

ORIGINAL

BEFORE THE COMMISSION OF FIVE JUDGES  
APPOINTED BY  
THE SUPREME COURT OF OHIO

In Re: Judicial Campaign Complaint	)	Case No. 2012-1653
Against Colleen Mary O'Toole	)	
	)	Respondent's Objections to the Findings
	)	& Recommendations of the Hearing
	)	Panel

Respondent Colleen Mary O'Toole, pursuant the Order entered by the Five Judge Commission on October 5, 2012, states the following objections to the Findings and Recommendations entered by the Hearing Panel in this case on October 1, 2012 .

**Procedural Background**

On September 13, 2012, the Respondent moved to dismiss the Complaint filed against her by Secretary Richard Dove, of the Board of Commissioners on Grievances and Discipline, on the basis that Rules 4.3(A) and (F) of the Ohio Code of Judicial Conduct, under which she was charged in that Complaint, unconstitutionally abridge her right to engage in core political speech, a right vouchsafed to her by the First and Fourteenth Amendment to the United States Constitution. Her contention was fully briefed.

At the hearing held September 18, 2012, Judge Otho Eyster, sitting as Chair of the Hearing Panel, summarily denied that Motion from the bench. (Transcript of Hearing, at 29). An Order memorializing that decision was entered by the Panel Chair on September 27, 2012. Neither the oral ruling, nor the written Order, explain the legal basis for the decision to deny the motion to dismiss.

On October 1, 2012, the Hearing Panel issued its Findings and Recommendations.

The Hearing Panel recommended that the first count of the Complaint against the Respondent

be dismissed for lack of clear and convincing evidence.

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As to Count II of the Complaint, the Panel found that on her own website, the Respondent used the phrases “has decided over 1,500 cases” and “Judge O’Toole” in such a way that voters might be misled into believing she still sits on the Court of Appeals when she does not, notwithstanding the fact that other information on her website makes clear that her present occupation is not that of appellate judge. The Panel, at ¶ 6, found that this violated Rule 4.3(A).

As to Count III of the Complaint, the panel found that the Respondent wore a name tag to various events which read “Colleen Mary O’Toole Judge 11th District Court of Appeals.” Despite the fact that she always wore this together with a paper name tag which read “O’Toole for Judge” as a disclaimer, the Hearing Panel found that the use of the first badge “would deceive or mislead a reasonable person” into believing that she was running as an incumbent. Hearing Panel, at ¶ 7.

The Panel recommended that: (a) the Respondent be fined \$1,000.00; (b) pay attorney fees to the Complainant in the Amount of \$2,500.00; (c) pay the costs of the proceeding against her; (d) that she be enjoined from wearing the badge at issue, and; (e) be compelled to alter her website to specify the dates during which she sat on the bench, and remove any reference to herself as “Judge O’Toole.” On October 5, 2012, this Commission entered Order giving force to both the mandate and the prohibition contained in the Findings and Recommendation of the Hearing Panel, in addition to setting October 10, 2012 as the date for filing these Objections.

**Objection I:**

**Rules 4.3 (A) and (F) of the Ohio Code of Judicial Conduct Violate the First and Fourteenth Amendments to the United States Constitution, Both On Their Face and As Applied in this Case, and Thus Provide No Lawful Basis to Proscribe or Punish the Political Speech of the Respondent.**

The Hearing Panel erred as a matter of law in denying the Motion to Dismiss, because the contested Rules violate the First Amendment on their face and as applied.

Rules 4.3(A) and (F) incontestably impose content based restrictions on core political speech, and as such, must survive strict judicial scrutiny in order to pass First Amendment muster, and thus:

serve a compelling governmental interest, and [be] the least restrictive means of doing so. Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality . . . .

*Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)(citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) and *United States v. Playboy Entertainment Group*, 529 U.S. 803, 817 (2000)).

The stated public policy rationale for Rule 4.3 is set forth in its Official Comments:

This rule obligates the candidate and the committee to refrain from making statements that are false or misleading or that omit facts necessary to make the communication considered as a whole not materially misleading.

OHIO R. JUD. COND. 4.3 CMT. 1 (WEST 2012). Based on this stated interest alone, the contested restrictions are unconstitutional. The First Amendment prohibits states from imposing content-based restrictions on political speech in the interest of preventing candidates from misleading voters.

