to be correct on the law but also to have fair and impartial judges willing to consider all sides of a legal issue. The authority to file this brief would derive from the granting of the motion for leave, filed concurrently with the submittal of this brief.

STATEMENT OF THE ISSUES

Pursuant to the Federal Rules of Civil Procedure and the Eleventh Circuit Rules of Civil Procedure, amicus adopts Apellee's Statement of the Issues as set forth in Appellee's Answer Brief. *See* Fed. R. Civ. P. 28(1);11th Cir. R. 28-1(f); *and see* Appellee's Brf. at 1.

SUMMARY OF ARGUMENT

While a naked ban on the speech of judicial candidates is not permissible, it remains a compelling interest to have a judge in a particular case dedicated to applying the law fairly to the litigants, unencumbered by any political commitment to the electorate. This interest is especially important to minority groups, who must rely on the courts to vindicate their rights. Florida's recusal canons are narrowly tailored to permit the speech of judicial candidates while also preserving a fair forum to litigants and public respect for the judiciary. The recusal canons properly target only political commitments to the electorate to reach a particular result, while not censoring, for example, the writings of a judge in an opinion or law review, which necessarily are only a particularized analysis of the facts and legal theories presented. Finally, the recusal canons are not facially unconstitutional, in that recusal does not serve to punish speech in any way, nor does a judge forego any legitimate interest in not being able to sit on a case that he or she wants to decide.

ARGUMENT

It is now established law that a judicial candidate may speak publicly about even controversial and sensitive issues and cannot be subject to discipline for exercising such rights. However, this case does not concern

that proposition. Instead, Appellant Florida Family Policy Council ("FFPC") attacks the recusal mechanism that helps assure litigants that they will have their day in court before a judge who has not already committed to the electorate that he or she will rule a certain way. The recusal canon generates essential confidence in the legal system by ensuring that cases will be decided by judges who will consider all evidence and arguments, unconstrained by an election commitment to reach a given result. The United States Supreme Court, in its 2002 ruling that the First Amendment protects judicial candidates' speech, specifically endorsed the alternative of recusal. Since then, courts around the country have rejected challenges to recusal rules, recognizing that they are narrowly-targeted means of ensuring that litigants will face judges who have not already committed to the electorate to reach a particular result. *Amicus* respectfully submit that this Court should not be the first appellate court in the country to invalidate this invaluable mechanism of promoting judicial fairness and integrity.[1]

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[1] None of the other federal circuit courts to hear similar challenges have struck down a recusal canon, holding either that the questionnaire proponents lacked standing or that the challenge was premature. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840 (9th Cir. 2007) (ripeness); *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545 (7th Cir. 2007) (standing); *Pennsylvania Family Inst., Inc. v. Black*, 489 F.3d 156 (3rd Cir. 2007) (standing).

I. THE JUDICIARY MUST BE, AND MUST BE SEEN AS, AN INSTITUTION THAT WILL BE OPEN-MINDED IN CONSIDERING THE LEGAL CLAIMS OF ALL PARTIES, ESPECIALLY POLITICALLY UNPOPULAR MINORITIES.

The arguments advanced by FFPC threaten perhaps the most fundamental and important characteristic of our judiciary – that it be an independent branch of government committed to applying the law fairly to each litigant irrespective of any majoritarian pressure to the contrary. This hallmark of the judiciary, important to everyone, is acutely vital to minorities who may be vulnerable and unable to protect their rights in the political arena.

A. Courts Must Be Required To Apply the Law to All Litigants Unencumbered by Campaign Commitments.

The recusal mechanism is essential to ensure that litigants appear before judges who are fair in appearance and actuality. As FFPC concedes, "due process [] requires trial before an unbiased judge." Appellant's Brief at 35-36, citing *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780 (1971). However, this understates the zeal with which the judiciary has pledged that judges must approach cases unencumbered by any commitment to rule a certain way. "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a

total stranger to the interest of the parties involved in the litigation." *Jenkins v. Forrest County Gen. Hosp.*, 542 So.2d 1180, 1181 (Miss. 1988). "[O]penmindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine – as opposed to illusory – opportunity to be heard." *In re Watson*, 100 N.Y.2d 290, 302, 794 N.E.2d 1, 7 (2003). "[T]he State, as steward of the judicial system, has the obligation to create and maintain a system that ensures equal justice and due process. We have described the State's interest in this regard as 'overriding' and have noted that '[t]here is "hardly * * * a higher governmental interest than a State's interest in the quality of its judiciary."'" *Id.* at 301 (omission in original).

