SUPREME COURT, STATE OF FLORIDA

CASE NO. ~~79,075~~ 79592

~~JOSEPH J. REITER, et al.,~~

Petitioners,

-vs-

~~ROBERT M. GROSS, Circuit Judge,~~ In re Code of Judicial Conduct - Canons 1, 2, and 7A(1)(b)

Respondent.

ANSWER BRIEF OF PETITIONERS

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and

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The introduction to the brief in behalf of Judge Glickstein correctly states the issues before the Court.

THE FACTS

March 20, 1990 - The Committee on Standards chaired by Judge Oliver Green issued Opinion 90-3. The opinion advised that Judges cannot publicly endorse judicial candidates in merit retention elections.

March 26, 1990 - Judge Glickstein wrote Justice Shaw congratulating him, forwarding clippings for a scrapbook and expressed regret that Justice Shaw had drawn opposition. The letter was written on ABA stationery. (Appendix 1)

May 10, 1990 - The Judicial Forum published a summary of Opinion 90-3. By 90-3, the Committee unanimously determined that a Judge may not engage in public activity on behalf of a member of the Judiciary who is the target of a rejection campaign for reasons unrelated to competency or misconduct. (Appendix 2)

August 10, 1990 - Judge Stafford enjoined the Florida Bar and JQC from enforcing Canon 7(B)(1)(c). (Appendix 3)

August 15, 1990 - As a result of Judge Stafford's order, Judge Oliver L. Green, Jr. wrote Justice Shaw concerning continued adherence to Canon 7. (Appendix 4)

Between August 15, 1990, and August 31, 1990 - the Supreme Court met in conference to discuss the question raised by Judge Green concerning continued adherence to Canon 7, and determined

that the Committee on Standards of Conduct governing Judges should continue to adhere to Canon 7 as written.

August 31, 1990 - Justice Shaw informed Judge Green that the Court expected continued adherence to Canon 7. (Appendix 5)

September 6, 1990 - Justice Shaw advised the Chief Judges of Circuit Courts of the Supreme Court's correspondence with Judge Green concerning continued adherence with Canon 7 with directions that copies of the correspondence between Judge Green and the Court and a copy of the Federal Court order of Judge Stafford be circulated to the various judges in the circuits. (Appendix 6)

October 16, 1990 - Judge Glickstein attended a reception at the law office of Willie Gary. Justice Shaw was in attendance at the reception. During a conversation with Justice Shaw, Judge Glickstein inquired of Justice Shaw as to whether or not Justice Shaw would like for Judge Glickstein to write another letter similar to the letter mentioned in Paragraph 1 hereof. Justice Shaw replied in the affirmative. (Glickstein Dep., Page 16, line 22 - Page 17, line 4.; Appendix 8)

October 25, 1990 - Judge Glickstein, on a letterhead of the Fourth District Court of Appeal, wrote the letter that is the subject matter of the charge. (Appendix 9) He read the letter to Justice Shaw and obtained Justice Shaw's approval before mailing it. The letter was mailed to several newspapers, some of which were specifically enumerated by Justice Shaw as papers that he desired the letter to be sent to. (Glickstein Dep. Page 18, lines 6-25; Appendix 8.) The signature line of the letter

identified Hugh S. Glickstein as a Judge of the Fourth District Court of Appeal.

October 30, 1990 - Justice Shaw thanked Judge Glickstein for writing letters. (Appendix 7)

November 16, 1990 - article published in Broward and Dade Review concerning Judge Glickstein's letter. (Appendix 10) As soon as the newspaper article appeared in the Palm Beach Review it became apparent to Judge Glickstein, according to his testimony, that the letter was becoming an issue, or had become an issue. (Glickstein dep, Page 21, lines 23-25; Page 22, lines 1-2; Appendix 8)

Because the newspaper article was of concern to Judge Glickstein, he telephoned Justice Shaw. Judge Glickstein had two conversations with Justice Shaw. He had a conversation with Justice Shaw's campaign manager, Art Collins. In one of the conversations Justice Shaw told Judge Glickstein, "I forgot to tell you that the Court had agreed to strictly enforce the Canon." He also said, "I will have to recuse myself." Judge Glickstein described his feelings upon hearing those words, "My feeling was the same kind of feeling that somebody has on a boat and he's standing on the end of a plank."
(Glickstein dep., Page 24, lines 12-14; Appendix 8))

In his telephone conversation with Art Collins, Judge Glickstein tells Collins, "<u>I want to hear from you and Justice Shaw that you appreciate what I did for Justice Shaw and that harm won't come to me from this</u>." