

ORIGINAL

IN THE SUPREME COURT OF OHIO

In Re: Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

On Appeal from the Decision of a Five Judge Commission
Empaneled Pursuant to Ohio R. Gov. Jud. II Section D(5)

MERIT BRIEF OF RESPONDENT COLLEEN MARY O'TOOLE

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– STATEMENT OF FACTS –

Respondent Colleen M. O’Toole served as a judge on the Eleventh District Court of Appeals between February 2005 and February 2011. During her time on the bench, she served on several committees and subcommittees of the Ohio Judicial Conference, and in connection with that work, represented the Conference in testimony before the Ohio House Criminal Justice Subcommittee. She ran for reelection to the bench in 2010, but was defeated in the Republican primary.

The Respondent ran for, and was elected to the Court of Appeals in November 2012. At issue in this appeal is the content of the website she maintained as a candidate, and a name badge she wore during a portion of her campaign, both of which are alleged to have violated Rule 4.3(A) of the Ohio Code of Judicial Conduct, through the use of the word “judge” by a non-incumbent candidate.

– These Proceedings –

On August 8, 2012, James B. Davis, a non-practicing attorney in Chagrin Falls, Ohio, sent a letter to the Board of Commissioners, alleging that the Plaintiff, through various actions and inactions, in various written and online materials, and in certain speeches and appearances, violated Rule 4.3 of the Ohio Code of Judicial Conduct, by stating, suggesting and/or implying that she was a sitting judge, when in fact she is not an incumbent in the office she is seeking. Davis alleged that the Respondent had violated Rule 4.3 in twelve distinct ways, each set forth as a separate allegation.

On August 24, 2012, Ms. O’Toole submitted her response to the Board of Commissioners. In it, she denied certain of the allegations in the Davis letter, noted that others described the conduct of third parties, and that still others stated no violation of Rule 4.3. In her response, the Respondent also detailed the constitutional infirmities of Rules 4.3 (C), (D) and (E), expecting to be charged, if at all, under those subparts, because the Davis letter tracked the language of those prohibitions.

A Probable Cause Panel was convened by the Secretary to the Board of Commissioners, and on August 29, 2012 issued its determination, finding that nine of the twelve allegations in the Davis letter stated no violation of Rule 4.3, but that the allegations set forth in Paragraphs 2, 7 and 12 of that letter provided that basis for a formal Complaint. On August 30, 2012, the Secretary filed a three-count Complaint alleging that the Respondent had violated Rules 4.3 (A) and (F) of the Code of Judicial Conduct in that:

1. A photograph of her wearing judicial robes, and thereby implying that she is a sitting judge, appeared on the website of the Ashtabula County Republican Party;
2. Statements on her own website, including the use of the phrase “Judge O’Toole testified . . . before the Ohio House Criminal Justice Committee” would be “deceiving or misleading to a reasonable person,” presumably regarding her incumbency as a judge, and;
3. She wore a name tag to a campaign event which read “Colleen Mary O’Toole Judge 11th District Court of Appeals.”

On September 13, 2012, the Respondent moved to dismiss the Complaint filed against her by Secretary Dove, 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, are unconstitutional, on their face and as applied under the First and Fourteenth Amendments to the United States Constitution. Her contention was fully briefed.

A three member hearing panel was appointed pursuant to Ohio R. Gov. Jud. II, Section 5(B), and a hearing was conducted on September 18, 2012. During that hearing, the Chair of the Hearing Panel, Judge Otho Eyster, summarily denied the Motion to Dismiss from the bench.¹

¹(Hearing Tr., September 18, 2012 (“Tr.”), at p. 29).

That decision, which was made solely by the Panel Chair, was entered as an Order by him on September 27, 2012. Neither the oral ruling, nor the written Entry, provided any basis for the decision to deny the Motion to Dismiss.²

– Testimony Before the Hearing Panel –

The Respondent testified during the September 18, 2012, on both direct and cross-examination. In doing so, she: (a) explained the limited and very specific context in which her campaign website identified her as “Judge O’Toole” in the course of a short biography; (b) explained the circumstances surrounding her use of an old name tag, the use of which was the basis for Count III of the Complaint against her, and; (c) explained that her beliefs regarding the continued use of the honorific term “judge” by former judges were substantially shaped by the opinion of the Thirteen Judge Panel in *O’Neill v. Crawford*, 132 Ohio St. 1472, No. 2012-0418 (Table, July 17, 2012), which had been announced only several weeks before.

We revisit here those portions of her testimony that are relevant to the findings of the Five Judge Commission from which this appeal is taken.³

– a –

The Respondent testified that she maintained a campaign website, the allegedly offensive content of which was received as an exhibit by the hearing panel.⁴

²See *Id.*, at p. 29; (Entry, September 27, 2012, at p.1, Appx. 14).

³The Three Judge Panel of the Board of Commissioners found that the Complainant had failed to prove, by clear and convincing evidence, that the Respondent had violated Rules 4.3 (A) and (F) by appearing in judicial robes on a website maintained by the Ashtabula Republican Party. In fact, the Probable Cause Panel determined as much on August 29, 2012, finding that the Respondent did not violate the Code of Judicial Conduct by virtue of her picture appearing on that website. (Panel Findings, Conclusions and Recommendations, at 3, Appx. 17).

⁴(Tr. at 228 and Tr. Ex. 2).

The biographical sketch on that site ran to two printed pages. In one phrase, which contained a reference made in the past tense to her service on the Ohio Judicial Conference, she was called Judge O'Toole. As she explained at the hearing, that altogether accurate statement describes activities, in the past, that took place while she was a sitting judge. The biography on her website is the best evidence of how she represented herself as a candidate online. It appears as Exhibit 2 to the Hearing Transcript, and we reproduce substantial portions of it here for the convenience of the Court.

Colleen O'Toole was elected to the Eleventh District Court of Appeals in 2004. During her term she has decided over 1500 cases and has authored over 500 opinions. The Eleventh District Court of Appeals serves the counties of Lake, Geauga, Ashtabula, Portage and Trumbull. She was a member of the Ohio Judicial Conference and the Courts of Appeals Judges Association. O'Toole was active in the Ohio Judicial Conference by serving on the Community Corrections, Court Administration, Court Technology and Criminal Law & Procedure committees. In addition she served as a member of the subcommittee for Court Reporting and Transcripts. She was integral member of these committees and assisted in drafting of various recommendations that were adopted in the legislative platform of the conference. Judge O'Toole testified on the positions of the Ohio Judicial Conference before the Ohio House Criminal Justice Committee and participated in many legislative conferences advocating the position of the conference before legislators. She was a member of Library of Reasoned Orders Committee. She was appointed by the late Chief Justice Moyer as a member of Ohio Criminal Sentencing Commission and is currently serving in an advisory capacity to that commission. The commission is a bipartisan statutory advisory body charged with reviewing the criminal justice system and recommending improvements and changes to the Ohio Legislature. She participated as a member of the Criminal Law Committee for the Ohio State Bar Association. She is a graduate of the Jo Ann Davidson Leadership Institute.

* * *

Admitted to the Ohio Bar in 1991, O'Toole initially practiced law and interned in the Cuyahoga County Public Defender's Office in the major trial division. She then worked with the National Interstate Company in Cleveland as a Litigation Manager. From 1996 to 1998, she was associated with the Cleveland law firm of Kramer and Nierman, LPA and the Housing Advocates Inc. In 1998 she opened her own law firm, specializing in criminal, civil and juvenile litigation in State and Federal courts. O'Toole has extensive experience in civil, criminal, family law litigation and Appeals.

* * *

Prior to assuming the bench, she served on many political / issue campaigns. She was chairman of the Highland Heights Board of Zoning appeals. She presently [*sic*] on the advisory committee of The Western Reserve Land Conservancy. An avid Sportsman, she enjoys Angling, lives on the Grand River with her husband and three children, is a member of White Tails Unlimited, and is licensed to carry a concealed weapon. She is presently CEO of On Demand Interpretation Services llc [*sic*].

On direct examination, the Respondent testified before the Hearing Panel regarding her intent as to the quoted material, and her use of the honorific term “judge.”

Q: And it says, “She was an integral member of these committees and assisted in drafting of various recommendations that were adopted by the legislative platform of the judicial conference;” is that true?

A: Correct.

Q: Then it says, “Judge O’Toole testified on the position of the Ohio Judicial Conference before the Ohio House Criminal Justice Committee and participated in many legislative conferences advocating the position of the conference” – and I can’t make out the next word – something legislators,” correct?

A: Correct.

Q: And is that a truthful statement? Did you give that testimony?

A: Yes.

Q: And at the time that you gave that testimony, were you a judge on the Court of Appeals of Ohio, 11th Appellate District?

A: Yes.

Q: Were you intending to communicate, by that description of what you did when you were a judge, that you were currently sitting on the Court of Appeals, 11th Appellate District?

A: No.

* * *

Q: And then it says, "She is presently CEO of On Demand Interpretation Services, LLC"?

A: Correct.

Q: Now, taken as a whole, did you have any intention to try to convince somebody by putting this out that you were still serving currently as a judge on the Ohio Court of Appeals. 11th Appellate District?

A: No.⁵

In sum, the Respondent testified that items in her biography that occurred in the past were written in the past tense, those that were ongoing were in the present tense, and that her description of herself as Judge O'Toole was in reference to events that took place in the past, while she was, in fact, a judge. Significantly, she also testified that she had no intention of misleading readers of her website into thinking she was a sitting judge, a fact underscored by her candid description of her present position as the head of a translation company. Her testimony with regard to her intentions was neither countered nor undermined on cross-examination. The website was, in fact, truthful.

- b -

The Respondent also testified regarding her use of a name badge at issue in Count III of the Complaint filed by the Secretary of the Board of Commissioners. Her testimony underscores that the badge was not intended to mislead, and was never worn in isolation, as a precaution against misleading voters.

Q: The name badge – again, read it into the record what it says.

⁵(Tr., 230-33).

A: "Colleen M. O'Toole," underneath "Judge," and then underneath that, "11th District Court of Appeals."

* * *

Q: Now, when you wear the badge "Colleen M. O'Toole, Judge." what are you attempting to communicate to people?

A: Well, I mean, obviously, I'm trying to communicate that I'm running for judge and that this is my name and this is the position I'm running for.

Q. Now, if you were attempting to claim that you currently sat on the court, would that – would you word that differently?

A: Well, I would put judge to modify my name, Judge Colleen Mary O'Toole. I would put it in the campaign thing for – you know. I would have the name badge to identify me that I was sitting. I realize that there was a issue with putting the judge before because I didn't want people to think – I think some of the judges on our court have Judge Mary Jane Trapp or Judge Diane Grendell. They all put it prior to their name so it modifies Colleen Mary O'Toole.

Commissioner Davis:

Question, does a sitting judge not run to be judge?

Mr. Murray:

Sure.

Commissioner Davis:

So they run for judge?

Mr. Murray:

Yes, but I think what she's saying is they would say she was a judge already for the court of appeals.

* * *

Q: So in other words, what's significant to you is that if you were trying to communicate that you were still sitting on the bench, the badge would read Judge Mary O'Toole, Court of Appeals, 11th District.

A: Right.

Q: Whereas the way you have it worded now, you think it's trying to communicate that you are just plain old Mary O'Toole, but that's the office you're seeking?

A: This is the way it appears on the ballot, or similar to this. So it makes it clearer for people to understand, you know, just what position. I'm not running for Congress. I'm not running for something else.

And then I always wear this with it to put the "for" on there for no other reason than just to make sure that there's no ambiguity. I just didn't really want to get a whole bunch of them reprinted is basically what it comes down to. So if it's here, I figured I was in compliance with the rule as the rule stood.

Q: . . . So was it your intention, by wearing that badge and that further badge that says "O'Toole for Court of Appeals," was it your intention to communicate to people that you were actually still sitting on the bench? Was that your intention?

A: No. Clearly, it was not. And, in fact, I tell people when I meet them I'm not sitting. If they ask me, are you still there, I say, no, I'm not. If they ask me about my judicial experience, I tell them what I'm doing.⁶

In sum, the Respondent testified that she intended to deceive noone, read the badge in question to describe the position she sought, not the position she held, and took the extra precaution of wearing a second badge to make sure noone understood her to be an incumbent.