Beginning with *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002) ("White"), courts have held that, unlike blanket bans on speech, recusal canons are narrowly tailored to serve the government's compelling interest in assuring judicial fairness. The Supreme Court made it clear in the *White* decision that the "announce clause" contained in certain jurisdictions' judicial canons failed because it was a naked prohibition on speech, in which the mere act of uttering the proscribed words resulted in sanctions. 536 U.S. at 773 ("it is clear that the announce clause prohibits a judicial candidate from stating his views"); *id.* at 774 (the

announce clause "prohibits speech on the basis of its content"); *id.* at 782 ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."). However, the decision also provides that the same cannot be said about the recusal canon.

White provides that recusal – even forced recusal – is legitimate, while blanket punishment for speech is not. Justice Kennedy, in casting the deciding vote, specifically stated that Minnesota "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear. . . ." 536 U.S. at 794 (Kennedy, J., concurring).[2]

Since *White*, courts around the country have held that it is permissible to have a canon requiring a judge to recuse herself when she has committed herself on the issue at bar. *Family Trust Found. of Ky., Inc v. Wolnitzek*, 345

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[2] While in a different context, the actions of Justice Scalia, the author of *White*, confirm the propriety of recusal in certain instances when a judge makes statements committing himself on the issue in the case. Justice Scalia wrote that "recusal is the course I must take – and will take – when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. *See Elk Grove Unified School Dist. v. Newdow*, 540 U.S. 945, 124 S. Ct. 384, 157 L.Ed.2d 274 (*cert.granted*, Oct. 14, 2003)." *Cheney v. U.S. Dist. Court for D. C.*, 541 U.S. 913, 916, 124 S.Ct. 1391, 1394 (2004) (emphasis added).

F. Supp. 2d 672, 708 (E.D. Ky. 2004) ("the recusal laws certainly serve the state's interest in impartiality . . . [and] are narrowly tailored to serve this state's interest in impartiality in this sense."). *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1084 (D. Alaska 2005) (the recusal "canon is narrowly tailored to serve a compelling State interest"), *vacated on other grounds*, 504 F.3d 840 (9th Cir. 2007); *Kansas Judicial Watch v. Stout*, 440 F.Supp.2d 1209, 1234 (D. Kan. 2006) ("The recusal Canon is also narrowly tailored to serve the compelling government interest in open-mindedness."); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005) ("The recusal provisions in Canon 3e(1) serve the state's interest in impartiality and the canon is narrowly drafted to achieve that interest."); *accord Indiana Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879, 887 (N.D. Ind. 2006), *vacated on other grounds*, 2007 WL 3120096 (7th Cir., Oct. 26, 2007).[3]

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[3] The only court to hold otherwise nevertheless was clear that elections pose special problems, and that judicial candidates who commit themselves on an issue properly may be required to recuse themselves. *Duwe v. Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007). However, *Duwe* struck down the recusal canon on the rationale that the language requiring recusal when one "appears to commit" on the issue at bar to render the canon overbroad. The District Court below correctly rejected the rationale of the *Duwe* decision, recognizing that appearances frequently shape recusal standards: "But disqualification standards long have turned on appearances. Thus, for example, federal judges must disqualify themselves not only when they are partial, but when their impartiality 'might reasonably be questioned.' Code

