

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 REPLY MEMORANDUM OF LAW IN
RESPONSE TO SPECIAL COUNSEL'S MEMORANDUM OF
LAW IN OPPOSITION TO RESPONDENT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Respondent, N. JAMES TURNER, by and through his undersigned counsel, files his Response to Special Counsel's Memorandum of Law in Opposition to Respondent's Motion for Partial Summary Judgment. Special Counsel asserts in its Motion to Strike Motion for Summary Judgment that a motion for summary judgment is an inappropriate procedural device in the context of Judicial Qualifications Commission proceedings. The position taken by Special Counsel forces the hearing panel to answer two essential questions:

1. Will the JQC consider First Amendment constitutional defenses?
2. Where there are no issues of fact in dispute on First Amendment constitutional issues, will the JQC consider a motion for summary judgment on such defenses?

This Reply Memorandum of Law will demonstrate that Special Counsel's memorandum of law fails to accurately address the current state of the law on the first amendment as applied in judicial election campaigns.

I. Special Counsel’s the Motion to Strike Should be Denied.

Initially, Respondent asserts that there is no such procedural device as a motion to strike a motion for summary judgment. Rule 1.140 (f) of the Fla.R.Civ.P. states that a party or the court may move to strike redundant, immaterial, impertinent, or scandalous matters from any pleading (emphasis added) at any time. A motion for summary judgment is not a pleading, and a motion to strike a motion for summary judgment has not been contemplated by the Fla.R.Civ.P. Alternatively, a motion for summary judgment should only be stricken if it contained scandalous or impertinent material, which is not the case in the matter at hand.

Secondly, unlike the matter of *In Re Eriksson*, Case No. 07-1648 cited by Special Counsel, neither the Amended Notice of Formal Charges nor the Answer involve any issues of intent, state of mind or other factually intensive matters. Moreover, Special Counsel apparently inadvertently misquoted the JQC’s decision in *Eriksson*.¹ By order dated November 13, 2008, the Panel Chair Thomas B. Freeman stated:

The Motion for Summary Judgment and Motion to Strike filed by Judge Eriksson are both denied. The arguments contained in the

¹ Page 4 of the Memorandum of Law states: “See, e.g., *In re Eriksson*, Case No. 07-1648 (2008) (Respondent's Motion for Summary Judgment stricken as improper and inappropriate in judicial disciplinary proceeding .)”

Motion for Summary Judgment *can be asserted* before the Hearing Panel. (emphasis added)

Therefore, it appears clear that no motion to strike Judge Eriksson's motion for summary judgment was granted in the *Eriksson* case. Rather, the motion was simply denied.

The matters raised by Respondent in his Motion for Summary Judgment involve only questions of law. Respondent respectfully suggests that if this honorable panel disagrees, the motion should be considered as one for judgment on the pleadings – even taking the allegations in the light most favorable to the JQC, Respondent contends that as a matter of law, his acts are constitutionally protected. Proceeding to a full evidentiary hearing on those constitutional matters will not serve justice and will only cause Respondent and the JQC to spend needless time and money.

Paragraph 3 of the Order on Status Conference dated September 14, 2009 states:

Judge Turner's Memorandum of Law on First Amendment Defenses is due on December 1, 2009. Special Counsel's responsive legal memorandum is due on December 15, 2009.

Given the Panel Chair's directive, Respondent chose to present these First Amendment Defenses by way of a Motion for Summary Judgment. In any case, the legal issues presented are not only appropriate, but necessary, for the panel in

its ultimate consideration of this matter.

II. Facial Challenges Versus As-Applied Challenges to the Constitutionality of Laws Impacting Free Speech.

When considering a claim which challenges the constitutionality of a statute or ordinance, a tribunal must first determine if the claim involves a facial or as-applied challenge. A facial challenge, compared to an as-applied challenge, attempts to invalidate a statute or ordinance on the grounds of overbreadth.

Citizens United v. Federal Election Com'n, ___ S.Ct. ___, 2010 WL 183856 U.S. (2010).

In the case-at-bar, with the exception of Canon 7C(1) prohibiting direct solicitation of campaign contributions, Respondent is making an as-applied argument regarding his First Amendment freedoms. Therefore, the points made in the lengthy argument made by Special Counsel that the Florida Supreme Court has consistently upheld the constitutionality of restrictions on inappropriate political activity are essentially conceded by Respondent.

Special counsel cites and relies on the Florida Supreme Court decision in *In re Angel*, 867 So. 2d 379 (Fla. 2004). However, Respondent submits that this decision is inapplicable to these proceedings because Judge Angel admitted engaging in all of the political activity alleged in the Notice of Formal Charges that were filed against him and did not raise any constitutional arguments thereto.