⁶(Tr., 233-36). A photograph of the name tag in question was admitted into evidence at the September 18, 2012 hearing, and appears as Exhibit 3 to the transcript thereof.

The Hearing Panel of Commissioners made much of the fact that the Respondent testified that she believes she is entitled to use the honorific title “judge” based on her prior judicial service.⁷ But a straightforward review of her testimony on that score reveals it to be both unremarkable in scope, and based upon the recent and applicable opinion of the Thirteen Judge Commission in the *O’Neill* matter, which was filed in July 2012.

We begin with the passages that were of greatest apparent concern to the Hearing Panel, taken in full context. Mr. Axelrod, counsel for the Complainant, was cross-examining the Respondent regarding her views on the *O’Neill* decision, and its significance for her.

Q: Now, you can read whatever part [of the O’Neill opinion] you think is necessary for context. I’m not trying to cut you off.

A: Okay.

Q: You said the opinion clarifies the rules for you. Would you show us the part of the opinion that clarifies the rule as opposed to merely holding it unconstitutional.

* * *

A: Okay. Let’s begin on the first section, where they say, “During the course of any campaign for nomination or election to judicial office, a judicial candidate” –

* * *

A: – “by means of campaign materials, including sample ballots, advertisements on radio, television, or newspaper, or periodical, electronic communications, a public speech, press release, or otherwise , shall not knowingly or with reckless disregard do any of the following: C, use the title of an office not currently held

⁷(Findings, Conclusions and Recommendations, October 1, 2012, at 6-7, Appx. 20-21).

by a judicial candidate in a manner that implies that the judicial candidate does not currently hold [sic] that office.” so that was the part that was found unconstitutional.

Q: I’m asking how it clarifies the rules as opposed to merely finding it unconstitutional.

* * *

A: Well, I mean, when I read it, once it was held unconstitutional, I looked at it as it was okay to do because they didn’t restrain it.

Q: So it doesn’t clarify the rule, does it?

* * *

A: It does for my application to the rule.

Q: So aside from the argument that 4(C) is unconstitutional, you have no quibble with what you said in your January 6 letter, that the rule was clear in reference to your campaign, that the use of the term would be improper? Can we agree on that?

A: Well, my understanding of the O’Neill case is it basically set aside that rule.⁸

It was after this exchange that Mr. Axelrod began his inquiry into whether the Respondent believed that, in light of *O’Neill*, it was proper for her to be called “judge,” and in which he elicited the testimony that the Hearing Panel quoted in isolation as a matter of great concern.

Q: When you said your statements were true, were you referring to your statement that you were a retired judge?

⁸(Tr., 50-52 (O’Toole, Cross)). The letter referred to, was sent by the Respondent to the Secretary of the Board of Commissioners on January 6, 2012, a requests an opinion as to when and under what circumstances it is appropriate for a former judge, who was defeated in seeking reelection, to use the terms “retired judge” or “Judge (ret.)” in personal and business affairs unrelated to the practice of law. The letter was introduced as Exhibit 6 before the Hearing Panel.

A: That I could – I could described myself the way I choose to. Specifically, I believed that I was retired. I looked up the definition of retired; and I thought that that is how it was logical to define myself, since I left the bench and I divested all of my PERS from the court. I was not intending on going back.

* * *

Q: Well, let's be clear. Do you contend that it is a true statement to describe yourself as a judge right now?

A: Yes. I am a judge, not a sitting judge. I believe I will always hold the title if I choose to. Not that I espouse it all the time or I run around telling people; but, I mean, that's the common usage. People call me judge all day long because that's how they know me or that's how they met me. Last night Judge Gwin referring [sic] to me as judge.

* * *

I use all of those things based on the situation and how the people know me or are familiar with me.⁹

– Panel Recommendations & The Five Judge Commission –

On October 1, 2012, the Hearing Panel issued its Findings and Recommendations. It found no clear and convincing evidence that the Respondent had engaged in the expression, alleged in Count I of the Complaint, that appeared on the website maintained by the Ashtabula County Republican Party.¹⁰

The Panel concluded that the Respondent's own website, however, contained misleading information as to whether she was an incumbent on the Eleventh District Court of Appeals, violating Rule 4.3(A), through the use of the phrase "she has decided over 1,500 cases and authored over 500

⁹(Tr., 54-55 (O'Toole, Cross)).

¹⁰(Findings, Conclusions and Recommendation, at ¶ 5, Appx. 18).

opinions,” and the use of the honorific “Judge O’Toole” on the site. It concluded this was misleading despite the fact that she elsewhere on the same page indicated that her term had ended.¹¹

The Panel further concluded that the Respondent also violated Rule 4.3(A) by wearing a name tag that identified her as “Colleen Mary O’Toole Judge 11th District Court of Appeals,” which she always wore in conjunction with another name tag reading “O’Toole for Judge” as a disclaimer. The Panel found that this “would deceive or mislead a reasonable person” into believing she was running as an incumbent.¹²

The Panel recommended that the Respondent be ordered to : (a) amend her website to include the dates during which she served as an appellate judge; (b) to remove from that site the references to her as Judge O’Toole; (c) cease and desist wearing the name tag at issue in Count III of the Complaint; (d) pay a fine of \$1,000.00; (e) pay the costs of the proceedings against her, and; (f) pay the attorney fees of the complainant in the amount of \$2,500.00.¹³

A Five Judge Commission was empaneled on October 3, 2012, pursuant to Ohio Gov. Jud. R. II, Section 5(D)(1), and on October 5, 2012 order the Responded to make the changes to her website and to cease and desist using the name tag described above. It also ordered her to file, with the Clerk of this Court, on or before October 9, 2012, an affidavit establishing her compliance with that Order.¹⁴

¹¹(*Id.* at ¶ 6, Appx. 18-19).

¹²(*Id.*, at ¶ 7, Appx. 19-20).

¹³(*Id.*, at ¶ 10, Appx. 22).

¹⁴(Order of October 5, 2012, Appx. 13).

The Respondent complied with that Order, and timely filed the required affidavit affirming that she had done so.¹⁵ She filed her Objections to Findings and Recommendations of the Hearing Panel on October 10, 2012.

On October 24, 2012, the Commission filed an Order adopting the findings, conclusions and recommendations of the Hearing Panel. The Commission held that the Respondent had violated Rule 4.3(A) both through the website content alleged in Count II of the Complaint, and through the use of the name tag at issue in Count III.¹⁶ The Commission rejected the argument, raised at length by the Respondent in her Objections, that Rule 4.3 violated the First and Fourteenth Amendment. In doing so, it distinguished the recent decision by the United States Supreme Court in *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2536 (2012), the decision of the Thirteen Judge Panel in *O'Neill*, and several other decisions involving the closest analogs to Rule 4.3, all of which have been invalidated in other states.

The Commission Ordered that the Respondent: (a) be publically reprimanded; (b) be fined \$1,000.00; (c) be ordered to pay \$2,500.00 toward the reasonable attorney fees and costs of the Complainant, and; (d) be ordered to pay the costs of the Commission, later calculated at \$2,530.82.¹⁷

Respondent filed this Appeal on November 15, 2012, together with a Motion to Stay the Sanctions Imposed Against Her.¹⁸

¹⁵(Affidavit of Compliance, October 9, 2012, Appx. 10-12). On October 8, 2012, the Complaint moved the Five Judge Commission to amend its Order to include additional injunctive relief against the Respondent, a motion which she opposed, and which the Commission, on October 22, 2012 overruled as seeking relief beyond the scope of its mandate. (See Order, October 22, 2012, Appx. 9).

¹⁶(Order of October 24, 2012, at 1-2, Appx. 4-5).

¹⁷(*Id.*, at 3, Appx. 6; Instructions Regarding Payment, October 24, 2012, Appx. 8).

¹⁸(Notice of Appeal, Appx. 2-3). _____

Her Motion was granted in part in an Order entered by the Chief Justice on November 15, 2012, staying the imposition of monetary sanctions against her.¹⁹ A briefing schedule was established that day. On November 30, 2012, the Parties filed a stipulation, pursuant to S. Ct. Prac. R. 14.3(B)(2)(a), permitting the Respondent to file her Merit Brief on or before December 14, 2012.

– LAW & ARGUMENT –

The Commission erred in adopting the findings, conclusions and recommendations of the Hearing Panel, and in imposing upon the Respondent the sanctions that it did, for three reasons:

1. Because, both on its face and as applied to the Respondent, Rule 4.3(A) of the Ohio Code of Judicial Conduct is unconstitutional under the First and Fourteenth Amendments, because it cannot survive either the decision of the United States Supreme Court *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which extends full First Amendment protections to the campaign speech of candidates for elected judicial office, or the more recent decision in *United States v. Alvarez*, 132 S.Ct.2537 (2012), in which that Court made clear that, with a few narrow and exceptions, the state is not free to proscribe or punish even knowingly false speech, let alone speech that is merely misleading.
2. Because even if Rule 4.3(A) is valid, the campaign speech at issue in the case could not have mislead a reasonable person into the erroneous belief that the Respondent was an incumbent judge seeking reelection, and;
3. Because even if the campaign speech at issue did violate Rule 4.3(A), the sanctions imposed upon the Respondent were unduly harsh, and incommensurate with the speech in question and unsupported by the record.

We examine the first of these reasons in Propositions of Law Nos. 1 through 5, the second in Proposition of Law No. 6 and the third in Proposition of Law No. 7, below.

¹⁹See Order, November 15, 2012.

Proposition of Law No. 1

RULE 4.3(A) OF THE OHIO CODE OF JUDICIAL CONDUCT REGULATES THE CONTENT OF POLITICAL SPEECH MADE DURING THE COURSE OF CAMPAIGNS FOR PUBLIC OFFICE, AND IS THUS SUBJECT TO STRICT SCRUTINY, NOTWITHSTANDING THE FACT THAT IT APPLIES ONLY TO THE SPEECH OF JUDICIAL CANDIDATES.

At issue in this case is the campaign speech of a candidate for public office. It has been ten years since the holding in *White* made unequivocally clear that the campaign speech of judicial candidates enjoys the fullest measure of First Amendment protection, no less than the political speech of other candidates for office. Restrictions on the campaign speech of judicial candidates tread upon expression at the very heart of what the First Amendment protects, and as such, must survive strict judicial scrutiny if they are to pass First Amendment muster.

Rule 4.3(A) fails that test, because it both prohibits, and permits the state to punish, judicial candidates for engaging in not only false speech, but **truthful** speech which either misleads, or which has the **potential** to mislead voters with respect to the credentials of a candidate, including her incumbency. The state has no compelling interest in preventing such speech.

Indeed, as recently clarified by the United States Supreme Court in *Alvarez*, 132 S.Ct. at 2544, outside a finite set of established categories – and electoral speech is not among them – the state has **no constitutionally cognizable interest** in prohibiting or punishing even false speech, much less a compelling interest in doing that, or *a fortiori*, in proscribing or punishing truthful but misleading, or potentially misleading speech. Moreover, the fact that such speech occurs in the context of an election makes it less, and not more, susceptible to regulation. And the sweeping breadth of Rule 4.3(A) means that it can in no sense be considered the least restrictive means of achieving any state interest, compelling or otherwise. It is thus unsurprising that every regulation like Rule 4.3 ever adopted has been found unconstitutional.

That includes Rule 4.3 itself, Subpart C of which was found unconstitutional as applied to another candidate for judicial office, William O’Neill, by a thirteen judge panel earlier this year. No less than Rule 4.3(C), and the Alabama, Georgia and Michigan canons invalidated before it, Rule 4.3(A) violates the First Amendment, and thus cannot provide a lawful basis for proscribing or punishing the speech at issue here.

Rule 4.3 of the Ohio Code of Judicial Conduct provides, in relevant part:

During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:

- A. Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person

OHIO CODE JUD. COND. 4.3(A)(WEST 2012).

The precise prohibitions of the Rule bear careful explication at the outset, because its defenders have sought to shield it from the First Amendment with claims that its focus is narrow, and confined to speech that is unworthy of protection. Plainly, Rule 4.3(A) prohibits false speech, made knowingly, or with a reckless disregard for its falsity.²⁰

But just as plainly, it prohibits more than falsehoods, including speech which “if true . . . would be deceiving or misleading to a reasonable person”

²⁰We will consider – later and in depth – the function and effect of the familiar “actual malice” language used by the rule. We will demonstrate that language, which was borrowed from the early constitutional defamation cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), does not, in light of the most recent United States Supreme Court holdings, insulate Rule 4.3(A) from constructional infirmity, nor does any scienter requirement in the rule create the sort of “breathing space” that the First Amendment requires of restrictions on political expression.

As we shall see, while the later may be a more egregious violation of the First Amendment, even the former is not permissible, both because the state may not filter the information that voters receive even from candidates for judicial office, and because there is no constitutionally cognizable state interest in preventing the dissemination of even known falsehoods in the context of a political campaign.

The United States Supreme Court has long cautioned that “broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP v. Button*, 371 U.S. 415, 438 (1963) (internal citations omitted). Nowhere is this more important than in the context of political expression.

We must be especially vigilant when, as in this case, the challenged laws implicate ‘an area of the most fundamental First Amendment activities’ — discourse about the merits of political candidates and public issues. Our nation has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” This is because, as Justice Holmes so eloquently explained, “the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”

Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 313 (6th Cir. 1998)(quoting, seriatim: *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)). Thus:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218 (1966).

While the State may have an interest in assuring the integrity of the electoral process, it cannot protect that interest by silencing candidates for office:

The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:

The candidate, no less than any other person, has a 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. Indeed, 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 qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," applies with special force to candidates for public office.

When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

Brown v. Hartlage, 456 U.S. 45, 53-54 (1982)(quoting *Buckley* 424 U.S. at 52-53 (in turn quoting *Whitney v. California*, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring)).

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'

McIntyre v. Ohio Elections Comm., 514 U.S. 344, 346 (1995) (quoting *Buckley*, 424 U.S. at 14-15 (in turn quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)(alteration by the *Buckley* Court)).

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court "changed the landscape for judicial ethics, at least with respect to political campaigns," when it 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. *Griffen v. Arkansas Judicial Discipline and Disability Commission*, 130 S.W.2d 524 (Ark. 2003).

The canon at issue prohibited a candidate for judge from announcing his or her views on disputed legal or political issues. *White*, 536 U.S. at 768.

The Court held that “the announce rule” unconstitutionally restricted speech on the basis of its content, and imposed a burden on political expression that was properly subject to, but could not survive, strict scrutiny; that is, the requirement that the state demonstrate that the rule was the least restrictive means to serve a compelling governmental interest. *Id.* at 775 (citation omitted).

Two interests were asserted by the state in defense of its rule: (1) maintaining the impartiality of the judiciary, and; (2) preserving the appearance of an impartial judiciary.

Minnesota claimed that the former interest was compelling because it protected the due process rights of litigants, while the latter interest was compelling because it preserved public confidence in the judiciary. *Id.* at 775. The Court rejected both claims.

Specifically, to the extent “impartiality” meant the lack of bias for or against a party, the Court held the rule was “barely tailored” to suit either asserted interest because it was not limited to speech relating for or against particular parties— it operated as a categorical ban on speech about issues. *Id.* at 776. The Court in *White* also rejected a third possible notion of the sort of impartiality ostensibly served by the announce rule: the lack of an ideological predisposition. *White*, 536 U.S. at 778. Indeed, the Court was skeptical that this could have been the genuine motivation behind the announce rule at all:

Statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible.

Id. at 779. Implausible or not, the Court refused to let Minnesota justify its restriction on such a basis in any event, because it served not even the asserted interest:

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

White, 536 U.S. at 779-80 (citing: *Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989)(parentheticals by the Court omitted)).

The Court also rejected the notion that the restrictions on judicial campaign speech were permissible because a distinction could be drawn between elected judges and elected legislators, sufficient to justify prohibiting the former from speaking out on issues:

This complete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system.

White, 536 U.S. at 784. Writing for the majority, Justice Scalia emphasized that it is precisely their power to shape law that led to the popular elections of American judges to begin with;

Not only do state-court judges possess the power to ‘make common law, but they have the immense power to shape the States’ constitutions as well. Which is precisely why the election of state judges became popular.

Id. at 784 (citation and footnote omitted).

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 other such restrictions.

Rule 4.3(A) is plainly a content-based restriction on speech. What speech is allowed or proscribed is determined under the rules by reference to what the speaker said or intends to say: whether speech is “false,” “deceiving” or “misleading” to a “reasonable person” are matters which can only be determined by reference to the content of the speech at issue.

A long line of United States Supreme Court precedent makes clear that law which purport to restrict the content of protected speech are presumptively invalid, and pass First Amendment muster only if they satisfy strict judicial scrutiny: that is, only when they are both necessary to serve a compelling governmental interest, and present 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)).

Strict scrutiny requires both that the regulation in question be adopted in support of a compelling governmental interest, and that it accomplishes that interest in the way that imposes the least possible restriction on protected expression. *Playboy Entertainment*, 529 U.S. at 813 (citing *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)).

On its face, Rules 4.3(A) purports to prohibit certain sorts of statements. Strict scrutiny applies, and under strict scrutiny, the contested rule cannot survive.

Proposition of Law No. 2

RULE 4.3(A) OF THE OHIO CODE OF JUDICIAL CONDUCT FAILS STRICT SCRUTINY, BECAUSE THE STATE HAS NEITHER A COMPELLING NOR A CONSTITUTIONALLY COGNIZABLE INTEREST IN PROSCRIBING OR PUNISHING THE DISSEMINATION OF EVEN FALSE, MUCH LESS TRUTHFUL AND MISLEADING, OR TRUTHFUL AND POTENTIALLY MISLEADING POLITICAL SPEECH BY CANDIDATES TO VOTERS, AND THE BROAD PROSCRIPTIONS OF RULE 4.3(A) ARE NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING ANY STATE INTEREST.

The stated public-policy purpose for Rule 4.3 is set forth in the 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). This Court has interpreted these provisions very broadly, and only last week, in *Re Judicial Campaign Complaint Against Moll*, No. 2012-1186, slip op. 2012-Ohio-5674 (Ohio S.Ct. Dec. 6, 2012), affirmed that a “judicial candidate acts ‘knowingly’ if the result is probable, and the candidate acts ‘recklessly’ if the result is possible and the candidate chooses to ignore the risk.” *Id.*, slip op at ¶ 11. From a First Amendment perspective, this breadth is remarkable: it allows a candidate for public office to be punished for uttering statements that might “possibly” mislead voters.

This alone renders Rule 4.3(A) unconstitutional, under the First Amendment, on several levels: because it serves neither a compelling, nor even a constitutionally cognizable state interest, nor is the least restrictive means of doing so; because it is overbroad, and; because it is vague. The absence of a constitutionally valid state interest is underscored by the holding, just last term, in *Alvarez*.

In that case, the Court struck down the Stolen Valor Act, 18 U.S.C. § 704, which prohibited persons from knowingly wearing military decorations they had not earned.

Alvarez falsely claimed to have been awarded the Congressional Medal of Honor. In invalidating the Act, and his conviction, the Supreme Court rejected the contention, by the government, that his false statements of fact enjoyed no protection under the First Amendment. *Alvarez*, 132 S.Ct. at 2548.

Significantly, the Court found the contention that false speech may be proscribed merely because it is false to ignore basic limitations on the government's power to restrict whole categories of speech through the use of content-based regulations.

Ten years earlier, when concurring in *White*, Justice Kennedy observed that the use of such regulations is confined to a few, narrow and historically well-defined categories of speech, and that judicial campaign speech is not – and has never been – among them.

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. “Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State’s argument that the statute should be upheld.” The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

White, 536 U.S. at 793 (Kennedy, J., concurring)(quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991)(Kennedy, J., concurring in the judgment)).

Writing for the *Alvarez* plurality, Justice Kennedy observed that the Stolen Valor Act could not be justified through the invocation of the argument that false statements necessarily lack redeeming social value, or that it is in the best interest of society to proscribe or punish them.

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.”

Alvarez, 132 S.Ct. at 2544 (quoting *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010)).

Instead, content-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.”

Id., at 2544 (quoting *Stevens*, 130 S.Ct., at 1584 (in turn quoting *Simon & Schuster*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)). Those restrictions are well-known – and for our purposes it bears emphasis, do not include judicial campaign speech, a fact observed by Justice Kennedy in *White*.

Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.

Id., at 2544 (citing, *e.g.*, and seriatim: *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(per curiam); *Miller v. California*, 413 U.S. 15 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *New York v. Ferber*, 458 U.S. 747 (1982); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Watts v. United States*, 394 U.S. 705 (1969)(per curiam); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971)(per curiam)(parallel citations and parenthetical as to *Sullivan* and *Gertz* omitted).

These few exceptions recognize that erroneous statements are part of a public commitment to robust debate, and that the best corrective for errors lies in the marketplace of ideas.

These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that 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 (citing *Sullivan*, 376 U.S. at 271).

Because even false statements made in the course of a campaign for judicial office do not fall within the historically defined exceptions listed in *Alvarez*, they cannot, as a matter of First Amendment law, be categorically banned as they are by Rule 4.3(A).

And if false statements cannot be proscribed or punished, then *a fortiori*, truthful but misleading, and truthful but potentially misleading, and certainly truthful but **possibly** misleading statements – which this Court has held Rule 4.3(A) to prohibit – cannot be proscribed or punished, consistent with the First Amendment, not only because the state has no compelling interest in their suppression, but because a rule which reaches even **possibly** misleading speech is not the least restrictive means of achieving any legitimate governmental interest, and indeed, is not even narrowly tailored to do so. The holding in *Alvarez* did not involve political speech, but rather a form of expression far less central to our democratic discourse, and far less deserving of First Amendment protection. *Alvarez* reaffirms two of the core truths behind our national commitment to free expression: that the best test of truth is its ability to thrive in the marketplace of ideas, and that the remedy for bad speech is more speech.

The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

* * *

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. 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,” The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so.

Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Alvarez, 132 S.Ct. at 2250 (citing *Whitney v. California*, 274 U.S. 357, 377(1927)(Brandeis, J., concurring) and quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)).

The fundamental rationale of *Alvarez* – that political speech requires breathing room, and that the best cure for misstatements by candidates is the corrective power of free expression, and not the oversight of a government censor – has long held sway where the First Amendment meets restrictions on electoral speech, including the electoral speech of judicial candidates.

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. Hartledge, 456 U.S. 45, 62 (1982)(citations omitted).

In *Brown*, the Court considered a combination of Kentucky laws which effectively prohibited candidates for public office from falsely promising to serve at a reduced salary, of pain of electoral forfeiture.

The Kentucky Corrupt Practices Act, Ky. Rev. Stat. 122.055 (1982), prohibited candidates for office from offering voters anything of value in exchange for their votes.

Brown ran for county commissioner, and as a candidate vowed to serve at a reduced salary, passing the savings along to the county if elected. *Brown*, 456 U.S. at 48.

Brown later rescinded his pledge, and was thereafter elected. Hartlage, his opponent, sued, seeking to have the election result voided under the Corrupt Practice Act. *Brown*, 456 U.S. at 49.

Years earlier, the Kentucky Court of Appeals had held that a candidate who promised to serve for nominal compensation, and distribute the remainder of his salary to charity, thereby violated that act. A trial court found that Brown had violated the Act in making his pledge, but that his later retraction, and subsequent election, cured the defect.

The Kentucky Court of Appeals reversed in part, holding that the trial court had erred in not ordering a new election. *Id.*, at 50-51. In doing so, it rejected the argument that Brown's pledge was protected by the First Amendment, holding that to accept that argument would be to open the door to all manner of unlawful solicitations and utterances in the name of free expression.

The Court of Appeals denied reconsideration, and in doing so found that the state had a compelling interest in the fairness and integrity of its elections, which was served by the contested application of the act. The Kentucky Supreme Court then denied review. *Id.*, at 51-52.

The United States Supreme Court reversed. In doing so, it recognized the need to balance electoral integrity with the supervening values that undergird the First Amendment.

Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

Id., at 52. Those limits turn on the notion that a public discussion of candidates and issues is to remain relatively unfettered. The Court found that Kentucky's legislative reach exceeded its constitutional grasp when it made even innocent false statements a basis for electoral forfeiture.

The Commonwealth of Kentucky has provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary. As the Kentucky courts have made clear in this case, a candidate's liability under § 121.055 for such an error is absolute: His election victory must be voided even if the offending statement was made in good faith and was quickly repudiated. The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.

* * *

Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. 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."

