

Williams-Yulee v. The Florida Bar: Judicial Elections as the Exception

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I.) Introduction

On April 19, 2015, the United States Supreme Court handed down their decision in *Williams-Yulee v. The Florida Bar*, upholding The Florida Bar rule barring candidates for judicial offices from directly soliciting campaign donations. The Supreme Court's 5-4 decision saw Chief Justice John Roberts join Justices Sotomayor, Kagan, Ginsburg, and Breyer in rebuking the appellants claim that the restriction violated her First Amendment right to Freedom of Speech. This decision on face value bucks the recent trend of the Court of “invalidating and modifying overreaching campaign finance regulations by citing infringement of protected speech.”¹

The case will likely have little to no impact on this general direction of the court, exemplified in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014). The ruling in *Williams-Yulee*, while apparently in favor of certain limits on a certain type of campaign donations, is so narrowly applicable to the situation of the case at issue, and so narrowly held at 5-4, that it practically illuminates the outer limits on campaign finance and political speech acceptable by this court as being only slightly beyond none at all.

II.) Factual Background

Lanell Williams-Yulee [Yulee] was admitted to the Florida Bar in 1991.² The Constitution of Florida gives the Supreme Court of Florida sole authority to regulate the practice of law in the state.³ The Court

1. Dennis Polio, *McCutcheon v. Federal Election Commission: Invalidating the FEC's Aggregate Campaign Contribution Restrictions*, 23 DIGEST 82 (2015).

2. *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656, 1663 (2015).

3. FLA. CONST.. art. 5, § 15.

erected the Florida Bar to be the public agency responsible for investigative and prosecutorial regulation of the state's legal and paralegal professionals.⁴

In 2009 Yulee began a campaign to be an elected judge for the Florida county containing the City of Tampa.⁵ Early in the course of her campaign, Yulee signed and mailed a letter to voters throughout the county to announce her candidacy and solicit donations.⁶ Yulee's campaign ended with her primary defeat, and the letter became fodder for a complaint to the Florida Bar against her.⁷ Yulee was required by the Bar rules⁸ to comply with the Florida Code of Judicial Conduct with regard to judicial campaigns, which in turn, barred the personal solicitation of campaign funds in judicial elections.⁹ Yulee agreed with the Bar's indictment in that she had personally solicited donations with her signed fundraising letter, but argued her speech was protected by the First Amendment.¹⁰

III.) Procedural History

As Yulee controverted the bar complaint made against her, the Florida Supreme Court directed a hearing being held by an administrative law judge who recommended finding Yulee guilty despite her arguments.¹¹

The Supreme Court of Florida reviewed the hearings recommended disposition and agreed that Yulee was guilty of

4. *Frequently Asked Questions About the Florida Bar*, THE FLORIDA BAR (Revised Aug. 12, 2015),

<http://www.floridabar.org/tfb/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/47fc0a8f415a11d285256b2f006ccb83?OpenDocument>.

5. *Williams-Yulee*, 135 S.Ct. at 1663.

6. *Id.*

7. *Id.*

8. FLA. BAR REG. R. 4-8.2(b).

9. FLA. CODE OF JUDICIAL CONDUCT CANON 7(C)(1).

10. *Williams-Yulee*, 135 S.Ct. at 1664.

11. *Id.*

professional misconduct.¹² The Florida high court directed that Yulee be publicly reprimanded for violating the bar rules by personally soliciting campaign contributions as a candidate for County Judge.

The Florida Supreme Court explained itself first by quoting an earlier decision of its own to establish the standard for constitutional restrictions of free speech, “Restrictions on first amendment rights must be supported by a compelling, governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary.”¹³ The Florida Supreme Court continued to rely on its own precedents in determining the state's interests in this case to be compelling, “As this Court has previously stated, Florida has ‘a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary.’”¹⁴ To find whether or not the restriction on donation solicitation was sufficiently narrow, the Court looked towards the United States Supreme Court, “The United States Supreme Court has stated that a government regulation is narrowly tailored ‘if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.’”¹⁵

The Court held that the restriction on solicitation was sufficiently narrow and promoted the State of Florida’s compelling interests in preserving the integrity of the judges which in turn gives the public confidence in the impartiality of the judiciary as a whole. As such, the Supreme Court of Florida rejected Yulee’s argument and held the rules she had violated, and her penalty as a result, to be Constitutional.¹⁶

Yulee petitioned the United States Supreme Court for a writ of certiorari which was granted.¹⁷

IV.) Issue

On appeal from the Florida Supreme Court, Justice Roberts’

12. *Fla. Bar v. Williams-Yulee*, 138 So.3d 379, 381 (Fla. 2014).