Each of the courts that have considered challenges to recusal canons since *White* has stressed that the recusal mechanism ensures that litigants will have a fair chance to be heard. The recusal canon "offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant." *Feldman*, 380 F. Supp. 2d at 1084. "[I]mpartiality in this sense assures equal protection of the law. An impartial judge is essential to due process." *Wolnitzek*, 345 F. Supp. 2d at 707-08; *Bader*, 361 F. Supp. 2d at 1043. ("There is no question that an impartial judge is critical to due process and the administration of justice."). "The purpose of the recusal canon is to guarantee to litigants that the judge will apply the law to them in the same way. . . . The recusal Canon requires a judge to recuse if he or she is unable to maintain an open mind about the

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of Conduct for United States Judges Canon 3C(1). The suggestion that a state cannot tie disqualification to reasonable appearances is simply wrong." Order of Dismissal, CASE NO. 4:06cv395-RH/WCS, at 9-10 n.3. In so holding, the District Court echoed the view of many other courts that public confidence in the judiciary is so vital to the institution's validity that courts must avoid even the appearance of unfairness. *See Jenkins*, 542 So.2d at 1181 ("The issue is . . . how this situation appears to the general public and the litigants whose cause comes before this judge."); *In re Watson*, 100 N.Y.2d at 302, 794 N.E.2d at 6-7 ("'[T]he perception of impartiality is as important as actual impartiality.' [citation] This is so because '[j]udges personify the justice system upon which the public relies to resolve all manner of controversy, civil and criminal.'").

results of a particular case until all of the evidence and arguments have been presented." *Stout*,440 F.Supp.2d at 1234.

The *Wolnitzek* court explained why the recusal mechanism is crucial to ensure the removal of judges who will not listen to the evidence and arguments:

> Judges are expected to be open-minded in regard to cases over which they preside. It is often said that to maintain the requisite degree of impartiality, judges should not predetermine their decisions. In other words, they should keep an open mind about the outcome of a case until all of the evidence and arguments have been presented. The recusal laws mandate that a judge voluntarily disqualify himself from a case in which he feels that he cannot be open-minded.
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> *Wolnitzek*, 345 F. Supp. 2d at 708.

The concept of not sanctioning speech, but instead endorsing recusal in affected cases, also has been endorsed by the Mississippi Supreme Court. *Mississippi Com'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1015 (Miss. 2004). *Wilkerson* held that a judge could not be disciplined for antigay comments in his letter to the editor of a local paper. Instead, the court held that the state's compelling interest in impartiality is served by allowing the speech and then permitting concerned litigants to file recusal motions:

> Whatever state interest the Commission may find in preventing judges from announcing their private views on gay rights would conflict with, and be outweighed by, the more compelling state interest of providing an impartial court for all litigants, including gays and lesbians. Allowing — that is to say, forcing — judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.
>
> *Id.*[4]

In sum, *White* and subsequent opinions hold that, while judicial candidates and judges retain their rights to free speech, the protections of recusal rules are essential to the independence of the judiciary.

B. Ensuring That Judges Are Not Beholden to Majoritarian Interests Is Especially Important to Politically Unpopular Minority Groups.

Courts have recognized that the principle of open-mindedness, while important to all, is especially crucial for minorities, who frequently must turn to the courts to vindicate their constitutional rights. "The irreplaceable value of the power [of judicial review] articulated by Mr. Chief Justice

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[4] *Wilkerson* thus answers FFPC's contention than an "enforced silence" is unacceptable. *See* Brf. at 41. A judicial candidate need not censor herself for fear of discipline based on her statements, as was the case in *White*. Instead, the ethics process is implicated only after a judge has had the opportunity to make a thorough evaluation of a recusal motion, including the right to seek an advisory opinion from the Florida Judicial Ethics Advisory Committee.

Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." *United States v. Richardson*, 418 U.S. 166, 192, 194 S.Ct. 2940, 2954 (1974) (Powell, J., concurring). "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 784 (1938); *see also Meek v. Metro. Dade County*, 908 F.2d 1540, 1548 (11th Cir. 1990) ("Minorities have resorted frequently to the federal courts for vindication of their rights."); *Kane v. Winn*, 319 F. Supp. 2d 162, 203-04 (D. Mass. 2004) (discussing "the courts' traditional role as protectors of minority rights by interpreting statutes in light of the social reality surrounding marginalized groups.").