Id. at 62 (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971), and quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

Brown is just one in a line of United States Supreme Court cases that has rejected the notion that the state has a paternalistic interest in controlling the information which candidates disseminate to voters in the interest of ensuring that the electorate is not somehow misled.

In *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214 (1989), for example, the Court invalidated a California statute that prohibited political parties from endorsing candidates in their own primary elections. The Court applied strict scrutiny, observing that such a "highly paternalistic approach' limiting what people may hear is generally suspect." *Eu*, 489 U.S. at 223 (quoting *Va. State Bd. of Pharmacy v. Va. Cit. Consumers Council, Inc.*, 425 U.S. 748, 770 (1976)).

California argued that its prohibition on primary endorsements was necessary, inter alia, to “protect voters from confusion and undue influence.” *Eu*, 489 U.S. at 226. While the Court allowed that the state has a “*legitimate* interest in fostering an informed electorate,” *Id.*, at 228 (emphasis added), it did so on the way to deciding that the interest asserted by the state was not sufficiently *compelling* to survive strict scrutiny, and that in any event, an informed electorate cannot be fostered by selectively editing the information to which voters are exposed. “A state’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.” *Eu*, 489 U.S. at 228 (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 221 (1986)).

The Court firmly rejected this sort of censorial paternalism with respect to judicial elections as well, in *White*, in which Justice Scalia, in the course of rejecting a supposed state-interest in impartiality-qua-the-appearance-of-open-mindedness, wrote:

Moreover, the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. “[D]ebate on the qualifications of candidates” is “at the core of our electoral process and of the First Amendment freedoms,” not at the edges.(internal quotation marks omitted). “The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” “It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.” We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

White, 536 U.S. at 781-82 (quoting, seriatim: *Eu*, 489 U.S., at 222–223, *Wood v. Georgia*, 370 U.S. 375, 395 (1962); *Brown*, 456 U.S., at 60 (internal quotation marks omitted by the Court)).

Justice Kennedy, concurring in *White*, even more clearly rejected such paternalism.

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It 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 as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.

* * *

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

White, 536 U.S. 794-95 (Kennedy, J., concurring)(citing *Brown*, 456 U.S. at 60)).

At least three states, beside Ohio, have adopted judicial canons similar to Rule 4.3(A), that prohibited misleading statements by judicial candidates. All have been held unconstitutional under the First Amendment, as paternalistic restraints on what the electorate may hear.

In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the United States Court of Appeals considered the constitutionality of Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct, which provided that candidates for judicial office:

shall not use or participate in the use of 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 or which is likely to create an unjustified expectation about results the candidate can achieve.

Weaver, 309 F.3d at 1315 (quoting Ga. Code Jud. Cond. Canon 7(B)(1)).

Weaver, an unsuccessful candidate for the Georgia Supreme Court, published a brochure which characterized his opponent as a supporter of same-sex marriage, an opponent of the death penalty and a foe of traditional moral standards. *Id.*, at 1316.

The Georgia Committee on Judicial Qualifications received a complaint, reviewed the brochure, and finding that it probably violated the contested canon, issued a private cease-and-desist order to Weaver, who then repeated similar allegations in a second brochure. The committee thereafter issued a public statement, accusing Weaver of both violating its order and of engaging in unethical, unfair, false and deceptive campaign practices. Weaver sued in district court, alleging that the canon abridged his rights as a candidate, under the First Amendment. *Id.*, at 1316-17. The district court found the Canon unconstitutional because it chilled core political speech and violated the overbreadth doctrine, by prohibiting false statements of fact made without knowledge or reckless disregard of their falsity. *Id.*, at 1318.

The Eleventh Circuit affirmed, expressly addressing the question of what degree of First Amendment protection attends misleading statements made in the course of a judicial election.

It is true that false statements are not entitled to the same level of First Amendment protection as truthful statements. Moreover, false statements made by candidates during political campaigns “may have serious adverse consequences for the public at large.” Nevertheless, “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”

Id., at 1319 (quoting *Brown*, 456 U.S. at 60-61)(in turn quoting *Sullivan*, 376 U.S. at 271-72 (and in its turn quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

“The chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.” Therefore, to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the

statement is false—i.e., an actual malice standard Restrictions on negligently made false statements are not narrowly tailored under this standard and consequently violate the First Amendment.

Id., at 1319-20 (quoting *Brown*, 456 U.S. at 61-62). In this light, the Eleventh Circuit held:

On its face, Canon 7(B)(1)(d) has the effect of chilling even more core political speech than the statute that was held unconstitutional in *Brown*. 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.

Id., at 1320 (emphasis added).

Here, it bears emphasis that Georgia Canon 7(B)(1)(d) was invalidated under intermediate scrutiny, as evidenced by the invocation, by the Eleventh Circuit, of the need for narrow tailoring.

Similar prohibitions against misleading statements made in the course of judicial campaigns have been invalidated as well, and on the same basis. In *Butler v. Alabama Judicial 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, which forbade judicial 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)).

An associate justice of the Alabama Supreme Court, an appellate judge and a voter challenged the canon on First and Fourteenth Amendment grounds, alleging it was overbroad on its face, unconstitutionally vague, and chilled candidates for judicial office from engaging in a full and frank discussion of their opponents. *Id.* at 1227.

The district court found their contest likely to succeed upon its constitutional merits. Applying strict scrutiny, and finding that the state had a compelling interest in preserving the integrity of the judiciary, the court none-the-less found the canon was not narrowly tailored to achieve its stated purpose:

The court finds that the breadth of the language used in the latter part of Canon 7B(2) raises concerns as to the constitutionality of Canon 7B(2). Specifically, the court is referring to Canon 7B(2)'s prohibition on the dissemination of "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person." See Alabama Canons of Judicial Ethics Canon 7B(2).

* * *

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 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.2d at 1232, 1235. The same lack of narrow tailoring mars Rule 4.3(A).

The *Butler* court drew heavily upon a Michigan decision, *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. The Michigan canon provided that a candidate for judicial office:

should not use or participate in the use of any form of public communication that 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 statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

Chmura, 608 N.W.2d at 36 (quoting MICH. CODE JUD. COND., CANON 7(B)(1)(D)). It reasoned:

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. The same logic applies here.

The Sixth Circuit in *Briggs v. Ohio Elections Commission*, 61 F.3d 487, 494 (6th Cir. 1994), invalidated an Ohio election law designed to prevent candidates from misleading voters regarding their incumbency and their credentials, albeit in non-judicial races. Revised Code § 3599.091(B)(1), which has since been repealed, forbade candidates to:

Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term “re-elect” when the candidate has never been elected at a primary, general, or special election to the office for which he is a candidate[.]

Briggs, 61 F.3d at 489 (citing former Revised Code Ann. § 3599.091(B)(1)).

Briggs, a candidate for state representative, produced a billboard which read: “Lou Briggs. State Representative. Strong New Leadership.” Her opponent filed a complaint with the Ohio Elections Commission, charging that the billboard violated the statute because it implied that she was already a state representative, and not merely seeking that office. *Id.*, at 489. The Commission found her guilty of violating the statute, because the billboard did not say “Briggs **for** State Representative,” and while it imposed no fine, the tribunal warned that Briggs’ misconduct would be considered against her if she were to appear before it again. *Id.*, at 490.

Briggs sued, alleging the statute violated the First Amendment on its face and as applied to her. On appeal, the Sixth Circuit held that the statute violated the First Amendment as applied, because it punished Briggs on the theory that her advertisement had the **potential** to mislead voters:

The district court incorrectly concluded that the Commission could “play the neutral role of policing the information put forth by political candidates so that their campaign materials meet certain minimum standards.” In this context, unless campaign speech is false, and made knowing of the falsehood or in reckless disregard for the truth, that speech is protected by the First Amendment, and the state must demonstrate a compelling interest to justify “policing the information.”

* * *

Section 3599.091(B)(1) regulates speech based upon its implication, so it reaches more speech than that declared unprotected in *Garrison*. As applied to Briggs, the statute proscribed a campaign billboard that is subject to different interpretations. Briggs’s billboard is not so much false as it is ambiguous. Therefore, at the very least, Briggs stated a valid claim that the statute as applied to her situation reached speech protected by the First Amendment.

Id. at 494 (citing: *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Burson v. Freeman*, 504 U.S. 191, 198-99 (plurality) and 213 (Kennedy, J., concurring)(1992); *Eu*, 489 at 225 (1989); *Mills*, 384 U.S. at 219-20). While a non-judicial election case – which, after *White*, scarcely matters, – the analogy here is apt. Like Rule 4.3(A) the statute invalidated in *Briggs* prohibited misleading political speech invalidated under the First Amendment for that reason.

The decisions just discussed – *Weaver*, *Butler* and *Chmura* – invalidated canons of judicial conduct that allowed a candidate to be sanctioned for making statements that – while not knowingly false – had the potential to mislead voters as to her qualifications for office.

When *Butler* was decided, only four states had such prohibitions: Alabama, Georgia, Michigan and Ohio. *Butler*, 111 F.Supp.2d at 1234, n.2. The Alabama, Georgia and Michigan rules were invalidated by the cases just discussed.

The fourth such regulation, and the only one remaining, is the Ohio provisions contained in Rule 4.3. It too has been declared invalid, in part, under the First Amendment; by a panel of thirteen appellate judges reviewing a decision of the Board of Commissioners, as recently as July 2012.

In *O'Neill*, a panel majority held that William O'Neill, a retired member of the Eleventh District Court of Appeals, could not be found to have violated Rule 4.3(C) by using the phrase “judge” in campaign materials produced in connection with his campaign for Associate Justice of the Ohio Supreme Court. In the leaflet in question, O'Neill described himself once as a “former judge,” and went on to use the phrase “Judge O'Neill,” without further qualification, seven times. Carlos Crawford, a law student, alleged that the materials were misleading. Responding, O'Neill argued that the prohibitions against the use of the term “judge” in Rule 4.3(C) were unconstitutional. The *O'Neill* panel majority recognized that, in light of *Alvarez*, the prohibitions on misleading campaign statements contained in Rule 4.3(C) cannot stand.

Canon 4.3 in many sections prohibits making false statements which would place it within a very broad interpretation of the *Alvarez* decision. As noted in *Alvarez* at *12, the “remedy for speech that is false is speech that is true.” As respondent notes, the hearing panel’s decision concedes that respondent is a judge, albeit a retired judge. Respondent argues with this accepted fact, the brochure is not false, but misleading. Although we might agree the brochure is not in toto false but misleading, the challenged rule does not address misleading speech, only the use of a judicial position that the candidate currently does not have.

* * *

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.

O'Neill, slip. op. at *2-3.²¹

Proposition of Law No. 3

AN OTHERWISE UNCONSTITUTIONAL RESTRICTION ON THE POLITICAL OF CANDIDATES FOR PUBLIC OFFICE CANNOT BE SAVED FROM INVALIDATION THROUGH THE INCORPORATION OF A PROVISION LIMITING ITS APPLICATION TO CASES OF KNOWN FALSEHOOD OR RECKLESS DISREGARD FOR THE TRUTH.

Defenders of Rule 4.3(A) may claim – as they have in other contexts – that the Rule can be distinguished from the judicial canons invalidated in *Butler*, *Chmura* and *Weaver* because it imposes a sort of scienter requirement, and proscribes only the publication of false or misleading information in circumstances where a judicial candidate knows "the information to be false or with a reckless disregard of whether or not it was false" or, if true, misleading. OHIO R. JUD. COND. 4.3(A).

It is true that in each of those cases, the court invalidating the subject rule noted that even statements made in good faith, with out knowledge of their falsity, could form the basis for liability.²²

In considering this claim, it bears repetition that the scienter requirement in Rule 4.3(A) is, in light of *Moll*, vanishingly thin.

²¹Seven appellate judges subscribed to this opinion. The remaining six did not take a contrary position on the merits, but rather found only that the First Amendment question presented to them had not been properly preserved for appeal.

²²*See, e.g.: Weaver*, 309 F.3d at 1319-20 (finding that a judicial canon that did not impose a knowing or reckless requirement on liability for false statements failed narrow tailoring under intermediate scrutiny); *Butler*, 111 F.Supp.2d at 1235 (applying strict scrutiny and noting, but not conditioning its holding upon the lack of an element regarding the intent of the candidate as to the publication of false or misleading information); *Chmura*, 608 N.W.2d at 43 (imposing a saving construction narrowing the contested canon to cases in which a candidate engages in false statements knowingly or with a reckless disregard for their truth).