III. The Notion of “Publicly voicing support” is Unconstitutionally Vague.

Paragraph 3 of the Amended Notice of Formal Charges filed against

Respondent states:

During the campaign, you knowingly participated in partisan political activity by publicly voicing support for a partisan political candidate for the Sheriff of Orange County, Florida at a AFL-CIO 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 specific Canons cited under paragraph 3 of the Amended Notice of Florida

Charges are, in relevant part:

CANON 7. A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity

A. All Judges and Candidates.

(1) Except as authorized in Sections 7B(2), 7C(2) and 7C(3), a judge or a candidate for election or appointment to judicial office shall not:

(b) publicly endorse or publicly oppose another candidate for public office;

(3) A candidate for a judicial office:

(a) 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;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon.

The question faced by the JQC is whether applauding candidate Jerry Demings or chanting his name (not while the Respondent had the floor but while Respondent was standing in a crowd) at a candidate forum: a) constitutes a public endorsement for purposes of applying the Florida Canons of Judicial Ethics; and b) if so, whether this conduct is protected activity under the First Amendment.

The decision and facts in *In re Glickstein*, 620 So.2d 1000 (Fla. 1993) provide an interesting contrast to the alleged conduct at issue. In that decision, Judge Glickstein wrote a letter endorsing the retention of Chief Justice Leander Shaw on the letterhead of the Fourth District Court of Appeal which identified Judge Glickstein as a member of the judiciary, and was published in the *Citrus County Chronicle* and the *Florida Flambeau*. The charges against Judge Glickstein before the JQC for writing the endorsement letter were based upon, among others, Canon 7A(1)(b) of the Code of Judicial Conduct, the same Canon for which Respondent is being charged.

The first point of distinction is that Judge Glickstein's conduct was express, clear and unambiguous, while the conduct alleged to have been engaged in by

Respondent is vague and implied. While the majority found that Judge Glickstein's conduct warranted a reprimand, Justices Kogan and Barkett filed separate dissenting opinions each stating that they believed that Judge Glickstein's conduct could not be constitutionally reached because there is no compelling state interest in prohibiting judges from making the specific kind of remarks Judge Glickstein made in the context in which he made them. These prescient dissenting opinions significantly predate the Supreme Court's decisions in *Citizens United v. Federal Election Comm'n*, ___ S.Ct. ___, ___ U.S. ___ (2010) and *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002). Emphasizing the preciousness of political speech, Justice Kennedy, in the *Citizens United v. Federal Election Comm'n*, *supra*, recently stated:

Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S., at 464, 127 S.Ct. 2652.

Respondent respectfully suggests that in light of the foregoing recent authorities and argument, Canon 7A(1)(b), as applied to him in these proceedings, violates his First Amendment Rights.

IV. Respondent's Personal Email Is Not the Level of Communication Contemplated by the Canons.

Paragraph 4 of the Amended Notice of Formal Charges filed on December 3,

2009, states:

During the campaign, you knowingly engaged in partisan political activity by campaigning on behalf of other partisan political candidates by promoting, on September 19, 2008, the attendance of others at a partisan political event, specifically an Obama/Biden fundraiser at which the sister of Democratic Vice Presidential Candidate Joseph Biden was scheduled to appear on September 20, 2008, 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.

Respondent sent an email to ten (10) of his personal friends. The email was an isolated act to a specific and limited number of persons and can hardly be construed as campaigning for a partisan candidate or promoting the function. Respondent submits that this activity was purely private conduct not intended to be restricted by Canon 7.² It further begs the question of the potential slippery slope – at what point does an email believed to be private, but perhaps copied to more than a single person, become a prohibited communication subject to discovery by the JQC. The policy ramifications here are of concern, and Respondent respectfully suggests the protection of privacy interests, not only of a judicial candidate but of his or her friends and family, outweigh the interest of the JQC in ensuring that partisan activity did not take place through limited email activity.

² The Commentary to Canon 7 states: “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.”

Respondent submits that for the reasons discussed below, the interests intended to be enforced and protected by Canon 7 are not served by seeking sanctions against Respondent for the conduct alleged in paragraph 4 of the Amended Notice of Formal Charges. In *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), the Court of Appeals made the following observation about the reasons why states have attempted to prohibit partisan activities in judicial elections:

The partisan-activities clause bars a judicial candidate from associative activities with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for nonjudicial offices) up until the day he begins his run for a judicial seat. A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial open-mindedness. The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.

The apparent goal of the restrictions on partisan political activity is to serve the interests of impartiality, both real and perceived; or, stated another way, the pursuit of judicial open-mindedness. However, those interests are not served by claiming that Respondent's email to ten friends is prohibited conduct because those identifiable friends presumably already know Respondent's political views whereas the general electorate would not.