Courts frequently must counter the tide of public opinion to vindicate important constitutional rights. *See Pool v. Commonwealth*, 308 Ky 107, 111-12, 213 S.W.2d 603, 605-06 (Ky. 1948) ("It is the duty of courts to protect a minority group . . . regardless of the unpopularity frequently encountered in doing so."). For example, in 1968, the year *after* the Supreme Court unanimously invalidated bans on interracial marriage in

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967), a Gallup poll revealed that 72% of Americans still opposed interracial marriage. *See United States v. Barber*, 80 F.3d 964, 973 (4th Cir. 1996) (*en banc*) (Murnaghan, J., dissenting). It was many years after *Loving* before the tide of public opinion changed. *See id. at n. 7* (citing George Gallup, Jr. and Dr. Frank Newport, For First Time, More Americans Approve of Interracial Marriage than Disapprove, *The Gallup Poll Monthly*, Aug. 1991, at 60-62).

Amicus Lambda Legal has a particular concern in the independence of judges because the judiciary frequently has vindicated the rights of gay men and lesbians in the face of hostile electoral majorities. For example, in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996) the Supreme Court struck down Colorado's Amendment Two, which precluded the state or any locality from providing any legal protections based on sexual orientation, finding that the law raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. [I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" 517 U.S. 620, 634-35 (*quoting Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2826 (1973)). In *Lawrence v. Texas*, the Court cited

Romer's language regarding animus towards politically unpopular groups in invalidating the nation's sodomy laws. *Lawrence v. Texas*, 539 U.S. 558, 574, 123 S.Ct. 2472, 2482 (2003). A court in this circuit observed that *Lawrence* addressed "the concern reflected in *Carolene Products*' famous footnote four-that majorities may, if unchecked by a non-majoritarian institutional balance, ride booted and spurred on the backs of despised or feared minorities." *Williams v. King*, 420 F.Supp.2d 1224, 1252 (N.D. Ala. 2006); *see also id.* at 1253 (*Lawrence* reflects a need for judicial review when "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.") (citation omitted); *see also Finstuen v. Edmondson*, 497 F.Supp.2d 1295, 1311 (W.D. Okla. 2006) (holding that a law nullifying adoptions by same-sex couples violates equal protection principles because the law "targets an unpopular group and singles them out for disparate treatment."), *aff'd in part and rev'd in part on other grounds*, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

Even before *Lawrence,* many state court judges recognized their obligation to vindicate the rights of gay men and lesbians under their state

constitutions in the face of sodomy laws favored by hostile majorities. A number of the courts that struck down sodomy laws specifically acknowledged the judiciary's role in ensuring that a legislative action reflecting the moral judgment of the majority could not deny rights "to a minority no matter how despised by society." *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 126 (1997); *Commonwealth v. Wasson*, 842 S.W.2d 487, 498, 501-02 (Ky. 1992) (Kentucky could not "enforce a majority morality on persons whose conduct does not harm others. . . . It matters not that the same act committed by persons of the same sex is more offensive to the majority because [our constitution] states such 'power ... exists nowhere in a republic, not even in the largest majority.'"), *quoting Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); *see also Campbell v. Sundquist*, 926 S.W.2d 250, 265 (Tenn. App. 1996) ("[T]he will of the majority could not be imposed upon the minority absent some showing of harmful consequences created by the actions of the minority."), *citing Wasson*, 842 S.W.2d at 496-97.

These courts' recognition of their obligation to protect the rights of minorities is a reflection of the very nature of our system of government that the judiciary must uphold the law without regard to majoritarian pressure. "It is our sworn duty to uphold the Constitution, even 'where legislative

invasions of it had been instigated by the major voice of the community.' . . . Majoritarian preferences are transitory; the Constitution is enduring and fundamental." *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 502, 715 N.E.2d 1062, 1103 (Ohio 1999), *quoting* Hamilton, The Federalist No. 78; *see also Harris v. City of Zion*, 1990 WL 37112, at *1 (N.D. Ill. 1990) ("We recognize the occasional countermajoritarian nature of the judiciary in this country on constitutional questions, for which we make no apology: the most fundamental constitutional principle is that popular opinion should not, and does not, sway the opinion of the court.").