A judicial candidate can run afoul of the Rule through the use of campaign materials that might “possibly” mislead voters. But a more robust scienter requirement would not save the Rule.

The fact that the lack of a scienter requirement is a **sufficient** reason to invalidate such a canon on First Amendment grounds emphatically does not make the lack of a scienter requirement a **necessary** prerequisite to finding such a rule unconstitutional.

Put another way, the inclusion of the “actual malice” language that prohibits only knowing and reckless violations of Rule 4.3(A) does **not** create a safe harbor for what is otherwise an unconstitutional restriction on core political speech.

It would make little sense, from a logical perspective, to say that the government has no compelling interest in prohibiting “x,” and thus cannot, consistent with the First Amendment prohibit “x,” unless “x” is done knowingly or recklessly.

The lack of a compelling state interest in restricting the information made available by candidates, to voters, ends the constitutional inquiry. The state of mind of the speaker when information at issue is disclosed is of no constitutional moment.

The Court in *Alvarez* considered and rejected precisely the argument we are now considering.

After cataloguing the historical exceptions to the general prohibition on content-based restrictions on speech, Justice Kennedy noted that even in cases where falsehood is at issue, the Court has often required more than mere falsehood before putting a certain sort of speech beyond the pale of First Amendment protection.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.

Alvarez, 132 S.Ct. at 2545.

That said, the fact the Court has required a sort of scienter in some cases does **not** mean that the imposition of a scienter requirement creates a safe harbor, that permits the government to ban statements simply because they are false. As noted in *Alvarez*, 132 S.Ct. at 2545:

The Government thus seeks to use this principle for a new purpose. It 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.

Because, Rule 4.3(A) represents a categorical, and content based restriction on false speech, and beyond that, on speech which is true, but misleading, it cannot be saved because it applies only to knowing and reckless violations, especially in light of how easily such culpability can be established after *Moll*.

Proposition of Law No. 4

RULE 4.3(A) VIOLATES THE FIRST AMENDMENT AS APPLIED TO THE RESPONDENT.

As demonstrated below, the Respondent has been punished for core political speech that was not false, and cannot even be considered misleading as to a reasonable person. To the extent that Rule 4.3(A) has been enforced against the statements detailed in Counts II and III of the Complaint against her, the Rule also violates the First Amendment as applied.

Proposition of Law No. 5

RULE 4.3(A) IS OVERBROAD AND VAGUE, AND THUS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

Both on its face and as construed by this Court in *Moll*, Rule 4.3(A) sweeps within its ambit a host of protected expression.

The measure of overbreadth is a comparison between the plainly legitimate sweep of a statute and the collateral damage done to protected expression which is chilled by its application. *Watchtower Bible & Tract Soc. v. Village of Stratton*, 536 U.S. 160, 165 (2002).

A regulation on speech will be declared unconstitutional on its face if its sweep is unnecessarily broad and if it threatens to ensnare either constitutionally protected activity or otherwise legitimate and innocent conduct. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Here, Rule 4.3(A) sweeps within its reach not only false speech, but truthful speech which has the potential to mislead, or might **possibly** mislead voters. Indeed, not only electors, but all “persons” must be considered before a candidate speaks. Thus, the law prohibits and permits judicial candidates to be punished for uttering statements that could “possibly” mislead anyone, from the least informed voter, to the most apathetic non-voter who will never act on the information in question, from children, to non-citizens to those living outside the state. Its reach is endless.

For the same reasons, Rule 4.3(A) is hopelessly vague. It has long been established that a law is unconstitutional if its provisions are so vague or imprecise that persons of ordinary intelligence must guess at its meaning and may differ in their understanding as to its application. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

It is impossible for a candidate to ascertain whether a statement is probably, potentially or even possibly misleading, given that the statements of candidates have the capacity to reach tens of thousands of people, each with his or her own level of knowledge, information, intelligence, and concern or apathy about a given judicial race. What may mislead one person of ordinary intelligence might not mislead another, who comes to the election better informed if equally bright.

The result of such a rule is to require candidates to speak in only the most literal and specific statements, and to summarize, characterize and generalize about their experience and qualifications at their own peril.

Proposition of Law No. 6

JUDICIAL CAMPAIGN MATERIALS WHICH, TAKEN AS A WHOLE CANDIDLY AND FACIALLY RECITE THE PRESENT OCCUPATION OF A CANDIDATE FOR JUDICIAL OFFICE, OR USE THE PHRASE JUDGE IN AT MOST AN AMBIGUOUS FASHION, TO IDENTIFY THE OFFICE WHICH THE CANDIDATE IS SEEKING, DO NOT WITHOUT MORE CONSTITUTE THE SORT OF KNOWING FALSEHOOD OR RECKLESS DISREGARD FOR MISLEADING VOTERS THAT RISE TO A VIOLATION OF RULE 4.3(A) OF THE OHIO CODE OF JUDICIAL CONDUCT.

Were the Court to conclude that Rule 4.3(A) is constitutional, it should none-the-less reject the conclusions of the Hearing Panel and the Commission for the simple reason that the information in question was not false, was not published with either knowledge of or reckless disregard as to its falsity, and on the facts of this case, no reasonable person could have been misled into believing that the Respondent was a sitting judge by the campaign materials identified in Counts II and III of the Complaint against her. Again, Rule 4.3(A) forbids a judicial candidate to:

Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be **false** or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a **reasonable** person

.....

OHIO R. JUD. COND. 4.3(A)(WEST 2012)(emphases added).

There is no evidence in the record that the Respondent knowingly published false information regarding her incumbency, or disseminated the campaign materials at issue in this case with a reckless disregard as to their falsity. The is true not least because the materials were not false, but, read in the entirety and taken as a whole were true.

On her website, the Respondent identified herself with the honorific title “Judge” only in the context of describing past activities that she had undertaken while she was a sitting judge, that is, legislative testimony she undertook on behalf of the Ohio Judicial Conference. The same short biographical sketch that forms the basis for Count II contains dozens of facts about the Respondent, including that she “is presently CEO of On Demand Interpretation Services,” as clear a statement as any that she was not, at the time the website was published, a sitting judge, but rather engaged in a private commercial enterprise.²³ Moreover, everything about her status and activities as a member of the Ohio Judicial Conference in that biography appeared in the past tense:

She was a member of the Ohio Judicial Conference and the Court of Appeals Judges Association. O’Toole was active in the Ohio Judicial Conference . . . She was [an] integral member of these committees and assisted in drafting various recommendations that were adopted in the legislative platform of the conference.

Only after this introduction, which places all these events squarely in the past, do we read:

Judge O’Toole testified on the positions of the Ohio Judicial Conference before the Ohio House Criminal Justice Committee and participated in many legislative conferences advocating the conference before legislators.²⁴

Here, and only here, does the biography call the Respondent a Judge. It does so in the unambiguous context of describing her activities in the past, activities she undertook as a judge.

In no sense can this be called false. It is no more false than respectfully referring to a man who died nearly fifty years ago as President Kennedy, or, if describing his activities in the late 1950s, as Senator Kennedy. John Kennedy is neither the president nor a senator. But he was once, and to use those titles in describing his activities in the days **when** he was is not false, but a matter of courtesy and common usage.

²³(Tr., 230-33 and Tr. Ex 2).

²⁴*Id.*

We routinely use titles of those no longer in office to place their acts in historical context. We speak of General Eisenhower or President Eisenhower, King Edward VIII or the Duke of Windsor, Mrs. Clinton, Senator Clinton, or Secretary Clinton, all depending on the dated context of the story we are telling.

Implicit in the use of Judge O'Toole in this context is the same common idiom: "what we are writing about here are things she did in the past, back when she was a judge."

Not only is this not false, taken the overall context of the website, it cannot be called misleading. The reader of that site has all the information necessary to draw an accurate and unambiguous conclusion regarding the Respondent, and her present occupation. She was once a judge. She was elected in 2004. She performed many functions as a judge. She is presently the CEO of an interpreting company.

This cannot be called misleading if we credit the "reasonable person" with a minimum of insight and awareness. How can it be said that a reasonable person could be misled regarding the Respondent's incumbency, when her present job is printed there for the reader to see?

What assumptions does this make about the "reasonable person?" That she does not read to the end of the page? That she reads only a select line in the middle of a long block of text, and reads it in isolation, so as to draw from it the inference – which can be taken only in isolation – that the Respondent is an incumbent? That she does not know that one cannot be both a sitting judge and the CEO of a private business at the same time? That she is unfamiliar with the use of past titles to describe past activities? It is a legal commonplace, that the "reasonable person" is presumed to be endowed with "ordinary intelligence." And yet it would take a person of less-than-average intellect, or a careless one beset with selective inattention, to be misled by the material described above.

This is no less true of the name badge which occasioned the allegations set forth in Count III of the Complaint. That badge read “Colleen Mary O’Toole Judge Eleventh District Court of Appeals.” The Respondent testified that she understood that name tag to announce her name and the office for which she was running.²⁵

In is true that might have been more clear if the badge had read, “O’Toole **for** Judge.” But in no sense can the elision of the word “for” from the offending name tag be called false. Indeed, it was precisely that elision – of Briggs **for** State Representative – that the Sixth Circuit in *Briggs*, 61 F.3d at 494, held to be “not so much false as it is ambiguous.”

But an ambiguous statement, “capable of being understood in two or more possible senses or ways,” is not inherently a misleading statement, which misleads, or “lead[s] in a wrong direction or into a mistaken action or belief often by deliberate deceit.”²⁶

And there is absolutely no evidence in the record that the Respondent intended or used the name tag in question to deceive.

The use of a very similar badge was at issue in *Re Judicial Campaign Complaint Against Roberts*, 81 Ohio Misc.2d 59 (Five Judge Commission, 1996), in which the Respondent, not an incumbent, wore campaign button that read, in its entirety, “For Court of Appeals Judge Roberts.”

The use of the button in that case, while “potentially misleading,” was held not to violate the provisions former Canons 7(D)(1) and 7(E)(1), which, respectively, prohibited the use of a title not held by a candidate, and misrepresentations regarding the candidate’s qualifications.

²⁵Tr. 233-36.

²⁶Webster’s Ninth New Collegiate Dictionary (1988 ed.) at 77 (“ambiguous,” second definition), 759 (“mislead,” first definition).

Thus, the Commission found insufficient evidence in the record of an intent to deceive. *Roberts*, 81 Ohio Misc.2d at 61.

Here, the Respondent testified before the hearing that she never wore the offending name tag except with another paper badge, that she felt clarified that she was merely a candidate for judge. On meeting potential voters, the only ones close enough to be misled by the badge, she was careful to make sure any who asked understood that she was not an incumbent.²⁷ On these facts it cannot be said that the Respondent, through use of the name tag, disseminated false information, or knowingly misled anyone. At worst, she wore a name tag with an implicit elision, which she understood, and intended others to understand meant “[Vote] O’Toole [for] Judge.”

Such punchy, telegraphic phraseology is a staple of campaign signs, buttons and short advertisements of all sorts. Confronted with a sign reading “Jones - Dog Catcher” during election season, it is no more natural to infer that Jones is the Dog Catcher than that he would like to be, and would appreciate your vote to get him there.

A natural, plausible and familiar reading of the name tag at issue would convey to a person of reasonable intelligence – one accustomed to the argot of campaign signs and buttons – that O’Toole wanted to be a Judge on the Eleventh District Court of Appeals, and nothing more.

²⁷Tr. 233-36.

Proposition of Law No. 7

THE IMPOSITION OF SANCTIONS UNDER RULE 4.3(A) OF THE OHIO CODE OF JUDICIAL CONDUCT SHOULD BE COMMENSURATE WITH THE CHARACTER OF THE CAMPAIGN MATERIALS AT ISSUE, AND MATERIALS WHICH MERELY CREATE THE POSSIBILITY FOR CONFUSION OR AMBIGUITY AS TO THE INCUMBENCY OF A CANDIDATE, WHILE SANCTIONABLE, DO NOT SUPPORT THE IMPOSITION OF ONEROUS PENALTIES.

The sanctions recommended by the Hearing panel, and adopted by the Commission, are remarkable for their severity given the factual basis behind them.

