No. _____

In the Supreme Court of the United States

ROBERT MYERS,

Applicant,

v.

SHAUN R. THOMPSON, in his official capacity as Chief Disciplinary Counsel for the State of Montana,

Respondent.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

**Directed to the Honorable Anthony Kennedy,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit**

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Dated: August 3, 2016

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To the Honorable Anthony Kennedy, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit:

Applicant Robert Myers is an attorney seeking election to a state district court in Montana. Three months ago, a local radio station broadcast his campaign advertisement criticizing his opponent, the incumbent judge, for rulings the judge made in a 2012 child–custody matter. The judge reported the advertisement to Montana's Office of Disciplinary Counsel (ODC), which investigated Myers for making "false" or "misleading" campaign statements in violation of professional ethics rules. At a hearing last month, the District Court characterized the investigation as a "fishing expedition," App. 67a,[1] but declined to enjoin ODC. Three weeks ago, ODC filed a formal complaint against Myers. App. 2a.

Myers's government is now prosecuting him for publishing "false" campaign speech about his opponent. App. 6a,¶15; 7a,¶24. Myers's campaign is being enormously disrupted and he faces a possible suspension or even disbarment.

The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). Indeed, "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter…." *Id.* at 340, quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment). At the very least, "our

[1] "App." refers to the appendix to this Application. "Dkt." refers to docket entries in the District Court. "9th Cir Dkt." refers to Ninth Circuit docket entries.

constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S.Ct. 2537, 2547 (2012) (plurality opinion).

The lower courts denied relief because "the principles enunciated in *Williams-Yulee* [*v. Florida Bar*, 135 S.Ct. 1656 (2015)] apply to this case…." App. 33a. *Williams-Yulee* upheld a state prohibition upon direct solicitation of campaign contributions by judicial candidates but left them "free to discuss any issue with any person at any time." *Id.* at 1670. The Court allowed regulation of this "narrow slice of speech" in order to preserve public confidence in the judiciary. *Id.*

The District Court held that prosecuting Myers for false campaign speech passes muster under the First Amendment because "public confidence in the *system*, not the individual judge, erodes when false statements are made in judicial races or by judicial candidates." App. 34a–35a (emphasis in original). It cited the Ninth Circuit's observation that "[e]thical rules that prohibit false statements impugning the integrity of judges" are intended "to preserve public confidence in the fairness and impartiality of our system of justice." *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995); see also *Winter v. Wolnitzek,* ___ F.Supp.3d __, 2016 WL 2864418 (E.D. Ky. May 13, 2016) (upholding Kentucky's prohibitions on false speech by judicial candidates).

These courts are treading on dangerous ground. It is one thing to prohibit judicial candidates from directly soliciting contributions. It is quite another to *prosecute* judicial candidates for criticizing incumbents.

Americans were once imprisoned for publishing "false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with the intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them into contempt or disrepute, or to excite…the hatred of the good people of the United States." Sedition Act of 1798, ch. 74, 1 Stat. 596. Though the Act expired in 1801, this Court has expressly repudiated it and its premise that citizens can be prosecuted for "defaming" the government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (observing that while the Sedition Act was never directly challenged in this Court, attacks on the Act's validity "carried the day in the court of history" and "reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

Prosecuting candidates "on the grounds that public confidence in the system…erodes when false statements are made in judicial races or by judicial candidates," App. 34a–35a, is as repugnant to the Constitution as prosecuting citizens on the grounds that "false, scandalous and malicious" statements about "either house of the Congress of the United States, or the President of the United States" will "bring them…into contempt or disrepute." Sedition Act of 1798, ch. 74, 1 Stat. 596. Nothing in *Williams–Yulee* even remotely suggests this Court intended to turn the clock back to 1798. It has instead declared "the remedy for speech that is false is speech that is true." *Alvarez*, 132 S.Ct. at 2550 (plurality opinion).