Whenever compatible with the underlying interests at stake, under the regime of that Amendment “we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.”

*Brown v. Hartlage*, 456 U.S. 45, 62 (1982)(citations omitted).

The First Amendment applies as fully to contested judicial elections as it does to elections for legislative and executive offices. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Supreme Court invalidated a Minnesota canon of judicial conduct that prohibited a candidate for judge from announcing his or her views on disputed legal or political issues. *Id.* at 768.

In doing so the Court rejected the notion that the Canon could be justified on the basis of some distinction between elected judges and elected legislators, that justified restrictions on judicial campaign speech that would not be tolerable in other First Amendment contexts:

[T]he First Amendment does not permit it [the State] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. “[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”

*Id.* at 788. (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991)(Marshall, J., dissenting)) and citing *Meyer v. Grant*, 486 U.S. 414, 424-425 (1988)(rejecting the argument that the greater power to end voter initiatives includes the lesser power to prohibit paid petition circulators)).

The holding in *White* is significant, of course, because it puts regulations on judicial campaign speech, such as Rule 4.3, on a constitutional par with restrictions on the speech of other candidates for elected office. Under Rule 4.3(A), statements are prohibited, and may be punished, if they are “false,” or even if they are true, if they are published with reckless disregard of the statement being “deceiving or misleading to a reasonable person.” Under Rule 4.3(F), a judicial candidate is forbidden from “misrepresent[ing]” her “qualifications, present position or other fact.”

Uniformly, judicial canons like Rule 4.3, which purport to protect the electorate from misleading statements, have been invalidated as overbroad, because of their considerable ability to chill candidates in the exercise of their First Amendment freedoms, and thereby to eliminate the “breathing space” the First Amendment requires for even inaccurate and misleading statements made in the context of political debates and contested elections.

On this basis, in *Weaver v. Bonner*, 309 F.3d 1312, 1320 (11th Cir. 2002), the court of appeals invalidated as unconstitutional Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct.<sup>1</sup>

Canon 7(B)(1)(d) not only prohibits false statements knowingly or recklessly made, it also prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results.

\* \* \*

For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the "breathing space" it requires. The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.

In *Butler v. Alabama Jud. Inquiry Comm.*, 111 F.Supp.2d 1224 (M.D.Ala. 2000), the district court enjoined the enforcement of Canon 7(B)(1)(d) of the Alabama Canons of Judicial Ethics.<sup>2</sup>

Canon 7B(2) of the Alabama Canons of Judicial Ethics extends beyond those statements that are false or made with knowledge of their falsity to speech that a "reasonable person" would deem "deceiving or misleading." The "deceiving or misleading" clause of

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<sup>1</sup>The canon prohibited "any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading. . . ." *Weaver*, 309 F.3d at 1315 (quoting Ga. Code Jud. Cond. Canon 7(B)(1)).

<sup>2</sup>The Canon forbade candidates to "Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person." *Butler*, 111 F.2d at 1228 (quoting ALA. CANON JUD. ETHICS, CANON 7(B)(1)(d)).

Canon 7B(2) neither takes into account the candidate's intent nor does it contain a falsity requirement. Therefore, if a "reasonable person" would deem "true information" either "deceiving or misleading," the candidate violates Canon 7B(2) and, thus, is subject to being charged by the JIC for a violation thereof.

*Butler*, 111 F.Supp.2s at 1232, 1235.

The *Butler* court drew heavily upon *In Re Chmura*, 608 N.W.2d 31 (Mich. 2000), in which the Michigan Supreme Court invalidated Canon 7(B)(1)(d) of that state's Code of Judicial Conduct, 608 N.W.2d 31 (Mich. 2000), in which the Michigan Supreme Court invalidated Canon 7(B)(1)(d) of that state's Code of Judicial Conduct:

The canon applies to any statement that the candidate "reasonably should know is false, fraudulent, misleading, [or] deceptive." It also applies to a statement that "contains a material misrepresentation of fact or law," and a statement that "omits a fact necessary to make the statement considered as a whole not materially misleading." It further prohibits a statement that is "likely to create an unjustified expectation about results the candidate can achieve."