For publishing a biographical sketch a few words of which might be called ambiguous, and using a name tag with a phrase the Sixth Circuit found ambiguous, but not misleading, the Respondent has been exposed to public reprimand, and fines, the imposition of attorneys fees, and costs in the amount of \$6,030.82. This is excessive.

Both the Hearing Panel and the Commission seemed to base the sanctions at issue on the conclusion that the Respondent was willful, deluded or somehow intransigent in the belief that, as a former member of the bench, she is entitled to the courtesy of being called "judge."

While the two Jud. Cond. R. 4.3(A) violations found by the panel may not appear egregious standing alone, the Respondent's insistence that she is a judge in view of overwhelming evidence to the contrary is of great concern.²⁸

It bears emphasis that the hearing Panel expressed this concern **after** quoting, at length, from a colloquy in which the Respondent expressed her belief that common usage and courtesy allowed former judges to be addressed as judge, and that she had a First Amendment right to use that honorific, based on her reading of the recent *O'Neill* opinion, and immediately **before** imposing sanctions.

²⁸(Order of October 1, 2012, at ¶ 10, Appx. 22)

The Commission, likewise, appears to have grounded its determination regarding sanctions less on the acts with which the Respondent was charged, than on what it perceived to be her state of mind:

The respondent's testimony, together with her wearing the name badge in question to the hearing in this matter, leave little doubt that she intended the public to believe that she is a judge, when she is not. Unlike in *Moll* and *Lilly*, we believe the respondent's conduct here is more than simply the omission of key facts in her campaign materials or the ignorance of our prior holdings. Instead, her conduct demonstrates that she is deliberately flouting the very rules that govern judges and candidates alike.²⁹

We respectfully submit that these conclusions are not only unsupported by the record, but are so at odds with the actual evidence in this case as to suggest that the sanctions imposed by the Hearing Panel and the Commission were the result of passion and prejudice. There is absolutely no evidence in the record that Respondent intended to mislead anyone as to her incumbency, and ample evidence to suggest she did not. Her own sworn testimony, the inclusion of her present occupation in her online biography and the use of a supplemental name tag all put the lie to that conclusion.

Moreover, her conclusions – be they right or wrong – as to the propriety of her being called judge were not the result of ignorance nor of willfulness. They were, as her testimony made plain, grounded in her reading of the *O'Neill* decision, which represented the most recent, and the most comprehensive opinion offered by the Ohio disciplinary system on the question at the heart of this matter. This underscores the degree to which the Commission erred in unfavorably comparing the expression of Respondent, for example, to the conduct at issue in the recent *Moll* and *Lilly* decisions, discussed below.

The respondent in *Re Judicial Campaign Complaint Against Moll*, 132 Ohio St.3d 1505 (Five Judge Commission, 2012), for example, published a flyer which depicted her in judicial robes and

²⁹(Order of October 24, 2012, at p. 2, Appx. 5).

described her, without qualification or further explanation, as a “Magistrate, Guernsey County,” notwithstanding that she had not served in that capacity in years, and had never held judicial office.³⁰

In doing so, it repeated that for a violation of Rule 4.3(A) to be knowing, it must represent action taken despite the known probability that voters will be misled as to the incumbency or qualifications of a candidate, and for it to be reckless, it must be done despite the awareness that such a result is possible.

That was easily the case with Moll, who called herself a Magistrate despite having not been one for five years, and who appeared in robes despite having never been a judge.

Likewise, the respondent in *Re Judicial Campaign Complaint Against Lilly*, 132 Ohio St.3d 1515 (Five Judge Commission, 2012) had been sanctioned in 2008 for misuse of the phrase “re-elect” and for publishing a flyer depicting her in judicial robes.

A former judge, in 2012 she again ran for office, and in various literature called herself a judge without qualification (while taking care to refer to herself as a (“former social worker”), asked voters to “return” her to the bench, and published photos of herself in judicial robes.

For these multiple, and repeated violations during the 2012 election, she was fined \$1,000.00 and assessed the costs of the proceedings.³¹ This is a sanction less severe than that imposed on the Respondent. But these cases were decided on facts that are a far cry from what the Respondent did.

³⁰This Court recently upheld the sanctions imposed in *Re Judicial Campaign Complaint Against Moll*, No. 2012-1186, slip op. 2012-Ohio-5674 (Ohio S.Ct. Dec. 6, 2012)

³¹She was also required to pay fines and costs imposed, but stayed, in connection with her 2008 offense, which we note imposed a separate punishment for a separate series of offenses.

Her online materials indicated her present occupation for all to see, and her sole reference to herself as a judge was in the past tense and described activities she performed while on the appellate bench, the same office to which she was seeking election.

Despite that, the Commission recommended the same sanctions – a \$1,000.00 fine, the imposition of attorney fees in the amount of \$2,500.00, and costs – in both cases.

Finally, the decision to impose upon the Respondent \$2,500.00 toward the reasonable attorney fees of the Complainant is both unwarranted by the record, and a dangerous precedent.

James Davis, the Complainant, testified before the Hearing Panel. He testified that the Complaint he filed was neither conceived nor drafted by him, but was presented for his signature by Mary Jane Trapp, the Respondent's opponent in the recent election, and F.M. Apicella, her husband and campaign manager³² The Trapp campaign selected and hired attorneys who have represented Davis in this case, and at the time of the hearing, Davis testified that he expected those attorneys to be paid by the Trapp campaign.³³

There was absolutely no evidence adduced at the hearing, and none since, that Mr. Davis has paid a dime in attorney fees, and the only evidence going to the question suggests he will not.³⁴ On

³²Tr. at 184, 188-91.

³³Tr. at 191.

³⁴This result is in stark contrast to *Moll*, where the Complainant established through the submission of evidence having incurred over \$21,000.00 in attorney fees, resulting in an award of \$2,500.00 in fees. The same fee award was entered in this case, with no evidence that Davis has paid any fees, and substantial evidence that he never will.

this record the Commission abused its discretion in imposing and award of fees at all.

To award \$2,500.00 in fees on this record is either to bestow a windfall on Davis, who lent his name and signature to the Trapp campaign, or to reimburse the campaign itself for the cost of retaining counsel to pursue a grievance against a candidate in the hope of obtaining an electoral advantage. Either result is inequitable, and the fee award in this case should be set aside.

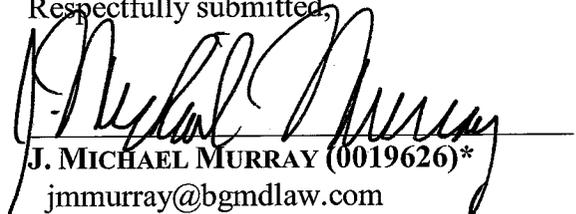
– CONCLUSION –

For all these reasons the Commission erred in finding that the Respondent violated Rule 4.3(A) of the Ohio Code of Judicial Conduct, and imposing the contested sanctions against her.

This Court should reject the conclusions of the Commission of Five Judges, and declare Rule 4.3(A) unconstitutional on its face and as applied to the Respondent. Failing that, the Court should find that the Complainant failed to establish, by clear and convincing evidence, that the Respondent violated that Rule, or that if she did violate, her violation was so minor as not to warrant the sanctions imposed.

This Court should accordingly reverse the decision of the Commission of Five Judges

Respectfully submitted,



J. MICHAEL MURRAY (0019626)*

jmmurray@bgmdl.com

RAYMOND V. VASVARI, JR. (0055538)

rvasvari@bgmdl.com

BERKMAN, GORDON, MURRAY & DEVAN

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Counsel for the Respondent

*Counsel of Record

Appendix

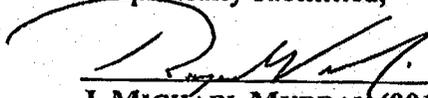
- Certificate of Service -

True and accurate copies of the foregoing *Notice of Appeal* were served today, November 8, 2012, upon each of the following via Federal Express next morning service:

Mary Cibella, Esq.
614 West Superior Avenue,
Rockefeller Building Suite 1300,
Cleveland, Ohio 44114

Steven C. Hollon, Esq.
Secretary to the Commission &
Administrative Director
Allen Asbury,
Administrative Counsel
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

Respectfully submitted,



J. MICHAEL MURRAY (0019626)

jmmurray@bgmdlaw.com

RAYMOND V. VASVARI, JR. (0055538)

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Counsel for the Respondent

FILED

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

OCT 24 2012

CLERK OF COURT
SUPREME COURT OF OHIO

In re Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

ORDER

ORDER OF THE COMMISSION OF JUDGES.

This matter came to be reviewed by a commission of five judges appointed by the Supreme Court of Ohio on October 3, 2012, pursuant to Gov.Jud.R. II(5)(D)(1) and R.C. 2701.11. The commission members are Judge Peggy L. Bryant, chair; Judge Richard K. Warren; Judge David A. Ellwood; Judge R. Scott Krichbaum; and Judge Mark K. Wiest.

The complainant, James Davis, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio alleging that the respondent, Colleen Mary O'Toole, had violated various provisions of Canon 4 of the Code of Judicial Conduct. The respondent served on the Eleventh District Court of Appeals for a six-year term ending in 2010 and is now running for judicial office on the same court. Following a review by a probable-cause panel of the board pursuant to Gov.Jud.R. II(5)(B), the secretary of the board filed a formal complaint alleging that the respondent, during the course of a judicial campaign, committed violations of Jud.Cond.R. 4.3(A) (a judicial candidate shall not knowingly or with reckless disregard distribute information concerning the judicial candidate that would be deceiving or misleading to a reasonable person) and 4.3(F) (a judicial candidate shall not misrepresent his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent).

The formal complaint was heard by a hearing panel of the Board of Commissioners on Grievances and Discipline on September 18, 2012, and the hearing panel issued a report of its findings, conclusions, and recommendations on October 1, 2012. In the report, the hearing panel dismissed Count I of the complaint, but found clear and convincing evidence that the respondent had violated Jud.Cond.R. 4.3(A) as alleged in Counts II and III of the complaint by giving the false impression that she is currently a sitting judge by (1) failing to include her dates of service as a judge and identifying herself as "Judge O'Toole" on her website and (2) wearing a name badge in public that reads "Colleen Mary O'Toole, Judge, 11th District Court of Appeals." In light of these violations, the hearing panel recommended that the respondent pay a fine of \$1,000, pay the costs of the proceedings, and pay \$2,500 of the complainant's reasonable and necessary attorney fees in bringing the grievance and prosecuting the formal complaint.

The hearing panel also recommended that the five-judge commission issue a cease-and-desist order to cause the respondent to (1) include the dates of her service as judge and remove

any reference of herself as "Judge O'Toole" on her website and (2) cease wearing the name badge that identifies her as judge. On October 5, 2012, the five-judge commission issued a cease-and-desist order that incorporated the recommendations of the hearing panel. The five-judge commission also required the respondent to file an affidavit of compliance. The respondent filed her affidavit on October 10, 2012. On October 17, 2012, the complainant filed a motion for the commission to amend its cease-and-desist order. We denied the motion on October 22, 2012, as this commission may only issue a cease-and-desist order based upon the findings of the hearing panel.

This commission convened by telephone conference on October 18, 2012, to review this matter. We were provided with the record certified by the board and a transcript of the September 18, 2012 proceedings before the hearing panel.

Pursuant to Gov.Jud.R. II(5)(D)(1), we are charged with reviewing the record to determine whether it supports the findings of the hearing panel and that there has been no abuse of discretion. We unanimously hold that there was no abuse of discretion by the panel and that the respondent violated Jud.Cond. R. 4.3(A) as alleged in Counts II and III of the complaint.

This commission has recently reviewed cases involving campaign advertisements that misrepresented the judicial candidate's present position and potentially misled the public. In *In re Judicial Campaign Complaint Against Moll*, 132 Ohio St.3d 1505, 2012-Ohio-3952, 973 N.E.2d 273, we found that the candidate's use of a picture of herself in a judicial robe without an accurate notation as to her current position and dates of service as a former magistrate created the impression that she held judicial office. Similarly, in *In re Judicial Campaign Complaint Against Lilly*, 131 Ohio St.3d 1515, 2012-Ohio-1720, 965 N.E.2d 315, the lack of a statement by the candidate that she was a "former judge" to accompany a picture of her in a judicial robe led to finding a violation of Jud.Cond.R. 4.3(D).