Therefore, an email about a political event to the general public or a large group would not be appropriate because it might inform the recipients of the sender's political views. On the other hand, that same email to ten friends would do no harm because those ten (10) persons should, for the most part, already have an idea of the sender's politics. Further, Respondent respectfully asserts that, in light of the foregoing authorities and argument, Canons 7A(1)(b), 7A(1)(e), 7A(3)(a) and 7A(3)(b) of the Code of Judicial Conduct, as applied to him in these proceedings, violate his First Amendment Rights.

V. The Canons of Ethics at Issue Must Be Examined Under the First Amendment's Strict Scrutiny Standard.

Beginning at page 10 of its memorandum of law, Special Counsel argues that the standard to be used in this case-at-bar regarding Respondent's First Amendment defenses should be examined under lesser standard than strict scrutiny.³ *Morial v. Judiciary Commission*, 565 F.2d 295 (5th Cir. 1977) was decided over 32 years ago. The application of the strict scrutiny to political speech

³ At page 10 of its Memorandum of Law, Special Counsel states: "The JQC submits that this case is subject to a lesser level of scrutiny, and the Hearing Panel should look to the Fifth Circuit's United States Court of Appeals for the decision in *Morial v. Judiciary Commission*, 565 F.2d 295 (5th Cir. 1977)."

was recently reaffirmed by the Supreme Court in *Citizens United v. Federal Election Comm'n*, ___ S.Ct. ___, ___ U.S. ___ (2010). (See quotation from *Citizens United* on page 7 *infra*. regarding strict scrutiny.)

Special Counsel relies on the recent United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, ___ U.S. ___ (2009) arguing that in that case, the Supreme Court gave proper weight to the state's compelling interest in providing its citizens with a fair and impartial judiciary and maintaining public confidence therein. Respondent disagrees with this application of the *Caperton, supra.*, decision to the facts before this panel.

The essential facts in *Caperton* are that after a West Virginia jury found a coal company, A.T. Massey, liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded the plaintiff, Caperton, \$50 million in damages. Shortly after the return of the verdict, judicial elections were held in West Virginia. Anticipating that the West Virginia State Supreme Court of Appeals would consider the appeal from the verdict in favor of Caperton, A.T. Massey's chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. Moreover, his \$3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won by fewer than

50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify by then-Justice Benjamin under the Due Process Clause and the State's Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The West Virginia Supreme Court then reversed the \$50 million verdict. Caperton thereafter sought and was granted certiorari to the United States Supreme Court.

First, the facts in the *Caperton, supra* decision involve an extreme and blatant case of judicial corruption. This argument is supported by the author of the *Caperton* opinion, Justice Kennedy, who stated:

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its amici predict that various adverse consequences will follow from recognizing a constitutional violation here-ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.

Therefore, Respondent urges that the *Caperton* decision provides little precedential guidance for this Panel regarding the issues involving the First Amendment.

VI. *Weaver v. Bonner* is Binding Precedent in Florida.

Special Counsel cites no cases that uphold the constitutionality of prohibiting the solicitation of campaign contributions by a judicial candidate. Solicitation clauses identical to the one sought to be enforced in this proceeding have also been found unconstitutional in *Siefert v. Alexander*, 597 F.Supp.2d 860 (W.D.Wis. 2009); *Kansas Judicial Watch v. Stout*, 440 F.Supp.2d 1209, 1237 (D.Kan. 2006) and in *Carey v. Wolnitzek*, ___ WL 4602786, ___ (E.D. Ky. 2008). In all of these cases, the courts indicated that diminished public confidence in the judiciary is inevitable where judges are elected and, thus, must engage in fundraising.

The Georgia Supreme Court, in response to the decision in *Weaver v. Bonner*, changed the language of its previous version of Canon 7. What follows is the commentary to that revised Canon:

Commentary: Although judges and judicial candidates are free to personally solicit campaign contributions and publicly stated support, *see Weaver v. Bonner*, 309 F 3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committees of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidacies.

Accordingly, *Weaver v. Bonner, supra*, is the controlling law in the Eleventh Circuit as to the application of Canon 7C(1). Therefore, the Chair should grant partial summary judgment in favor of Respondent as to paragraph 5 of the

Amended Notice of Formal Charges.

CONCLUSION

Based on the foregoing authorities and argument, Respondent requests that the Panel Chair grant Respondent's Motion for Partial Summary Judgment.

Dated this 3rd day of February, 2010.

Respectfully submitted:

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 3rd day of February, 2010, to the persons on the attached Service List.

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