Injunctive relief under the All Writs Act, 28 U.S.C. § 1651, is necessary to prevent further debasement of the First Amendment's most fundamental protection – the right to criticize authority harshly, even falsely, without fear of prosecution by the government. Relief is also necessary to prevent ongoing, irreparable harm to Myers's right to publish his campaign advertisement and the electorate's right to evaluate it. Myers vehemently denies his advertisement is false and, if necessary, will defend himself in upcoming disciplinary proceedings. Meanwhile, he desires to rebroadcast the advertisement but cannot because he is being prosecuted for previously broadcasting it and risks additional charges for each new broadcast.

The First Amendment makes the electorate, not Montana's Chief Disciplinary Counsel, the rightful arbiter of the veracity of Myers's campaign speech. At a minimum, Myers requests a temporary injunction to allow him, pending full briefing of this Application, to convey his campaign message.

JURISDICTION

The district court has subject–matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because Myers's First Amendment claim raises a federal question. The Ninth Circuit has jurisdiction over Myers's appeal from the District Court's denial of his motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). On July 28, 2016, the Ninth Circuit denied Myers's motion for an injunction pending appeal. App 1a. This Court has jurisdiction over this Application under 28 U.S.C. § 1254(1) and has authority under 28 U.S.C. § 1651 to grant the relief Myers seeks.

BACKGROUND AND PROCEDURAL HISTORY

I. MONTANA'S ATTORNEY DISCIPLINE SYSTEM

The Montana Supreme Court established ODC to process, investigate, and prosecute complaints filed against Montana attorneys. App. 18a. It appointed Respondent Shaun Thompson as Chief Disciplinary Counsel for ODC. App. 18a.

The Commission on Practice, another arm of the state's judiciary, hears and decides complaints filed by ODC and makes recommendations to the Montana Supreme Court for disciplining attorneys. App. 18a. The Montana Supreme Court considers such recommendations, issues written decisions, and imposes discipline as it deems appropriate. App. 18a.

II. FACTS UNDERLYING MYERS'S CAMPAIGN ADVERTISEMENT

On June 29, 2012, Sara Cox filed a "Motion and Brief to Amend Parenting Plan" involving children with whom she and Dan Cox, Plaintiff Myers' client, held joint custody, but failed to include with the motion a proposed amended parenting plan as required by Mont. Code Ann. § 40-4-219(7). App. 89a. On or about July 17, 2012, an assistant for Judge Jeffrey Langton contacted Sara Cox's attorney *ex parte* and informed him to file a proposed amended parenting plan. App. 89a.

Dan Cox filed a response to Sara Cox's motion on July 27, 2012, and also filed a petition for contempt against Sara Cox based on her alleged violation of the parenting plan. App. 89a. Dan Cox was unaware of the *ex parte* communication between Judge Langton's staff and Sara Cox's attorney that had occurred. App. 89a.

On August 8, 2012, Sara Cox filed a response to Dan Cox's petition for

contempt. She attached to that pleading a proposed amended parenting plan – the one that should have been filed on June 29. Judge Langton refused to grant leave to Dan Cox to file a supplemental response addressing Sara Cox's untimely proposed amended parenting plan. App. 90a. Judge Langton granted Sara Cox's motion to amend the parenting plan on December 4, 2012. App. 90a.

Cox retained Myers shortly afterwards, then discovered Judge Langton's *ex parte* communication when he reviewed the court file and found the following handwritten notation: " July 17, 2012 - Need Prop. Amend. Parent Plan per JHL. Call & let Cuffe's asst. know. O.C. 2 weeks. O.C. 08-06-12." App. 90a, 110a. Cox and Myers interpreted this notation as Judge Langton (whose initials are "JHL") authorizing an *ex parte* contact with Sara Cox's attorney, Matthew Cuffe, in order to alert him to his violation of Mont. Code Ann. § 40-4-219(7). App. 90a.

On December 5, 2013, Dan Cox filed a motion for relief and also moved to disqualify Judge Langton based upon the *ex parte* communication. App. 92a. Judge Langton did not disqualify himself, App. 92a, denied the motions, App. 93a-94a, then imposed a $10,000 sanction. App. 93a-94a. He selected this amount because Myers's wife is a physician: "for a lawyer living on a lawyer's and doctor's combined incomes, the court determines that a sanction of $1,000, or $5,000 or even $7,500 would constitute no more than a sting, or a nuisance penalty." App. 94a.