The state's interest in ensuring a judiciary committed only to fair application of the law to all litigants is beyond question. That interest is all the more compelling when it comes to politically unpopular minorities seeking to vindicate their legal rights, and the recusal mechanism that helps assure this crucial protection is a necessity.

II. FFPC'S UNDERINCLUSIVENESS ARGUMENT FUNDAMENTALLY MISUNDERSTANDS THE INTEREST AT STAKE IN HAVING A JUDICIARY NOT BEHOLDEN TO ELECTORAL PROCESSES.

FFPC argues that the recusal canon's focus on electoral speech renders it underinclusive for failure to target other statements, such as those made by judges in legal opinions or law review articles. FFPC's argument

misunderstands the particular threat posed by commitments made during the electoral process.

Facing a judge who has written an opinion or law review article against one's position is different from facing a judge who has made a campaign commitment against that position in two basic respects. First, appearing before a judge who previously has rejected certain legal arguments against one's position does not implicate a litigant's right to have the law fairly applied to one's case, as does appearing before a judge who has foresworn an obligation evenhandedly to consider the facts and applicable legal theories in favor of reaching a politically popular result. A party's right to have a judge who will apply the law as she sees it, unencumbered by commitments to the electorate, is thwarted in the latter instance, but not the former. Second, the existence of a prior opinion or article does not foreclose the type of "openmindedness" that the *White* Court stated might well be compelling – that of ensuring that a litigant has *some* opportunity to prevail. 536 U.S. at 778. An opinion or article is a legal analysis based on all the theories considered by the jurist. No responsible judge would conclude an opinion or article stating, "and there may be other legal theories that I have not analyzed herein, but rest assured that I would find those legally deficient as well and reach the same result." Thus, the

existence of a prior written legal analysis informs the lawyer what theories and factual development still may be successful and provides the type of openmindness that remains a compelling state interest.

The canon's focus on campaign speech counters the efforts of those, like FFPC, who would reduce the judiciary to a political body beholden to the preferences of the majority of the electorate. *See* Appellant's Brf. at 34. By arguing that no differences exist between a judicial election and a legislative election, FFPC urges a system that would encourage judicial candidates to make promises to vote a certain way and then carry out the promises on the bench. *Id.* While this indeed is a laudable modus operandi of a a candidate for the legislature, it is counter to the entire notion of an independent judiciary. *See generally White*, 536 U.S. at 780 (suggesting that Minnesota's ban on promissory statements during an election passes constitutional muster); *Duwe v. Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007) ("Impliedly, a commitment to decide a case or issue in a particular way is offered in exchange for votes, a process which makes no sense for a non-candidate. Additionally, a non-candidate statement simply does not pose the same threat to the judiciary."); *see also Stout*, 440 F.Supp2d at 1230 ("the underinclusiveness argument is not as persuasive when applied to these clauses because 'the only time a promise to rule a

certain way has any meaning is in the context of a judicial campaign.'" (*quoting Wolnitzek*, 345 F.Supp.2d at 696.)).[5]

This Court should reject the invitation to declare that Florida has abandoned all interest in an impartial judiciary by electing judges. While it is true that former Justice O'Connor essentially advocated a similar view in *White*, it is noteworthy that no other justice did so. *See White*, 536 U.S. at 788-792 (O'Connor, J., concurring). Indeed, the Court rejected the position that FFPC urges, that there be no difference between judicial and legislative elections: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783. In casting the deciding vote, Justice Kennedy eloquently explained that, while Minnesota's blanket speech prohibition went too far, federal courts should not castigate states that elect their judges: "In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve

[5] FFPC argues that the canon is underinclusive because it does not reach statements by a candidate immediately prior to the official onset of her candidacy. Appellant's Brf. at 37-38. Whatever force this argument has with respect to a naked prohibition on speech such as the announce clause at issue in *White*, it is unavailing here, in light of Florida's general recusal canon, which provides for recusal when a judge's impartiality could reasonably be questioned. Thus, the recusal canons do reach the activity of the devious candidate who tries to game the system to time the candidacy announcement in order to make campaign commitments.

judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. *Id.* at 795-96 (Kennedy, J., concurring).[6]

III. FOR THE SAKE OF ITS LEGITIMACY, THE JUDICIARY MUST BE, AND MUST BE SEEN AS, AN INSTITUTION THAT IS OPEN-MINDED TO THE LEGAL CLAIMS OF ALL, INCLUDING MINORITY GROUP MEMBERS.

Separate from the interest of affording individual litigants a fair decisionmaker, the recusal canon also serves the vital systemic purpose of ensuring that the public regards the judiciary as an impartial institution. *In re K.L.W.*, 131 S.W.3d 400, 405 (Mo. Ct. App. 2004) (citations and internal quotations omitted) ("The public's confidence in the judicial system is the paramount interest safeguarded by the [recusal] canon. It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair."). Like all officers of the court, *amicus* are concerned about public confidence in the courts, which derives from belief in the judiciary's commitment to providing a fair forum for all litigants. *Huffman*

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[6] Similarly, while FFPC cites this Court's language in *Weaver* questioning whether there is any difference in judicial elections after *White*, it should be noted the actual holding in that case was merely that the *Brown v. Hartlage* standard for liability for untruthful campaign speech, *i.e.*, that it be knowingly false, was the same for judicial candidates. 456 U.S. 45, 102 S.Ct. 1523 (1982).

v. Ark. Judicial Discipline and Disability Comm'n, 344 Ark. 274, 282, 42 S.W.3d 386, 392 (2001) ("An independent judiciary is essential for our society. The judiciary cannot function without the trust and confidence of the public in the integrity and independence of its judges."). *Amicus* are particularly affected by this concern, because the minority group members they represent depend on public respect for the judiciary's vindication of civil and constitutional rights. Striking down the recusal canon would communicate to the public that the judiciary is virtually indistinguishable from the legislature and can make determinations based not on any enduring legal or constitutional principles, but on the whim of the majority of the electorate.

"The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice.' [citation omitted]."'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580, 1587 (1986). This Court has held that reassignment of even an impartial judge is required to "respond to the appearance of a lack of neutrality and act to preserve in the public mind the image of absolute impartiality and fairness of the judiciary." *United States v. Torkington*, 874

F.2d 1441, 1447 (11th Cir. 1989); *see also id.* ("[W]e must preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice.").

The recusal mechanism is vital because "[t]he public and individual litigants must be reassured that the judiciary will decide legal disputes based on the law alone." *Wolnitzek*, 345 F. Supp. 2d at 707-08. Thus, recusal serves the interests not only of individual litigants, but also of the judiciary as an institution whose legitimacy derives from the public's belief that it decides cases based only on the evidence and the law.

IV. THE RECUSAL CANON IS FACIALLY CONSTITUTIONAL.

Amicus understands FFPC to be arguing that the injury to judges stems from their not being able to sit on cases that they want to hear and have committed already to a result, as distinguished from any uncertainty concerning the recusal process itself. In other words, FFPC would still complain even if Florida had a system whereby recusal motions were decided definitely by other judges, or that a judicial ethics panel provided a binding ruling on whether recusal was required when a motion was filed. Because recusal does not injure judges, FFPC's position is untenable.