\* \* \*

Canon 7(B)(1)(d) greatly chills debate regarding the qualifications of candidates for judicial office. It applies to all statements, not merely those statements that bear on the impartiality of the judiciary. A candidate for judicial office faces adverse consequences for statements that are not false, but, rather, are found misleading or deceptive. Further, the canon extends beyond the candidate's actual statement to permit discipline for factual omissions.

*Chmura*, 608 N.W.2d at 41-42.

All these canons bear a striking and material resemblance to Rule 4.3(A), which allows judicial candidates to be punished for making even true statements "that would be deceiving or misleading to a reasonable person." The state has no constitutionally cognizable interest in preventing even false, much less misleading, or potentially deceptive **true** statements, in the course of regulating political campaign speech.

Just last term, in *United States v. Alvarez*, 132 S.Ct. 2536 (2012), the Supreme Court invalidated the Stolen Valor Act, which criminalized false claims to have been awarded certain military honors. The Court recounted with particularity the few, and well-defined realms within which, as a matter of longstanding jurisprudence, false speech may serve as the basis for civil or criminal liability: defamation, fraud, commercial speech, false statements made to federal officials, perjury and false claims that one represents the government. *Alvarez*, 132 U.S. at 2544-46.

Beyond these narrow categories, no general rule exists that places false statements beyond the protection of the First Amendment, or allows the government to restrict them at all.

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as “startling and dangerous” a “free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.” [C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few “historic and traditional categories [of expression] long familiar to the bar . . . .”

*Alvarez*, 132 S.Ct. at 2544 (quoting *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010)(in turn quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)(Kennedy, J., concurring in the judgment)).

Significantly, the Court refused to create such a rule in *Alvarez*.

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

*Alvarez*, 132 S.Ct. at 2547-48.

Finally, the cases invalidating the Alabama, Georgia and Michigan canons cannot be distinguished by the claim that Ohio Rule 4.3 imposes liability upon only “knowing or reckless” misstatements. The United States, in *Alvarez*, had argued that the existence of a scienter requirement was sufficient to save the Stolen Valor Act from invalidation. The Supreme Court disagreed, noting that the “knowing and reckless” standard, which can be traced to constitutional defamation cases like *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964), and which is mimicked in Rule 4.3(A), was intended as a **shield** to protect speakers, and may not be twisted into a **sword** to prosecute them.

The Government . . . seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

*Alvarez*, 132 S.Ct. at 2545. The same logic applies here. The addition of “actual malice” language cannot inoculate a Rule, otherwise invalid under the First Amendment, from its proper legal fate.

In July 2012, a thirteen judge appellate panel relied heavily on *Alvarez* to find Rule 4.3(C) unconstitutional as applied to William O’Neill, a former member of the Eleventh District appellate bench who also described himself as “Judge” in his campaign literature. *O’Neill v. Crawford*, 132 Ohio St.3d 1472 (2012). The panel noted that prohibitions against false statements appear in “many sections” of Rule 4.3 and “place it within a very broad interpretation of the *Alvarez* decision.”

It found that Rule 4.3, applied to the use of “Judge” in the context of that case, stifled the breathing space that the First Amendment allows to ensure a robust discussion of public affairs:

Although it is arguable that respondent’s brochure may mislead an observer, we find a “doctrine against misleading” is even a greater threat to free speech.

\* \* \*

To prohibit respondent from speech wherein the disclaimer of “former judge” is prominent in the advertisement has a chilling effect on his First Amendment privileges and rights.

Rules 4.3 (A) and (F) sweep within their ambit vast amounts of speech which, while true, may mislead voters. That is protected expression, and in this regard, the rules are overbroad. Moreover, prohibiting speech with the propensity to mislead voters is the quintessence of vagueness. What is misleading in one context – and to one voter – may not mislead another, whose education, life experience or knowledge base is greater. Rules 4.3 (A) and (F) are also vague, and in any case, restrict speech which is beyond the power of the government to proscribe. The Rules are unconstitutional on their face and as applied.

## **Objection II**

**The Relator Failed to Prove, By Clear and Convincing Evidence, That the Expression Charged in Counts II and III of the Complaint Against the Respondent Was, In Fact, Untrue, Deceptive or Misleading to a Reasonable Person.**

The website maintained by the Respondent contained two pages of biographical material. From the, the Hearing Panel fixed on two phrases to establish that her website might mislead voters as to her incumbency: (a) the isolated reference to the Relator as Judge O’Toole, which was use in a context of describing activities she undertook **while on the bench** (Tr. 231), and; (b) and a several-years-old name-tag, described earlier, which the Respondent testified she always wore together with a paper badge indicating that she was a candidate for judge (Tr. 234-36). Neither of these documents was intended to mislead anyone, and the Respondent takes care on the campaign trail to tell those she meets in person that she is not a sitting judge. (Tr. 224, 236). Taken in context, these statements are not untrue, or even misleading, and certainly not intentionally or recklessly misleading.

A reader who examined the Respondent's website would find in black and white the honest statement that she is not a judge, but presently heads a translation company. (Complaint, Exhibit 2). A voter close enough to read the badge at the heart of Count III would see the paper disclaimer Respondent always wears with it, and might well hear from the Respondent herself that she is not an incumbent. Only the most careless voter, and perhaps only the willfully blind, might be misled.

### **Objection III**

#### **The Hearing Panel's Recommendation that the Respondent Be Required to Pay Relator \$2,500.00 in Attorney Fees is Arbitrary and Capricious**

The Relator did not request attorney fees, nor did he indicate that he had incurred any costs in filing or prosecuting his Complaint against the Respondent. Indeed, to the contrary, he admitted under oath that the Complaint was prepared by the political campaign of the Respondent's opponent, and that he expected the Mary Jane Trapp campaign to pay his lawyers for him. (Tr. 188-91). To require the Respondent to pay Relator Davis in this light would be a windfall for him, and force her, in effect, to subsidize the campaign of her opponent, who instigated the Davis Complaint.

**Wherefore the findings of the Hearing Panel should be set aside, and its recommendations disregarded, and the Complaint against the Respondent dismissed.**

Respectfully submitted,



**J. MICHAEL MURRAY (0019626)**

jmmurray@bgmdlaw.com

**RAYMOND V. VASVARI, JR. (0055538)**

rvasvari@bgmdlaw.com

BERKMAN, GORDON, MURRAY & DEVAN

55 Public Square, Suite 2200

Cleveland, Ohio 44113-1949

Telephone: 216-781-5245

Telecopier: 216-781-8207

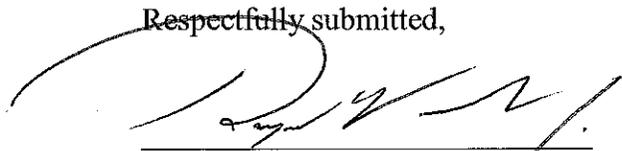
Counsel for the Respondent

– Certificate of Service –

A true and accurate copy of the foregoing was served today, October 9, 2012 upon Mary Cibella, 614 West Superior Avenue, Suite 1300, Cleveland, Ohio 44114, and David Axelrod, 41 South High Street, Suite 2400, Columbus, Ohio 43215, with a copies to Steven C. Hollon, Administrative Director, and Allen Asbury, Administrative Counsel, Supreme Court of Ohio, 65 South Front Street, 7th Floor, Columbus, Ohio 43215, all via Federal Express Next Morning Delivery.

Courtesy copies were served by PDF email attachment, the same day, on these persons at their respective email addresses, to wit: [mcibella@worldnetoh.com](mailto:mcibella@worldnetoh.com); [daxelrod@slk-law.com](mailto:daxelrod@slk-law.com); [s.hollon@sc.ohio.gov](mailto:s.hollon@sc.ohio.gov) and [a.asbury@sc.ohio.gov](mailto:a.asbury@sc.ohio.gov).

Respectfully submitted,



**J. MICHAEL MURRAY (0019626)**

[jmmurray@bgmdl.com](mailto:jmmurray@bgmdl.com)

**RAYMOND V. VASVARI, JR. (0055538)**

[rvasvari@bgmdl.com](mailto:rvasvari@bgmdl.com)

BERKMAN, GORDON, MURRAY & DEVAN

55 Public Square, Suite 2200

Cleveland, Ohio 44113-1949

Telephone: 216-781-5245

Telecopier: 216-781-8207

Counsel for the Respondent