III. MYERS'S CAMPAIGN ADVERTISEMENT

Both Myers and Judge Langton are candidates for district judge for Ravalli County. App. 83a-84a. Myers is campaigning on the positive changes he would like

to bring to the judicial system but also seeks to inform voters that Judge Langton is unfit for office by describing instances in which he abused his power. App. 84a. To that end, Myers caused to be broadcast a campaign advertisement critical of Judge Langton's handling of the Cox matter. App. 85a. The advertisement was narrated by Cox and stated as follows:

> This is Dan Cox and I have a warning for you. I caught Judge Jeff Langton committing fraud on the court. He was secretly communicating with attorneys for the other party. He denied me a chance to respond and prevented me from fully presenting my case. Robert Myers was the only attorney who helped me to stand up to this corruption. All I was asking for was a new judge to determine how his conduct affected my ability to have a fair hearing. Not only did Jeff Langton not allow a neutral judge to look at his conduct, but he stopped all witnesses including himself from being questioned. He of course found himself innocent without a hearing. No judge should judge his own conduct. Shame on Jeff Langton for retaliating against my lawyer, and shame on Jeff Langton for not giving me and my children a fair hearing. Paid for by Myers for Judge.

App. 85a. This advertisement was broadcast several times from late April 2016 through late May 2016 on KGVO, a radio station in Missoula, Montana. App. 85a.

Judge Langton's law clerk sent to ODC a transcript of Myers's radio advertisement. App. 20a. On May 27, 2016, ODC informed Myers that it had "initiated an investigation into your advertising campaign for election to District Court Judge for Ravalli County, for potential violations of Rule 8.2, MRPC, and Canon 4 of the Montana Code of Judicial Conduct." App. 20a. Myers was "directed to provide ODC with digital copies of all published campaign materials, whether written, video, or audio, including all television or radio advertisements, with written transcripts, aired by your campaign. ODC also requires the invoices and publishing contracts related to all advertising materials, including the publishing

dates and frequency of all materials." App. 20a. ODC also demanded "any internet/social network posting by yourself, your campaign, or affiliated campaign committees/groups." App. 20a.

Three days after filing his action in federal court on June 6, 2016, Myers's counsel received an email from ODC stating the following:

> Your federal lawsuit notwithstanding, Mr. Myers' response is still due as directed, absent an injunction. Your client is free to run any advertising he wishes, but *there will be consequences for untruthful (or reckless disregard for the truth) advertisements in violation of the Rules, which will withstand constitutional scrutiny*.

App. 21a-22a (emphasis added).

On July 15, 2016, ODC formally charged Myers with violating Canon 4.1(A)(10) of the Montana Code of Judicial Conduct[2] and Rule 8.2 of the Montana Rules of Professional Conduct.[3] App. 6a,¶15[4], App. 7a,¶24.

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[2] Canon 4.1(A)(10) states that "Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not…knowingly, or with reckless disregard for the truth, make any false or misleading statement." It is modeled after Rule 4.1(A)(11) of the American Bar Association's Model Code of Judicial Conduct. See <americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4/rule4_1politicalandcampaignactivitiesofjudgesandjudicial.html>

[3] Rule 8.2(a) states that "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." It is modeled after Rule 8.2 of the American Bar Association's Model Rules of Professional Conduct. See <americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_2_judicial_legal_officials.html>

[4] The allegation contained in paragraph 15 of the complaint that Myers violated Rule 8.1 rather than 8.2 appears to be a typographical error.

Myers desires to rebroadcast his radio advertisement. App. 88a. He will not do so, however, while being prosecuted for his prior broadcast of it. App. 88a.