FFPC's resort to the "unconstitutional conditions" principle is creative, but that concept is not applicable here. That doctrine presupposes

that the government is *punishing* a judge for her exercise of a constitutional right, which simply is not the case in a matter of recusal. The recusal of a judge not only does not change the terms and conditions of employment, it also casts no aspersions as to the judge's fitness or impartiality. See *Torkington*, 874 F.2d at 1447 (reassigning the case to a different judge despite the fact that the court did "not question the district judge's actual ability, integrity, and impartiality."); *see also Raposa v. Meade Sch. Dist. 46-1*, 790 F.2d 1349, 1353 (8th Cir. 1986) (no constitutional violation occurred when a transfer that was not intended to punish and did not adversely affect a public employee).

Moreover, the "unconstitutional conditions" doctrine presupposes that the individual's desire to receive the government benefit, while not a property right, is at least *legitimate*. However, no person -- not the litigants, the public, and certainly not the judge -- has an interest in the assignment of a particular judge to a particular case. *State ex rel. Oliver v. Crookham*, 302 Or. 533, 537, 731 P.2d 1018, 1021 (1987); *State ex rel. Knox v. Shelby County Superior Court*, 259 Ind. 554, 557, 290 N.E.2d 57, 59 (1972) (" . . . [T]he judge has no right to preside in a particular case nor does the litigant have any right to have a particular judge try his case."); *cf. Ross v. Zavarella*, 916 F.2d 898, 898 (3d Cir. 1990) (judge would not suffer

irreparable injury from failure of appellate court to enjoin her transfer to another division where "her transfer between divisions of the court in no way denigrates her legal status or her judicial reputation[, and s]he suffers no diminution in salary or tenure because of the transfer."). It would be an insult to the independence of the judiciary to hold that a judge suffers constitutional injury from not being able to sit on particular cases, especially those cases on which she has committed to the electorate to vote a certain way.

If, on the other hand, FFPC is contending that the *mechanism* of the recusal process is problematic and chills speech because a judge cannot know for certain whether she will be disciplined for failing to recuse herself, Amicus respectfully submits that that claim is not justiciable. As FFPC points out, Florida has ameliorated any uncertainty in the recusal process by establishing the Judicial Ethics Advisory Committee ("JEAC") to "render advisory opinions to inquiring judges relating to the propriety of contemplated judicial and non-judicial conduct." Brf. at 4, quoting *Petition of the Committee on Standards for Conduct of Judges*, 327 So.2d 5, 5 (Fla. 1976). If it turns out in fact that this process is not providing judges with sufficient certainty and is chilling speech, that claim should be addressed on as an-applied basis. Recently, the Supreme Court rejected a challenge to the

Children's Internet Protection Act that asserted that libraries were not honoring adults' requests to unblock legitimate websites in a prompt manner, thus causing First Amendment injury to those adults who were denied access to information to which they were entitled. *United States v. Am. Library Ass'n*, 539 U.S. 194, 123 S.Ct. 2297 (2003). The deciding votes in the case relegated any affected adults to an as-applied future challenge should it turn out in fact that the mechanics of unblocking actually did impede First Amendment rights. 539 U.S. at 214, 215 (Kennedy, J., concurring) ("If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.").[7] Indeed, a few months ago, the Ninth Circuit rejected another of these pre-fabricated judicial questionnaire attacks on recusal canons on precisely this ripeness basis. *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840 (9th Cir. 2007).

[7] *See also id.* at 232 (Souter, J., concurring) ("Nor would I dissent if I agreed with the majority of my colleagues, . . . that an adult library patron could, consistently with the Act, obtain an unblocked terminal simply for the asking.").

CONCLUSION

Florida's recusal canons comport with the First Amendment, because they are narrowly tailored to ensure, in both appearance and actuality, that the only commitment a judge has is to fair application of the law to particular facts, and not to a statement previously made to the electorate. *Amicus* respectfully ask this Court to affirm the validity of this crucial means of ensuring judicial fairness, independence, and integrity.

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RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief complies with Fed. R. App. P. 32(a)(7)(B) as having only 5,601 words, or less than one-half the 14,000 that the rules allow for a brief of the appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of January, 2008, a true and correct copy of the foregoing *AMICUS CURIAE* BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLEES URGING AFFIRMANCE was served by United States Mail, postage prepaid, upon the following:

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