13. *Firestone v. News-Press Publ'g Co.*, 538 So.2d 457, 459 (Fla. 1989).

14. *Fla. Bar*, 138 So.3d at 384 (citing, *In re Kinsey*, 842 So.2d 77, 87 (Fla. 2003)).

15. *Fla. Bar*, 138 So.3d, at 385, (citing, *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

16. *Fla. Bar*, 138 So.3d, at 387.

17. *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 44 (2014).

opinion did not seek to determine whether Yulee’s right to speech was restricted, as this was stipulated by the parties.¹⁸ Instead, the question posed by Roberts was defined as a disagreement on “the level of scrutiny that should govern [...] review.”¹⁹

V.) Holding of the Court

A.) Robert’s Plurality on the Appropriate Level of Scrutiny

Roberts began by immediately looking at past precedents of the Supreme Court which upheld limitations on speech with regard to limits on the solicitation activities of charities.²⁰ “We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest.”²¹ Roberts colored political solicitation and solicitation for charities as both being “noncommercial solicitation [which] ‘is characteristically intertwined with informative and perhaps persuasive speech.’”²² Roberts further reasoned that the application of a lower standard of scrutiny would endanger “the exercise of rights so vital to the maintenance of democratic institutions.”²³

In greater depth, Justice Roberts continued to explain the Court's preference for strict scrutiny. The opinion notes that political speech has always commanded the greatest protections available through the First Amendment²⁴ and that in the only previous Supreme Court case

18. *Williams-Yulee*, 135 S.Ct. at 1664. (Chief Justice Roberts delivered the opinion of the Court, a plurality opinion. The ultimate holding is still binding when one also takes account of the Concurring opinions of Justices Breyer and Ginsburg, while not all reasoning leading to the conclusion is similarly supported.).

19. *Id.*

20. *Id.* at 1664-65.

21. *Id.* (citing, *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (1988)).

22. *Id.* at 1665. (citing, *Schaumburg v. Citizens for Better Environment*, 444 U. S. 620, 632 (1980)).

23. *Williams-Yulee*, 135 S.Ct. at 1665. (citing, *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 161 (1939)).

24. *Id.* (citing, *Eu v. San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223, (1989)).

regarding judicial elections, *Republican Party of Minn. v. White*, the application of strict scrutiny was assumed by all parties and members of the Court.²⁵

The question of the appropriate level of scrutiny garnered considerable debate prior to the decision, many amici briefs supporting the holding of the Florida Supreme Court contended that strict scrutiny was the inappropriate standard. The American Bar Association was the most prominent organization to contend that, “Canon 7C(1) does not restrict actual ‘speech,’ it should be analyzed under the ‘closely drawn’ scrutiny standard, rather than under strict scrutiny.”²⁶ The ‘closely drawn’ standard of scrutiny grows out of the famous election law case of *Buckley v. Valeo*, which found that even significant infringement of protected political rights may be sustained if the state can demonstrate a compelling interest and avoids unnecessary infringement of rights by closely drawing the means of achieving those interests.²⁷

The Court in *Yulee* rejected the standard of *Buckley*, calling it “a poor fit for this case.”²⁸ The court distinguished the two cases by stating that while *Buckley* made the claim that campaign contribution limits violated freedom of association, and that *Yulee* in the case at issue only argued that the Bar violated her freedom of speech.²⁹ Further, while the Court applied the *Buckley* standard in *McConnell v. Federal Election Comm’n* (2003),³⁰ this was distinguished by the legislative intent; the solicitation restrictions in *McConnell* were determined to have been intended to “prevent circumvention of the contribution limits, which were the subject of the ‘closely drawn’ test in the first place.”³¹ Roberts dismissed similar application in *Yulee* by reasoning that the restrictions at issue were not

25. *Id.* (citing, *Republican Party of Minn. v. White*, 536 U. S. 765, 774, (2002)).