IV. PROCEEDINGS IN THE LOWER COURTS

Myers filed a verified complaint in the District Court on June 6, 2016, Dkt. 1, a motion for preliminary injunction on June 10, 2016, Dkt. 5, and an amended complaint on June 17, 2016. App. 80a–100a. The State moved to dismiss the complaint on June 21, 2016, contending that Myers's claims were unripe and abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971). Dkt. 13. The District Court held a hearing on June 22, 2016, App. 40a–79a, and issued a written order on June 28, 2016, denying both motions. App. 17a–39a.

Myers filed a notice of appeal in the Ninth Circuit on July 1, 2016, Dkt. 22, and moved the District Court on that same day for an injunction pending appeal. Dkt. 23. The District Court denied the motion on July 5, 2016. App. 9a. Myers then moved the Ninth Circuit on July 8, 2016, for an injunction pending appeal. 9th Cir. Dkt. 4–1. The Ninth Circuit denied the motion on July 28, 2016. App. 1a.

SUMMARY OF ARGUMENT

Speech concerning the "qualifications of candidates for elected office commands the highest level of First Amendment protection." *Williams–Yulee*, 135 S.Ct. at 1665 (plurality opinion), citing *Eu*, 489 U.S. at 223 (1989). Prohibitions on such speech must be narrowly tailored to advance a compelling state interest. *Id.* Narrow tailoring requires that "if a less restrictive alternative would serve the

Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000).

Montana's ban on false or misleading speech in judicial campaigns is not narrowly tailored because reliance upon counterspeech is (1) an effective alternative that would serve the state's interest in preserving public confidence in the judiciary and (2) less restrictive than banning false or misleading speech. Montana "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Alvarez,* 132 S.Ct. at 2549 (plurality opinion). Its ban on false or misleading speech in judicial campaigns is therefore unconstitutional.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers). Myers's Application satisfies each of these requirements.

Myers's speech alleges misconduct by an elected official and is thus entitled to the greatest degree of protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values"); *Gentile v State Bar of Nevada*, 501 U.S.

1030, 1034 (1991) (plurality opinion) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment"). That the target of Myers's criticism is a member of the judiciary rather than the executive or legislative branches does not diminish this protection because "[w]hen a case is finished, courts are subject to the same criticism as other people." *Id.* at 1070, quoting *Patterson v. Colorado ex rel. Attorney General of Colorado*, 205 U.S. 454, 463 (1907). Nor does Myers's status as an attorney diminish his First Amendment rights. *Id.* at 1054 (plurality opinion) ("our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."). His campaign speech is based on the outcome of a case that ended in 2014 and therefore does not "create[ ] a danger of imminent and substantial harm" such as "an attorney of record … releasing information of grave prejudice on the eve of jury selection." *Id.* at 1036 (plurality opinion).

The First Amendment applies with particular force to speech about candidate qualifications. *Williams–Yulee*, 135 S.Ct. at 1665 ("speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection"); *Brown v. Hartlage,* 456 U.S. 45, 53 (1982) ("[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election…."). Free speech is critical not only for candidates desiring to speak but

also for voters desiring to listen. *Id.* ("it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualifications and their positions on vital public issues before choosing among them on election day").

Restrictions on candidate speech are subject to strict scrutiny, thus Montana officials "may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Williams–Yulee*, 135 S.Ct. at 1665 (plurality opinion). That the regulations at issue in this case concern false speech does not reduce the level of scrutiny because Montana's bans on false speech in judicial campaigns are content–based and therefore exacting scrutiny is required. *Alvarez*, 132 S.Ct. at 2543 (plurality opinion); *Meyer v. Grant*, 486 U.S. 414, 419 (1988) (the "First Amendment is a value–free provision whose protection is not dependent on the truth, popularity or social utility of the ideas and beliefs which are offered") (citations omitted).

Narrow tailoring means that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative" because "to do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Playboy Entertainment Group,* 529 U.S. at 813. The burden is on the State to "prove that the proposed alternatives will not be as effective as the challenged statute," *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004), a burden that is particularly heavy. *Williams–Yulee*, 135 S.Ct. at 1665-66 ("It is the

rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest") (citations omitted).

