

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE

CASE NO.: SC09-1182

N. JAMES TURNER

JQC Case No.: 09-01

**RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Respondent, The Honorable N. James Turner, by and through his undersigned counsel, pursuant to Rule 12 of the Florida Judicial Qualification Rules¹ and Rule 1.510 of the Florida Rules of Civil Procedure, hereby moves this Panel for a partial summary judgment in his favor as to paragraphs 1, 3, 4 and 5 of the Notice of Formal Charges dated July 8, 2009. The grounds and substantial matters of law to be argued on this motion are set forth below. This Motion will show that as to paragraphs 1, 3, 4 and 5 of the Notice of Formal Charges dated July 8, 2009, there are no genuine issues as to any material fact and that Respondent is entitled to a judgment as a matter of law based on the First Amendment to the United States Constitution and other authorities. Respondent submits that the arguments made herein with respect to the First Amendment to the U. S. Constitution also apply to paragraphs 2 and 6 of the Notice of Formal Charges

¹ Rule 12(a) of the Florida Judicial Qualification Rules states: "In all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules."

dated July 8, 2009, however, Respondent believes that those paragraphs involve issues that are too factually intensive to be appropriate for consideration by a motion for summary judgment. Therefore, Respondent reserves his right to raise his First Amendment defenses as to paragraphs 2 and 6 of the Notice of Formal Charges dated July 8, 2009, at the final evidentiary hearing on February 15, 2010.

SUMMARY OF ARGUMENT

The Preamble to the Code of Judicial Conduct states, in pertinent part, that:

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances.

The particular Canons of the Code of Judicial Conduct upon which Respondent's improper conduct is allegedly based are unconstitutional under the First Amendment to the United States Constitution as applied to Respondent.

MEMORANDUM OF LAW

I. Summary Judgment Standard

Florida law is well established on the legal standards required for granting a Motion for Summary Judgment. Pursuant to Rule 1.510(c) of the Florida Rules of Civil Procedure, a summary judgment shall be granted upon the showing of an absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Whitten v. Progressive Casualty Ins. Co.*, 410

So.2d 501 (Fla. 1982). Summary judgment shall be granted if the proof brought forth by the moving party overcomes all reasonable inferences in favor of the party opposing summary judgment. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

II. Respondent is entitled to a judgment as a matter of law regarding any alleged improper conduct for identifying himself as a member of a political party based on the First Amendment to the U.S. Constitution.

Paragraph 1 of the Notice of Formal Charges dated July 8, 2009 states as follows:

During the campaign for the judicial office you now hold, you participated in partisan political activity by campaigning as a member of a partisan political party, including identifying yourself to voters as a member of a partisan political party, in violation of Fla. Stat. §§105.071(1), 105.071(2), 105.071(3) and Canons, 7A(3)(a) and 7A(3)(b) of the Code of Judicial Conduct.

Protection of political speech is paramount under the First Amendment.

“[I]t can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley*, 424 U.S. at 15, 96 S.Ct. 612 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)). That is because our constitutional form of government not only was borne

of the great struggle to secure such freedoms as political speech, but also because such freedom helps assure the continuance of that constitutional government. “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.” *Id.* at 14-15, 96 S.Ct. 612.

The courts have consistently applied strict scrutiny to any regulation that would have the effect of curtailing political speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”).

In *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit affirmed the trial court’s order granting summary judgment and held that the “partisan activities clause” of

Canon 5 restricting party identification did not pass the strict scrutiny test required to be applied by the First Amendment to the U.S. Constitution.

At issue was Canon 5 of the Minnesota Code of Judicial Conduct, which stated:

Except as authorized by Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) identify themselves as members of a political organization, except as necessary to vote in an election;

| * * * *

(d) attend political gatherings; or seek, accept or use endorsements from a political organization.