26. Amicus Brief, *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015) No. 13-1499, 2014 U.S. S.Ct. Briefs LEXIS 4585.

27. 424 U.S. 1, 25 (1976).

28. *Williams-Yulee*, 135 S.Ct. at 1665.

29. *Id.*

30. *McConnell v. Federal Election Comm’n*, 540 U. S. 93, 136 (2003), *overruled in part by*, *Citizens United v. Federal Election Comm’n*, 558 U. S. 310 (2010).

31. *Williams-Yulee*, 135 S.Ct., at 1665, (citing, *McConnell*, 540 U. S. at 138-39.)

intended to prevent circumvention of state campaign finance laws.³²

B.) Robert’s Majority on the Disposition of the *Yulee* Case

In the portion of the holding that garnered majority support which decided the actual dispute brought before the Supreme Court, the Florida Bar faced an admittedly high bar of showing both compelling interest and narrow tailoring in restricting Yulee’s speech.³³

The Florida Supreme Court’s admitted purpose for Canon 7C(1)’s adoption was “protecting the integrity of the judiciary, as well as maintaining the public’s confidence in an impartial judiciary, represent compelling State interests capable of withstanding constitutional scrutiny.”³⁴ The majority credited this interest as valid, relying on historical support for it from the Magna Carta, the Federalist Papers, and the modern oath taken by the Supreme Court Justices themselves.³⁵ Further, Justice Roberts and the majority found unwavering support for the maintaining the integrity of, and public confidence in, the judiciary throughout previous precedent.³⁶ The Court repeated its holding from *White* that different or stricter regulations may be applied to judicial elections than political ones as the roles of the officeholders differ widely.³⁷

Similarly, the court found the restriction imposed on Yulee to be sufficiently narrowly tailored to serve these goals. Here Yulee’s argument on appeal was muddled, arguing that Canon 7C(1) failed for being too narrow as it did not restrict other speech that was equally damaging to the state’s interest such as solicitation by campaign committees, and the writing of thank you letters to contributors by the candidates themselves.³⁸ The Court sharply responded to this, “It is always somewhat counterintuitive to argue that a law violates the First

32. *Id.* at 1666.

33. *Id.* at 1665-66.

34. *Fla. Bar*, 138 So.3d at 385, (citing, *In re Kinsey*, 842 So.2d 77, 87 (2003)).

35. *Williams-Yulee*, 135 S.Ct. at 1666.

36. *Id.*

37. *Id.*, (citing *Republican Party v. White*, 536 U.S. 765, 783 (2002)).

38. *Id.* at 1668.

Amendment by abridging *too little* speech [...] the First Amendment imposes no freestanding ‘underinclusiveness limitation.’”³⁹ Following their own precedents, the Court held that Canon 7C(1) was not fatally underinclusive and went on to differentiate campaigns committees from candidates themselves as reducing the appearance of *quid pro quo*, thus maintaining the state's interests.⁴⁰

Alternatively, Yulee argued that the Canon was too restrictive and not narrowly tailored and the least restrictive option available to the state for advancing their interests.⁴¹ Citing again the stated interests Florida expressed in adopting the rule, the Court determined, “the interest remains whenever the public perceives the judge personally asking for money.”⁴² The Court reiterated that narrow tailoring did not mean perfect tailoring, and that requiring as such would be “impossible.”⁴³ Instead, Roberts and the majority concluded that banning all personal solicitations for campaign donations was sufficiently narrow to serve the state's interests of avoiding the appearance of impropriety.⁴⁴ Finally, the Court rejected Yulee’s argument that other limitations would be less restrictive ways for Florida to serve its ends. Recusal requirements would disable many Courts from functioning, enable forum shopping by donating to certain judges and not others, and create a “flood of postelection recusal motions” would only serve to highlight the problems the state seeks to solve.⁴⁵ Similarly, campaign contribution limits already existed in Florida, but did not preclude the state from taking further action.⁴⁶

Roberts concluded the opinion of the Court by stating that candidates are protected by the First Amendment and contemporaneously states have an interest in the public's confidence in their courts and

39. *Id.*, (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)).

40. *Williams-Yulee*, 135 S.Ct. at 1669.

41. *Id.* at 1670.

42. *Id.* at 1671.

43. *Id.*, (citing *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

44. *Id.* at 1671.

45. *Id.* at 1671-72.

46. *Id.* at 1672.

and judges.⁴⁷ The restriction here was narrowly tailored to keep those two penalties from conflicting and the Florida Supreme Court's judgment was affirmed.

C.) Breyer's Concurrence

Justice Breyer wrote a single sentence concurrence in order to express his view that the tiers of scrutiny should be used, “as guidelines [...] not tests to be mechanically applied.”⁴⁸

D.) Ginsburg's Concurrence

Justice Ginsburg's opinion is a concurrence in part and a dissent in part. Justice Breyer joined Justice Ginsburg in her concurrence as to the level of scrutiny they felt was appropriate in reviewing the restriction in *Yulee*. As a result, these two justices denied Roberts a majority in the opinion on the issue of examining the restriction of Yulee's First Amendment Rights under strict scrutiny, but nevertheless came to the same conclusion otherwise.

Justice Ginsburg argued there was no need to apply strict scrutiny when a state sought to make a distinction between political and judicial campaigns.⁴⁹ As such, states deserve “substantial latitude” to regulate judicial elections, and the campaign finances thereof as campaign donations have the potential to cause the appearance, and even the occurrence, of impropriety.⁵⁰

VI.) Dissent

A.) Scalia's Dissent

Justice Scalia was joined by Justice Thomas in dissenting from the Roberts' opinion, calling a rule against a judicial candidate “asking anyone, under any circumstances” to contribute a “wildly

47. *Id.* at 1673.

48. *Id.* (Breyer, J., concurring).

49. *Williams-Yulee*, 135 S.Ct. at 1673 (Ginsburg, R., concurring), (citing, *Republican Party of Minnesota v. White*, 536 U.S. 765, 803-5 (2002)) (Ginsburg, R., dissenting).

50. *Id.* at 1673-75 (Ginsburg, R., concurring).

disproportionate restriction upon speech.”⁵¹ Instead, Scalia argued the First Amendment protects speech “unless a widespread and longstanding tradition ratifies its regulation,” with obscenity, incitement, and fighting words being areas of traditional regulation.⁵² Scalia found the Florida rule did not fall into one of the limited, traditional categories. As such, Scalia presumed the rule unconstitutional as per the First Amendment, only redeemable by an adequate finding of compelling state interest accomplished by a narrow and servile restriction imposed by the State.⁵³ In *Yulee*, Scalia declined to find any evidence that the ban increased public faith in the judiciary, instead arguing at length the Florida rule is overbroad in its effects.⁵⁴

B.) Kennedy’s Dissent

Justice Kennedy wrote the most vitriolic of the three dissents, arguing that the First Amendment’s guarantees should apply in the context of electioneering more so than with regard to any other form of expression.⁵⁵ Justice Kennedy derided the majority’s decision to uphold the restrictions and penalties emplaced on *Yulee* as “state censorship” that effectively “gags” candidates and “silence[s]” the democratic process.⁵⁶ Kennedy concluded by contending that the plurality portion of the Roberts’ opinion had erred in finding the rigors of strict scrutiny satisfied, “This law comes nowhere close to being narrowly tailored. [...] the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes.”⁵⁷

51. *Id.* at 1675-76 (Scalia, A., dissenting).

52. *Id.* (Scalia, A., dissenting), (citing, *Brown v. Entertainment Merchants Assn.*, 131 S. Ct. 2729, 2733 (2011)).

53. *Id.* at 1676 (Scalia, A., dissenting).

54. *Id.* at 1677-80 (2015), (Scalia, A., dissenting).

55. *Id.* at 1682-83 (Kennedy A., dissenting).

56. *Id.* at 1683-84 (Kennedy A., dissenting).

57. *Id.* at 1685 (Kennedy A., dissenting).