As shown below, Montana has a simple, effective alternative to banning false or misleading speech in judicial campaigns: allow such speech – along with the inevitable counterspeech, then "depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." *Brown*, 456 U.S. at 61, quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–40 (1974).

I. MYERS FACES CRITICAL AND EXIGENT CIRCUMSTANCES BECAUSE HE IS A CANDIDATE WHO DESIRES TO CRITICIZE THE INCUMBENT BUT CANNOT BECAUSE HE IS BEING PROSECUTED FOR PREVIOUSLY MAKING THE SAME CRITICISM

The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Such injury "is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and delay of even a day or two may be intolerable." *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012). Accordingly, this Court has issued injunctions in election cases to preserve First Amendment rights that would otherwise be lost forever. See, *e.g.*, *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (ordering the names of third party candidates placed on the ballot pending appeal).

Myers faces exigent circumstances because he is campaigning for public office and desires to rebroadcast the campaign advertisement he aired in late April and

May. He dare not do so, however, because he is currently being *prosecuted* for those broadcasts based upon their alleged falsity. App. 2a.

Montana's Secretary of State will mail absentee ballots on October 11, 2016.[5] Each day that passes results in Myers losing opportunities to communicate his desired message to voters. There will never be another election for the 2016 Ravalli County District Court and thus these losses cannot be remediated by a favorable ruling issued after Election Day. His circumstances are thus critical and exigent.

The State's prosecution of Myers is disrupting his campaign in other ways. In states that sanction false campaign speech, "complainants may time their submissions to achieve maximum disruption of their political opponents while calculating that an ultimate decision on the merits will be deferred until after the relevant election." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2346 (2014). Moreover, "the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election." *Id.*

This is exactly what is happening to Myers. Judge Langton's law clerk sent to ODC a transcript of Myers's radio advertisement. App. 20a. Since then, Myers has been forced to divert resources to retain an attorney and respond to an investigation the District Court rightly described as a "fishing expedition," App. 67a, that required Myers to submit to ODC copies of every scrap of campaign material and every campaign statement he has made on social media. App. 20a.

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[5] See <sos.mt.gov/elections/documents/Election-Calendar.pdf>

Now that ODC is prosecuting Myers, he must defend himself against a state agency with unlimited resources to litigate its claims of falsity while he attempts to win votes, a task complicated by the stigma arising from ODC's filing. *Cf. Driehaus*, 134 S.Ct. at 2346 (probable cause finding that a candidate engaged in false campaign speech "may be viewed by the electorate as a sanction by the State."). Expedited relief is thus warranted for this reason as well.

II CITIZENS HAVE HAD AN INDISPUTABLY CLEAR RIGHT SINCE 1801 TO BE FREE FROM PROSECUTION FOR "DEFAMING" THE GOVERNMENT

A. Montana's Bans on False or Misleading Speech Are Not Narrowly Tailored Because Counterspeech is an Effective, Alternative Remedy

The State is prosecuting Myers for making "false" campaign statements. It is thereby violating a fundamental First Amendment principle that counterspeech is the preferred remedy for false speech. *Alvarez*, 132 S.Ct. at 2550 (plurality opinion) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth"); *id.* at 2556 (concurring opinion) ("in this area more accurate information will normally counteract the lie"); *Brown*, 456 U.S. at 61 ("The preferred First Amendment remedy of more speech, not enforced silence…has special force"); *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)

("the theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

This Court's decision in *Alvarez* involved a First Amendment challenge to the Stolen Valor Act, which criminalized false claims of receiving the Medal of Honor. A four–Justice plurality applied exacting scrutiny and held that, while the "Government's interest in protecting the integrity of the Medal of Honor is beyond question," the Act was not "actually necessary to achieve its interests." *Alvarez*, 132 S.Ct. at 2549 (plurality opinion). A concurring opinion reached many of the same conclusions, but did so by applying intermediate scrutiny. *Id.*, 132 S.Ct. at 2552 (concurring opinion). And although the dissenting Justices described false statements concerning the Medal of Honor as unworthy of protection, they recognized "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech," including speech involving "matters of public concern." *Alvarez*, 132 S.Ct. at 2549 (Alito, J., dissenting). A judge's fitness for office is certainly a matter of public concern.