In the instant case, we are reviewing the panel's findings that a candidate's Internet website and name badge misrepresent the respondent's present position. We agree with the panel that a reasonable person would be deceived or misled into believing that the respondent is currently a sitting judge. The respondent's testimony, together with her wearing the name badge in question to the hearing in this matter, leave little doubt that she intended the public to believe that she is a judge, when she is not. Unlike in *Moll* and *Lilly*, we believe that the respondent's conduct here is more than simply the omission of key facts in her campaign materials or the ignorance of our prior holdings. Instead, her conduct demonstrates that she is deliberately flouting the very rules that govern judges and candidates alike.

The respondent filed her objections to the hearing panel's report on October 10, 2012. The complainant filed his answer brief on October 15, 2012. The respondent raised three separate objections to the hearing panel's report, including a facial and as-applied challenge to the constitutionality of Jud.Cond.R. 4.3(A) based on the First and Fourteenth Amendments to the United States Constitution. The hearing panel dismissed a similar motion filed by the respondent before the hearing. The respondent relies on a recent decision of the 13-judge commission in *O'Neill v. Crawford*, 132 Ohio St.3d 1472, 2012-Ohio-3223, 970 N.E.2d 973, to support her objection. The *O'Neill* commission dismissed a complaint alleging a Jud.Cond.R. 4.3(C)

violation based on a recent decision of the United States Supreme Court that invalidated the Stolen Valor Act. *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2536, 183 L.Ed.2d 574 (2012). The respondent's objections are not well taken. *O'Neill* is factually distinguishable from the case at hand, and the numerous other cases cited by the respondent do not involve judicial-conduct rules similar to Jud.Cond.R. 4.3(A).

In addition to adopting all the sanctions recommended by the hearing panel, this commission also finds that the respondent should be publicly reprimanded. The disciplinary process for judicial-campaign complaints serves many important purposes: punishing behavior that is contrary to the Code of Judicial Conduct, informing the legal and judicial communities of the appropriate standards governing judicial-campaign conduct, and deterring similar violations by judicial candidates in future elections. See *In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 64, 675 N.E.2d 580 (1997); *In re Judicial Campaign Complaint Against Burick*, 95 Ohio Misc.2d 1, 705 N.E.2d 422 (1999); and *In re Judicial Campaign Complaint Against Brigner*, 89 Ohio St.3d 1460, 732 N.E.2d 994 (2000). The record here is replete with testimony offered by the respondent that she believes she may continue to use the title "judge" because she once served in that office, despite the fact that she does not currently hold the office and that such conduct is in direct contravention of Jud.Cond.R. 4.3(A). Canon 4 of the Code of Judicial Conduct does not permit judicial candidates to identify themselves as judge or magistrate if they do not currently hold the public office. Maintaining the integrity of judicial elections requires us to impose a public reprimand in this case.

It is the unanimous conclusion of this five-judge commission that the respondent be publicly reprimanded for her violations of Jud.Cond.R. 4.3(A) of the Code of Judicial Conduct and that she be fined \$1,000. We additionally order the respondent to pay the costs of these proceedings and the complainant's reasonable and necessary attorney fees and expenses in the amount of \$2,500.

The secretary shall issue a statement of costs before this commission and instructions regarding payment of the monetary sanctions. Payment of all monetary sanctions shall be made on or before November 15, 2012. This opinion shall be published by the Supreme Court Reporter in the manner prescribed by Gov.Bar R. V(8)(D)(2).

SO ORDERED.

/s/ Peggy L. Bryant
Judge Peggy L. Bryant, Chair

/s/R. Scott Krichbaum
Judge R. Scott Krichbaum

/s/ David A. Ellwood
Judge David A. Ellwood

/s/ Mark K. Wiest
Judge Mark K. Wiest

/s/ Richard K. Warren
Judge Richard K. Warren

Dated: October 24, 2012.

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

FILED

OCT 24 2012

In re Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

CLERK OF COURT
SUPREME COURT OF OHIO

ORDER

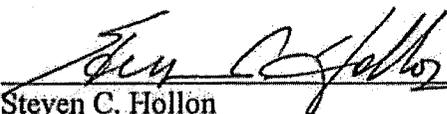
INSTRUCTIONS REGARDING PAYMENT OF FINE, COSTS
AND ATTORNEY FEES

The October 24, 2012 commission order directed the secretary of the commission to provide instructions to the respondent regarding the payment of the fine, costs and attorney fees.

Respondent is hereby instructed to pay a fine of \$1,000.00 and costs of \$2,530.82 to the Supreme Court of Ohio, Attorney Services Fund by cashier's check or money order on or before November 15, 2012. If the fine and costs are not paid in full on or before November 15, 2012, interest at the rate of ten percent per annum shall accrue on the unpaid balance, respondent will be found in contempt, and the matter will be referred to the office of the Attorney General for collection.

Respondent is also instructed to pay attorney fees in the amount of \$2,500 by cashier's check or money order payable to Mary L. Cibella, 614 West Superior Ave., Ste. 1300, Cleveland, Ohio 44113 on or before November 15, 2012, and provide proof of payment to the Clerk of Court.

BY ORDER OF THE COMMISSION.



Steven C. Hollon
Secretary to the Commission

Dated: October 24, 2012.

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

FILED

OCT 22 2012

CLERK OF COURT
SUPREME COURT OF OHIO

In re: Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

ORDER

Pursuant to Rule II, Section 5(D)(1) of the Supreme Court Rules for the Government of the Judiciary of Ohio, the five-judge commission appointed to consider the above-cited matter convened by telephone conference on October 19, 2012.

On October 8, 2012, the complainant, by and through counsel, filed a motion requesting the five-judge commission amend its October 5, 2012 Order.

On October 17, 2012, the respondent, by and through counsel, filed a response in opposition to the motion of the complainant seeking to amend the order of October 5, 2012. Upon consideration thereof,

IT IS HEREBY ORDERED by the five judge commission that the complainant's motion requesting the five-judge commission amend its October 5, 2012 Order is, DENIED. The jurisdiction of the five-judge commission to issue a cease and desist order is limited to matters contained in the report and recommendation of the hearing panel and the record. Gov.Jud.II(5)(D)(2).

BY ORDER OF THE COMMISSION.


Steven C. Hollon, Secretary of the Commission

Dated: October 22, 2012

IN THE SUPREME COURT OF OHIO

In re: Judicial Campaign Complaint
Against Colleen Mary O'Toole

: Supreme Court Case No. 2012-1653

Respondent

:

:

RESPONDENT'S AFFIDAVIT OF COMPLIANCE

J. Michael Murray (0019626)
Raymond V. Vasvari, Jr. (0055538)
Berkman, Gordon, Murray & DeVan
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Cleveland OH 44113-1949
Counsel for Respondent
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216-781-8207 (Fax)
jmmurray@bgmdlaw.com (Email)
Counsel for Respondent

Colleen M. O'Toole (0053652)
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440-350-0887
440-375-0413 (Fax)
colleenotoole@ireland.com (Email)
Respondent

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Counsel for Complainant

David F. Axelrod (0024023)
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614-463-9441
614-463-1108 (Fax)
daxelrod@slk-law.com (Email)

STATE OF OHIO)

) SS

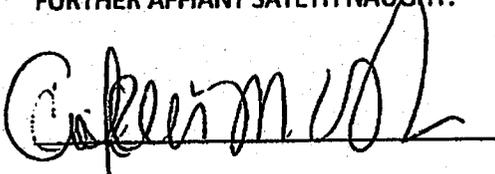
AFFIDAVIT

COUNTY OF LAKE)

NOW COMES COLLEEN MARY O'TOOLE, and having been first duly sworn and cautioned, avers and states as follows:

1. I have personal knowledge of the matter testified to herein.
2. I will not wear the name tag described in the panel recommendations.
3. I have requested that my web designer remove the word "judge" from appearing in front of my name on the website otooleforjudge and he has made the appropriate changes.
4. I have requested that my web designer insert the actual dates of my service as an appellate judge on the website otooleforjudge and he has made the appropriate changes.
5. The "about page" of the otooleforjudge webpage is in compliance with the five judge panel's order.

FURTHER AFFIANT SAYETH NAUGHT.



COLLEEN MARY O'TOOLE

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 9th day of October, 2012.



BRIAN SCHICK, NOTARY PUBLIC

ATTORNEY AT LAW – STATE OF OHIO

MY COMMISSION DOES NOT EXPIRE

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was served October 9, 2012, on the following:

Original and Seven Copies via Federal Express:

**Kristina D. Frost, Clerk
The Supreme Court of Ohio
65 South Front Street, 8th Floor
Columbus, OH 43215**

Copy via U.S. Mail:

**Steven Hollon, Administrative Director
The Supreme Court of Ohio
Secretary, Five-Judge Commission
65 South Front Street, 7th Floor
Columbus, OH 43215**

**D. Alan Asbury, Administrative Counsel
The Supreme Court of Ohio
65 South Front Street, 7th Floor
Columbus, OH 43215**

**Mary L. Cibella
614 West Superior Avenue, Suite 1300
Cleveland, OH 44113**

**David F. Axelrod
Shumaker, Loop & Kendrick LLP
41 South High Street, Suite 2400
Columbus, OH 43215-6104**

**J. Michael Murray
Raymond V. Vasvari, Jr.
Berkman, Gordon, Murray & DeVan
55 Public Square, Suite 2200
Cleveland, OH 44113**



**Colleen M. O'Toole (0053652)
Respondent, Pro Se**

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

FILED

OCT 05 2012

CLERK OF COURT
SUPREME COURT OF OHIO

In re: Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

ORDER

OCT 05 2012



Pursuant to Rule II, Section 5(D)(1) of the Supreme Court of Ohio Rules for Government of the Judiciary, the five-judge commission appointed to consider the above-cited matter has considered the report of the hearing panel of the Board of Commissioners on Grievances and Discipline filed with the Supreme Court of Ohio on October 1, 2012.

Having considered the report of the hearing panel and the record in this proceeding to date, the five-judge commission hereby issues, pursuant to Rule II, Section 5(D)(2), an interim order that the respondent immediately and permanently cease and desist from using any reference to herself as "Judge O'Toole" on the respondent's website, www.otooleforjudge.com, and shall add the date her service as judge ended. The commission further orders the respondent to cease and desist from wearing the name badge identified as Ex. 3 and Ex. 17 or similar name badge that identifies the respondent as a judge.

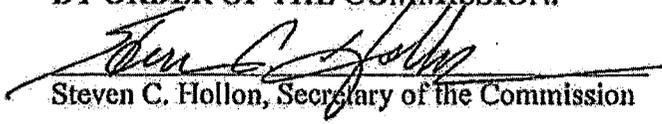
The respondent shall file an affidavit with the clerk of the Supreme Court of Ohio before 5:00 p.m. on Tuesday, October 9, 2012, affirming she has complied with this order.

This interim order is issued based on the recommendation of the hearing panel.

The commission hereby orders that the respondent may file objections to the panel report of the Board of Commissioners on Grievances and Discipline, not to exceed ten pages, with the Supreme Court clerk no later than October 10, 2012, and the complainant may file a reply brief, not to exceed ten pages, no later than October 15, 2012.

Briefs shall be filed in the manner set forth in the Supreme Court's order of October 3, 2012, appointing the five-judge commission, with a copy served on the other party and opposing counsel.

BY ORDER OF THE COMMISSION.


Steven C. Hollon, Secretary of the Commission

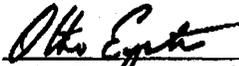
Dated: October 5, 2012

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In re:	:	
Judicial Campaign Grievance Against	:	Case No.: 12-066
Colleen Mary O'Toole (0053652)	:	
Respondent,	:	FILED
James Davis (0007850)	:	SEP 27 2012
Complainant.	:	BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

ENTRY

On September 13, 2012, Respondent filed a Motion to Dismiss the Complaint On The Grounds that Rules 4.3(A) and (F) of the Ohio Code of Judicial Conduct Are Unconstitutional On Their Face and As Applied Under the First and Fourteenth Amendments. The panel chair finding Respondent's motion not well taken, it is **ORDERED** Respondent's Motion to Dismiss is denied.



Otho Eyster, Panel Chair



per authorization

**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF THE SUPREME COURT OF OHIO**

12-1653

In re:

Judicial Campaign Complaint Against

Colleen Mary O'Toole (0053652)

Respondent,

James Davis (0007850)

Complainant.