In its ruling striking down the offending provision, the Court stated:

It cannot be disputed that Canon 5's restrictions on party identification of party affiliation limit a judicial candidate's right to associate with a group in the electorate that shares common political beliefs and aims. *Republican Party of Minnesota v. White*, 416 F.3d 738, 748-749 (8th Cir. 2005).

Based on the foregoing authorities and arguments under the First Amendment to the U.S. Constitution, Respondent respectfully requests that this Panel enter an Order granting a partial summary judgment in his favor as to paragraph 1 of the Notice of Formal Charges dated July 8, 2009.

III. Respondent is entitled to a judgment as a matter of law regarding any alleged improper conduct for voicing support for a partisan political candidate based on the First Amendment to the U.S. Constitution.

Paragraph 3 of the Notice of Formal Charges dated July 8, 2009 states as follows:

During the campaign, you participated in partisan political activity by publicly voicing support for a partisan political candidate at a candidate forum you attended in Orange County, Florida on or about May 14, 2008, in violation of Fla. Stat. §§105.071(1), 105.071(4) and Canons 7A(1)(b), 7A(3)(a) and 7A(3)(b) of the Code of Judicial Conduct.

The factual basis for this allegation is as follows:

Subject to further, ongoing discovery, on or about May 14, 2008, Judge Turner attended an AFL-C10 Candidate Forum in Orlando, where various local candidates appeared. At that candidate forum, Judge Turner was observed loudly and vociferously chanting “Jerry, Jerry” in support of Jerry Demings, a Democrat and candidate for Orange County Sheriff.²

At page 1 of “An Aid to Understanding Canon 7, Guidelines to Assist Judicial Candidates in Campaign and Political Activities,” prepared by the Judicial Ethics Advisory Committee, it states:

The committee’s experience during the past several years has demonstrated that literal obedience to Canon 7 is at times difficult and cannot be accomplished through adherence to formulated principles. Indeed, the committee members occasionally express divergent views

² See Unsigned Answers to Interrogatories submitted by the JQC dated November 24, 2009.

about the canon's application. Their disagreement results from factual settings that present circumstances not readily susceptible of determination through a "bright-line" doctrine.

Respondent was unable to locate any primary authority dealing with the factual basis for paragraph 3 of the Notice of Formal Charges; however, Respondent submits that in this case, literal obedience to the Canons would not be appropriate. Does the act of chanting "Jerry, Jerry" constitute "engaging in partisan political activity"? What about enthusiastically applauding a candidate? Moreover, Respondent further submits that based on the foregoing authorities and arguments under the First Amendment to the U.S. Constitution, Respondent's actions in chanting "Jerry - Jerry" in unison with other attendees at the meeting, is protected political speech. Therefore, Respondent respectfully requests that this Panel enter an Order granting a partial summary judgment in his favor as to paragraph 3 of the Notice of Formal Charges dated July 8, 2009.

IV. Respondent is entitled to a judgment as a matter of law regarding any alleged improper conduct for forwarding to friends and acquaintances information about a partisan political event that took place on September 19, 2008 based on the First Amendment to the U.S. Constitution.

Paragraph 4 of the Notice of Formal Charges dated July 8, 2009 states as

follows:

During the campaign, you engaged in partisan political activity by campaigning on behalf of other partisan political candidates by promoting the attendance of others at a fund raising partisan political event you did not attend on or about September 19, 2009, in violation of Fla. Stat. §§105.071(1), 105.071(4) and Canons 7A(1)(b), 7A(1)(e), 7A(3)(a) and 7A(3)(b) of the Code of Judicial Conduct.

The JQC alleges that Respondent “campaigned” for the Obama/Biden ticket by forwarding an email to 11 friends about an event and by “promoting” the event.

The email is dated September 19, 2008 and states as follows:

“Dear Friends,

I have been asked to pass along some information. My friend in Osceola has asked me to invite my women friends to an event in St. Cloud tomorrow. Joe Biden’s sister will be there. I am told that this event is limited to women only.