Counterspeech is an effective remedy for false speech involving public figures because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz,* 418 U.S. at 344. This is especially true of candidates seeking public office. *Brown*, 456 U.S. at 61 ("in a political campaign, a candidate's factual blunder is unlikely to escape the notice of,

and correction by, the erring candidate's political opponent"). Campaign trackers,[6] YouTube, a myriad of media outlets, interest groups, political parties, activists and, increasingly, bloggers and other "alternative media" now weigh in on campaigns. *Williams–Yulee*, 135 S.Ct. at 1684 (Kennedy, J., dissenting) ("Modern communication technologies afford voters and candidates an unparalleled opportunity to engage in the campaign and election process. These technologies may encourage a discourse that is principled and informed. The Internet, in particular, has increased in a dramatic way the rapidity and pervasiveness with which ideas may spread"). Voters now have more access to counterspeech than ever before.

The District Court's reliance upon *Williams–Yulee* is misplaced because that case involved a ban on the direct solicitation of contributions by judges, something that created a "regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity." *Id.* at 1667. This speech restriction, "[b]y any measure," affects only "a narrow slice of speech" and "leaves judicial candidates free to discuss any issue with any person at any time." *Id.* at 1670. Montana's false–speech prohibitions, by contrast, are not limited to a narrow slice of speech and instead apply to any subject. Canon 4.1(A)(10).

More importantly, *Williams–Yulee* is not on point because there is nothing inherently false about judges soliciting contributions that can be rebutted by counterspeech. By contrast, counterspeech is an effective remedy for any harm to

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[6] See Emma Roller, "Inside the Strangest Job on the Campaign Trail," *The Atlantic*, Sept. 3, 2014, accessible at <theatlantic.com/politics/archive/2014/09/inside-the-strangest-job-on-the-campaign-trail/455145/>

the judiciary caused by false campaign speech because "the remedy for speech that is false is speech that is true." *Alvarez*, 132 S.Ct. at 2550 (plurality opinion).

The District Court held otherwise, reasoning that counterspeech is not effective in judicial campaigns because "[p]ublic confidence in the *system*, not the individual judge, erodes when false statements are made in judicial races or by judicial candidates." App. 34a–35a. (emphasis in original). Thus, "[c]ounterspeech is not a remedy to a systemic challenge that is false and undermines the public's confidence in the third branch of government." App. 35a.

The efforts by state authorities to suppress false speech have a ring of familiarity. Congress once attempted to do the same. See Sedition Act of 1798, ch. 74, 1 Stat. 596 (prohibiting, *inter alia*, false speech made "with intent to defame…either house of the . . . Congress"). Much of this Court's First Amendment jurisprudence after the Sedition Act's expiration in 1801 refutes the idea that citizens can be punished for "defaming" the government. *Sullivan*, 376 U.S. at 276 (observing that while the Sedition Act was never directly challenged in this Court, attacks on the Act's validity "carried the day in the court of history" and "reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

In this century, however, prohibitions on defaming the government – or at least the judiciary – appear to be back in vogue. Before Montana and other states unravel two centuries of First Amendment jurisprudence, strict scrutiny demands more than a declaration that false speech damages the judicial system.

Counterspeech results in truth, which is "the remedy for speech that is false," *Alvarez*, 132 S.Ct. at 2550 (plurality opinion), and "will normally counteract the lie." *Id.* at 2556 (concurring opinion). Given this Court's centuries–old presumption that counterspeech cures falsity, the State must show a judicial candidate's false speech inflicts indelible damage upon the judicial system that cannot be cured by counterspeech. It has not done so.