Case No.: 12-066

**PANEL FINDINGS,
CONCLUSIONS AND
RECOMMENDATIONS**

INTRODUCTION

{¶1} This matter came on for hearing in Columbus, Ohio on September 18, 2012, pursuant to Section 5(C)(3) of Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio, before a panel consisting of Patrick L. Sink, a nonattorney member of the Board of Commissioners, McKenzie Davis, Esq. and Judge Otho Eyster, panel chair, all members of the Board of Commissioners on Grievances and Discipline. None of the panel members resides in the appellate district from which the complaint originated. The Complainant, James Davis, was present and represented by David F. Axelrod and Mary L. Cibella. The Respondent, Colleen Mary O'Toole, was also present and represented by J. Michael Murray.

FILED
OCT 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

{¶12} The complaint in this matter contains three counts. Count I alleges that Respondent is a candidate for the Eleventh District Court of Appeals and that she is not now nor has she been a judge in the State of Ohio since 2011; that the biography or resume distributed by Respondent to the Ashtabula County Republican Party contains a photograph of her in what appears to be a judicial robe (Exhibit 1); that this photograph creates the false impression of being a current judge; and, this photograph was posted, published, circulated, or distributed concerning the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person. Count II alleges Respondent's web site otooleforjudge.com (Exhibit 2) contains a statement that she "was elected to the Eleventh District Court of Appeals in 2004" and that "Judge O'Toole testified on the positions of the Ohio Judicial Conference Committee and participated in many legislative conferences advocating the position of the conference be[fore] legislators"; and these statements were posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person. Count III alleges Respondent wore a gold and black name badge which reads "Colleen Mary O'Toole Judge 11th District Court of Appeals (Exhibits 3 & 17); that this statement is misleading to a reasonable person in that it conveys the impression that the Respondent is

currently a judge of the 11th District Court of Appeals; and this statement was posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

{¶13} The panel, having considered the testimony, exhibits, arguments and all relevant matters, finds the Complainant did not prove by clear and convincing evidence the alleged violations of Rules 4.3(A) and 4.3(F) of the Ohio Code of Judicial Conduct contained in Count I of the complaint, and recommends Count I be dismissed. The panel further finds the Complainant did prove by clear and convincing evidence a violation of Rule 4.3(A) [statements posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person] as alleged in Counts II & III.

FINDING OF FACT

{¶14} The Respondent is currently a judicial candidate for the Eleventh District Court of Appeals in November 6, 2012 general election. The Respondent served a full term on this Court from 2006 through 2011, and was defeated in the 2010 primary in her bid for re-election. The Respondent has not served as a judge in the State of Ohio since 2011.

ANALYSIS AND CONCLUSIONS

COUNT I

{15} The allegation in this count is that Respondent distributed a biography or resume to the Ashtabula County Republican Party containing a photograph of her in what appears to be a judicial robe (Exhibit 1). The Respondent testified that she never provided a resume or picture to the Ashtabula County Republican Party and had never been on their web site prior to the filing of this grievance. Charles Frye, Chairman of the Ashtabula County Republican Party, testified the photo shown in Exhibit 1 came from the 2010 election, and was posted by the party in January or February of this year. He said the wordage accompanying the photo came from Respondent within the past couple of months. The Respondent later testified that she had, in fact, provided the text contained in Exhibit 1, but not the photograph captioned "Judge Colleen Mary O'Toole". The panel finds the photograph does create the false impression that the Respondent is a current judge, but the Complainant has failed to prove by clear and convincing evidence that Respondent posted, published, circulated or distributed the photograph, and the panel finding no violation of Rule 4.3(A) or 4.3(F) of the Ohio Code of Judicial Conduct recommends Count I be dismissed.

COUNT II

{16} The allegation in this count is that Exhibit 2 (Respondent's campaign web site) contains statements posted by Respondent either knowing

the information to be false or with reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person. The posting entitled, "About", begins with the statement, "Colleen O'Toole was elected to the Eleventh District Court of Appeals in 2004", followed by the sentence, "During her term, she has decided over 1500 cases and has authored over 500 opinions". The panel finds the failure to state her term ended in 2010 gives the impression she is still on the court. The second sentence is worded in such a manner as to reinforce the impression that she is still a sitting judge. On line 9 of the page, she refers to herself as "Judge O'Toole", again giving the impression that she is currently serving as a judge. It is Respondent's contention the last sentence, the last line on the page, "She is presently CEO of On Demand Interpretation Services, LLC", indicates her term has ended. The panel finds a reasonable person would be deceived or misled into believing Respondent is currently serving on the Eleventh District Court of Appeals. Respondent acknowledges writing the page, and the panel finds her conduct has violated Rule 4.3(A) of the Code of Judicial Conduct.

COUNT III

{17} The allegations in this count are that the badge worn by Respondent which reads, "Colleen Mary O'Toole Judge 11th District Court of Appeals", is misleading to a reasonable person in that it gives the impression the Respondent is currently a judge on that court. The badge is depicted in Exhibit 3 and further identified as Exhibit 17 is the badge Respondent wore to the hearing.

The Respondent did not deny that it was the same badge depicted in Exhibit 3, but testified she always wears it in conjunction with another name tag reading "O'Toole for Judge" with a disclaimer. Respondent testified the badge was made for her by her secretary when she was sitting as a judge, but was not designed to communicate that she was a judge. She says the badge is the description of the position, and not a description of a title and wearing it in conjunction with the other name tag indicates she is now running for judge. The panel finds Respondent's explanation somewhat confusing and not at all persuasive. The panel finds the gold and black name badge depicted in Exhibits 3 & 17 reading, "Colleen Mary O'Toole Judge 11th District Court of Appeals," would deceive or mislead a reasonable person into believing Respondent is currently serving on the court of appeals. The panel finds Respondent's conduct has violated Rule 4.3(A) of the Ohio Code of Judicial Conduct.

{¶18} Respondent has attended five judicial candidate seminars and professes to desire to comply with the rules. The panel has serious concerns as to how the Respondent views herself. When asked, "Do you contend that it is a true statement to describe yourself as a judge right now," Respondent replied, "Yes, I am a judge, not a sitting judge. I believe I will always hold the title if I choose to." Hearing Tr. 54, l. 10-15. Referring to the web site that is the subject of Count II, Respondent was asked, "Okay. When you put it up, did you believe the First Amendment permitted you to call yourself a judge?" Her response, "I believe it was accurate and not misleading when I put it up; and I

mean if you read the case, yes, I think the First Amendment also supports the position. I'm not waiving any of those First Amendment rights; but more importantly, I don't think it was misleading and I don't think it was inaccurate." *Id.* at 117, l. 10-19. Respondent was asked, "So you believe that's appropriate for you to describe yourself as a judge?". Respondent's reply, "In non-campaign material absolutely. I'm not misleading anyone". *Id.* at 142, l. 24 to 243, l. 3. One panel member asked Respondent, "Now, are you a judge?". The response, "I am a judge, but I am not a sitting judge" *Id.* at 255, l. 19-21. When asked by another panel member, "Where do you get the idea that you're a judge," Respondent answered, "Because I served for six years as a judge and so people commonly call you by that name" *Id.* at 278, l. 3-7. A panel member stated, "But you have testified that you think you're a judge". To which the Respondent answered, "I think I can use the title because of my former service". *Id.* at 283, l. 21-24.

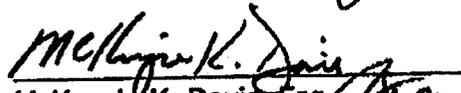
RECOMMENDATION

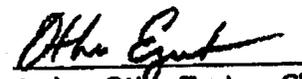
{¶19} BCGD Advisory Opinion 89-15 states "an advertisement that is unclear as to whether the candidate is currently a judge is, in our opinion, a misrepresentation of the candidate's identity." Respondent acknowledges she wrote the text of the web site addressed in Count II. It has her elected judge but doesn't state her term has ended. It speaks in the present tense and refers to the Respondent as "Judge O'Toole." The badge worn by Respondent (Exhibits 3 & 17) identifies her as "Colleen Mary O'Toole Judge 11th District Court of

Appeals" and gives the distinct impression that Respondent is presently serving as a judge on the appellate court. The panel can only conclude that Respondent's web site and badge are part of an effort to portray herself as an incumbent judge.

{¶10} While the two Jud. Cond. R. 4.3(A) violations found by the panel may not appear egregious standing alone, the Respondent's insistence that she is a judge in view of overwhelming evidence to the contrary is of great concern. The panel recommends the Respondent be ordered to include the date her service as judge ended and to remove any reference to herself as "Judge O'Toole" from the web site addressed in Count II. The panel also recommends that the Respondent be ordered to cease and desist from wearing the name badge (Exhibits 3 & 17) that identifies her as a judge. The panel further recommends that the Respondent be assessed a fine of \$1,000.00 and to pay the costs of these proceedings. The panel further recommends the Respondent pay Complainant \$2,500.00 as and for attorney fees.


Patrick L. Sink *By per author*


McKenzie K. Davis, Esq. *By per author*


Judge Otilio Eyster, Chair *By per author*

C

United States Code Annotated Currentness

Constitution of the United States

▣ Annotated

▣ Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances (Refs & Annos)

→→ **Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<This amendment is further displayed in three separate documents according to subject matter>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

<see USCA Const Amend. I, Assemblage>

Current through P.L. 112-197 approved 11-27-12

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END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Code of Judicial Conduct (2009)

☐ Canon 4. A Judge or Judicial Candidate Shall Not Engage in Political or Campaign Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary.

→→ **Rule 4.3 Campaign standards and communications**

During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard do any of the following:

- (A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the *judicial candidate* or an opponent, either *knowing* the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person;
- (B) Manifest bias or prejudice toward an opponent based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status;
- (C) Use the title of an office not currently held by a *judicial candidate* in a manner that implies that the *judicial candidate* does currently hold that office;
- (D) Use the term “judge” when the *judicial candidate* is not a judge unless that term appears after or below the name of the *judicial candidate* and is accompanied by either or both of the following:
 - (1) The words “elect” or “vote,” in prominent lettering, before the *judicial candidate's* name;
 - (2) The word “for,” in prominent lettering, between the name of the *judicial candidate* and the term “judge;”
- (E) Use the term “re-elect” in either of the following circumstances:

- (1) When the *judicial candidate* has never been elected at a general or special election to the office for which he or she is a *judicial candidate*;
- (2) When the *judicial candidate* is not the current occupant of the office for which he or she is a *judicial candidate*;
- (F) Misrepresent his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent;
- (G) Make a false statement concerning the formal schooling or training completed or attempted by a *judicial candidate*; a degree, diploma, certificate, scholarship, grant, award, prize of honor received, earned, or held by a *judicial candidate*; or the period of time during which a *judicial candidate* attended any school, college, community technical school, or institution;
- (H) Make a false statement concerning the professional, occupational, or vocational licenses held by a *judicial candidate*, or concerning any position a *judicial candidate* held for which he or she received a salary or wages;
- (I) Make a false statement that a *judicial candidate* has been arrested, indicted, or convicted of a crime;
- (J) Make a statement that a *judicial candidate* has been arrested, indicted, or convicted of any crime without disclosing the outcome of all pending or concluded legal proceedings resulting from the arrest, indictment, or conviction;
- (K) Make a false statement that a *judicial candidate* has a record of treatment or confinement for mental disorder;
- (L) Make a false statement that a *judicial candidate* has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;
- (M) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a *judicial candidate* by a person, *organization*, *political party*, or publication.

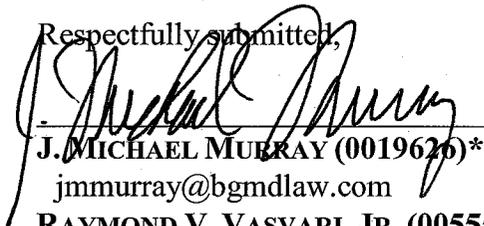
CREDIT(S)

(Adopted eff. 3-1-09)

– Certificate of Service –

A true and accurate copy of the foregoing Merit Brief of Respondent Colleen M. O'Toole was sent today, via Federal Express Next Morning Service to counsel for the Complainant, Mary L. Cibella, 614 West Superior Avenue Suite 1300, Cleveland, Ohio 44113.

Respectfully submitted,



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