C.) Alito's Dissent

Justice Alito wrote the shortest of the three dissenting opinions, in which he focused on the Florida rule Yulee was found to have violated, arguing that it failed strict scrutiny, “[T]his rule is about as narrowly tailored as a burlap bag.”⁵⁸ His characterization of the majority holding was similar to Justice Kennedy’s, that the rule was overbroad and explodes the definition of narrow tailoring to an almost unrecognisable breadth.⁵⁹ Instead Alito points to the Supreme Court of Florida for violating the Constitution by penalising and slandering Yulee for “unethical conduct.”⁶⁰

VII.) Implications of *Yulee*

Yulee appears initially as a King Solomon like decision, with the Supreme Court balancing free speech in the course of electoral campaigns with the preservation of the impartiality of the eventual officeholders. Instead, the ruling is of such narrow application and such modest implications that, in light of the Court’s recent full throated support of the unlimited flow of money into politics, *Yulee* is an overlookable aberration.

Decades of jurisprudence appeared to favor the *Yulee* dissenters. Political speech has consistently been deemed the preeminent concern of the First Amendment,⁶¹ especially analogous was the court’s decision of *Citizens United* five years before, “if the First Amendment has any force, it prohibits [...] fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”⁶² The most important takeaway from the Roberts Majority is the distinction made between speech in “judicial” as compared to “political” elections.⁶³ Roberts by declaring

58. *Id.* (Alito S., dissenting).

59. *Id.*, at 1685 (Alito S., dissenting).

60. *Id.* at 1685-86 (Alito S., dissenting).

61. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (“[political speech] is the type of speech indispensable to decision making in a democracy”).

62. *Citizens United*, 558 U. S. at 349.

63. *Williams-Yulee*, 135 S.Ct. at 1667.

“judges are not politicians”⁶⁴ distinguishes *Yulee* from cases such as *Citizens United* in that the Court’s ruling is only applicable to judicial elections, “Unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors.”⁶⁵ As such, the ruling has no effect on the current state of campaign finance law with respect to local, state, and national legislative and executive elections.

Even still, in the context of judicial elections at the local and state levels⁶⁶ the ruling will likely bring limited effects. Only with the 2002 *White* case, were candidates for judicial offices to take contentious political and legal stances in the course of their campaign activities.⁶⁷ *Yulee* now opens the floodgates of politicization as the majority explicitly rejects *Yulee*’s underinclusiveness arguments by specifically allowing candidates to be their own campaign committee treasurer, know who their campaign donors are, and to express gratitude to donors with a signed letter.⁶⁸ Under *Yulee*, candidates are encouraged to say thank you, but discouraged from first saying please.

Nevertheless, even this almost apologetically written decision, which points out its own obvious porousness, barely garnered enough votes to uphold the Florida rule. The finding of narrow tailoring, as well as a compelling public interest, possible only because the restriction effected a *judicial* and not a *political* election, yielded a bare majority of five justices. These five were unable to even decide on the appropriate test to applicable in coming to their conclusion.⁶⁹ As such, it seems *Yulee* demarcates the far outer limits of “cases in which a speech

64. *Id.* at 1662.

65. *Id.* at 1659.

66. *Id.* at 1662 (While Federal Judges of all levels are appointed for life, “In 39 States, voters elect trial or appellate judges at the polls”).

67. *Republican Party*, 536 U. S. at 765.

68. *Williams-Yulee*, 135 S.Ct., at 1663 (citing, *An Aid to Understanding Canon 7*, 51-58 (2014)).

69. Justice Ginsburg rejected application of strict scrutiny. The four dissenters, Justices Scalia, Kennedy, Thomas, and Alito all applied strict scrutiny but came to an alternate conclusion. Together, *Yulee* actually rules 8-1 in favor of applying strict scrutiny.

restriction withstands strict scrutiny.”⁷⁰ Any application in a political election, or application in a broader form as the weakly applicable Florida rule would presumably fail to garner the support of five justices to withstand strict scrutiny. *Yulee*, in upholding a modest restriction on electioneering, actually illuminates how very limited campaign finance laws are in the wake of *Buckley*, *Citizens United*, and *McCutcheon*. Without a constitutional amendment, or a tremendous and unlikely shift by the court, will any major departure from this line of jurisprudence be possible.

70. *Williams-Yulee*, 135 S.Ct. at 1666.