Indeed, punishing criticism of judges, even criticism that is harsh or untrue, does more harm than good to the public's perception of the judiciary because "discipline imposed by the judiciary that may appear designed to shield judges from general statements of adverse opinions can itself undermine confidence in the judiciary." *Attorney Grievance Comm. v Frost*, 85 A.3d 264, 283 (Md. App. 2014) (McDonald, J., concurring and dissenting). Discipline imposed at the behest of an incumbent judge upon a challenger, such as Myers, for simply broadcasting a negative ad would not promote an appearance of judicial integrity but rather an appearance of retaliation by a judiciary that brooks no criticism of its members.

It would also appear hypocritical. This Court has held that the First Amendment protects false speech involving the Medal of Honor even though such falsity "may offend the true holders of the Medal" and "insults their bravery and high principles" by "put[ting] them in the unworthy company of a pretender." *Alvarez*, 132 S.Ct. at 2549 (plurality opinion). Many citizens might question why false speech that undermines the integrity of the judiciary is punishable but false speech that undermines the integrity of the nation's highest military award is not.

Reliance upon counterspeech is at least as effective, and likely more effective, in preserving judicial integrity than banning false speech. Canon 4.1(A)(10) and Rule 8.2 are thus unconstitutional as applied to speech by judicial candidates.

B. Montana's Bans on False or Misleading Speech Are Not Narrowly Tailored Because Reliance Upon Counterspeech is Less Restrictive Than Banning Speech

Assuming Canon 4.1(A)(10) and Rule 8.2 reduce the quantity of false speech in judicial campaigns, the electorate suffers because a candidate's false statement can "make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." *Sullivan,* 376 U.S. at 279 n.19, quoting J. Mill, On Liberty 15 (Blackwell ed.1947). In the era of the internet, "a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent." *Brown*, 456 U.S. at 61. And an exposed factual blunder, or an exposed lie, communicates more information to voters than hours of canned advertisements and mailboxes filled with slate mailers. Threats of punishment for false campaign speech reduce the likelihood of deceitful attorney–candidates acting in conformity to their character, thereby depriving voters of the opportunity to sort the honest from the dishonest. *Williams–Yulee,* 135 S.Ct. at 1684–85 (Kennedy, J., dissenting) ("voters can decide" by hearing candidate speech "how each candidate defines appropriate campaign conduct (which may speak volumes about his or her judicial demeanor)"); *United States v. Alvarez,* 638 F.3d 666, 675 (9th Cir. 2011) (Kozinski, J., concurring in the

denial of rehearing en banc) ("[h]ow can you develop a reputation as a straight shooter if lying is not an option?").

Bans on false campaign speech also result in reduced quantities of truthful speech. An "erroneous statement is inevitable in free debate" and thus "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, 132 S.Ct. at 2544 (plurality opinion), quoting *Sullivan*, 376 U.S. at 271. Canon 4.1(A)(10) and Rule 8.2 can result in draconian sanctions, including suspension or even disbarment. The safe strategy for Montana judicial candidates is to avoid criticizing their opponents entirely. The resulting polite, staid campaigns deprive the voter of information and the candidate of the "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Brown,* 456 U.S. at 53 (citations omitted).

Even requiring the State to prove knowledge, as Canon 4.1(A)(10) and Rule 8.2 do, cannot eliminate the chill on truthful campaign statements because a "speaker might still be worried about being prosecuted for a careless, false statement even if he does not have the intent required to render him liable," *Alvarez*, 132 S.Ct. at 2555 (concurring opinion), particularly when the speaker is an attorney whose bar license might be at risk. Increasing this risk is that, for attorney disciplinary proceedings, most jurisdictions have watered down the actual–

malice standard that would apply in defamation cases involving public figures.[7] See *Yagman*, 55 F.3d at 1437; *In re Cobb*, 838 N.E.2d 1197, 1212 (Mass. 2005) ("A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements"). Rejection by state disciplinary authorities of the actual–malice standard and reliance instead upon an objective standard exposes attorneys to discipline not just for intentional lies but also for negligent publication of false statements. This imposes an unacceptable and unconstitutional risk upon attorneys seeking judicial office.