If you are interested in attending, please contact Sheri Morton @neat3@embarqmail.com or call her at (407) 396-0152.

Obviously, I will not be attending this event. Please feel free to pass this information along to anyone that you feel would be interested.

Sincerely,

Jim Turner”

The Commentary to Canon 7 states, in pertinent part, as follows:

Section 7A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other

candidates for public office.³

First, the email was a private communication to eleven of the Respondent's friends. Second, Respondent suggests that sending this email was not engaging in prohibited political activity. Lastly, the conduct is protected by the First Amendment to the United States Constitution.

Based on the foregoing authorities and arguments, including the First Amendment to the U.S. Constitution, Respondent respectfully requests that this Panel enter an Order granting a partial summary judgment in his favor as to paragraph 4 of the Notice of Formal Charges dated July 8, 2009.

V. Respondent is entitled to a judgment as a matter of law regarding any alleged improper conduct for personally soliciting campaign contributions based on the First Amendment to the U.S. Constitution.

Paragraph 5 of the Notice of Formal Charges dated July 8, 2009 states as follows:

During the campaign, you personally solicited contributions for your campaign, including without limitation, doing so in writing on or about August 27, 2008, in violation of Canons 7A(3)(a), 7A(3)(b) and 7C(1) of the Code of Judicial Conduct.⁴

³ See page 8 of "An Aid to Understanding Canon 7, Guidelines to Assist Judicial Candidates in Campaign and Political Activities," prepared by the Judicial Ethics Advisory Committee and published by the Office of the State Courts Administrator Tallahassee, Florida, updated November 15, 2007.

⁴ Canon 7A(3)(a) A candidate for a judicial office shall be faithful to the law and

Canon 7C(1) has been held unconstitutional by the Eleventh Circuit Court of Appeals. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) as having a chilling effect on a candidate's speech. The following quote is helpful in understanding this ruling:

A candidate's speech during an election campaign "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995). The proper test to be applied to determine the constitutionality of restrictions on "core political speech" is strict scrutiny. *Id.* Under strict scrutiny analysis, the government has the burden of proving that the restriction is "(1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 2534, 153 L.Ed.2d 694 (2002); *see also Brown v. Hartlage*, 456 U.S. 45, 53-54, 102 S.Ct. 1523, 1529, 71 L.Ed.2d 732 (1982) ("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.").

maintain professional competence in it, and shall not be swayed by partisan interests, public clamor, or fear of criticism.

Canon 7A(3)(b) A candidate for a judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity, and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.

Canon 7C(1). Judges and Candidates Subject to Public Election. A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy.

Subsequent to the decision in *Weaver, supra*, in the remand of *Republican Party of Minnesota v. White*,⁵ the United States Court of Appeals for the Eighth Circuit affirmed the trial court's summary judgment and held that the personal solicitation clause was unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signatures. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

The particular Canon of the Code of Judicial Conduct upon which Respondent's improper conduct is allegedly based is identical to the ones that have been held as unconstitutional under the First Amendment to the United States Constitution by *Weaver, supra*. and *Republican Party of Minnesota, supra*.

Based on the foregoing authorities and arguments under the First Amendment to the U.S. Constitution, Respondent respectfully requests that this Panel enter an Order granting a partial summary judgment in his favor as to paragraph 5 of the Notice of Formal Charges dated July 8, 2009.

CONCLUSION

Based upon the foregoing argument and authorities, Respondent respectfully requests that this Panel enter an Order granting a partial summary judgment in his

⁵ 536 U.S. 765, 122 S.Ct. 2528, 2534, 153 L.Ed.2d 694 (2002).

favor as to paragraphs 1, 3, 4 and 5 of the Notice of Formal Charges dated July 8, 2009.

Respectfully submitted this 1st day of December, 2009.

_____/s/_____
Barry W. Rigby, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 1st day of December, 2009, to the persons on the attached Service List.

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