And even if a candidate is exonerated, the state's disciplinary process will irreparably damage his or her campaign. In states that sanction false campaign speech, "complainants may time their submissions to achieve maximum disruption of their political opponents…." *Driehaus*, 134 S.Ct. at 2346. Moreover, "the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election." *Id.* For an attorney such as Myers who is campaigning under these circumstances, the disciplinary process is itself a punishment regardless of whether the attorney is ultimately exonerated.

Further chilling judicial campaign speech is the extreme overbreadth of Canon 4.1(A)(10), which not only prohibits false statements but also ones that are "misleading." Virtually any campaign statement could be deemed "misleading."

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[7] See *Sullivan*, 376 U.S. at 280-81.

The District Court sidestepped this enormous defect by construing Canon 4.1(A)(10) as being inapplicable to true statements. App. 37a. In so doing, it violated the rule that courts "may impose a limiting construction on a statute only if it is readily susceptible to such a construction." *United States v. Stevens*, 130 S.Ct. 1577, 1591–92 (2010). The District Court's reasoning renders the term "misleading" in Canon 4.1(A)(10) mere surplusage. The Canon already bans "false" speech. Thus, its additional ban on "misleading" speech makes clear that at least some true speech by judicial candidates can be prosecuted, making Canon 4.1(A)(10) even more repugnant to the Constitution than the Sedition Act.

Canon 4.1(A)(10) is also overbroad because it applies to any subject. *Cf. Susan B. Anthony List v. Driehaus,* 814 F.3d 466, 475 (6th Cir. 2016) (state's false–speech ban was overbroad because "influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue."). It applies to any setting, including private conversations. *Cf. Alvarez*, 132 S.Ct. at 2547 (plurality opinion) (criticizing the "sweeping, quite unprecedented reach" of the Stolen Valor Act because it "appl[ied] with equal force to personal, whispered conversations within a home"); *id.* at 2555 (Breyer, J., concurring) (Stolen Valor Act's "breadth means that it creates a significant risk of First Amendment harm" by "appl[ing] in family, social, or other private contexts, where lies will often cause little harm"). This overbreadth encompasses vast swaths of speech that cannot possibly impact the public's perception of the judiciary.

Allowing false speech by judicial candidates to be rebutted by counterspeech is a less restrictive alternative than banning it. Accordingly, Montana's bans on false speech are unconstitutional as applied to judicial campaigns.

III. RELIEF WOULD AID THIS COURT'S JURISDICTION

Issuing an injunction under the All Writs Act in this case would be "in aid of" this Court's certiorari jurisdiction. 28 U.S.C. § 1651(a). The Court's authority under the Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966). Cases raising issues of national importance are ones over which this Court traditionally assumes jurisdiction. See, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371-72 (2000). These include cases involving constitutional issues that impact the validity of laws in multiple states. *Id.*

This issue of whether a state may prosecute judicial candidates for false campaign speech has nationwide significance. Forty states will hold judicial elections in 2016.[8] Virtually all of those states have, like Montana, adopted the American Bar Association's model rules governing the conduct of judges[9] and attorneys[10] and therefore have versions of Canon 4.1(A)(10) and Rule 8.2(a) prohibiting false speech by judicial candidates. As shown previously, prohibitions

[8] See <ballotpedia.org/Judicial_elections>

[9] See <americanbar.org/content/dam/aba/administrative/professional_responsibility/4_1.authcheckdam.pdf>

[10] See <americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_2.authcheckdam.pdf>

on false speech by judicial candidates are essentially modern versions of the Sedition Act of 1798. As such, they are patently unconstitutional to the point where the exercise of this Court's certiorari jurisdiction is clearly warranted.

CONCLUSION

For all of the foregoing reasons, Applicant Robert Myers requests this Court immediately enjoin Respondent from enforcing Canon 4.1(A)(10) and Rule 8.2 until Election Day, November 8, 2016. Alternatively, Myers requests a temporary injunction to allow him, pending full briefing of this Application, to convey his desired campaign message without fear of discipline by the State.

DATED: August 3, 2016

Respectfully submitted,

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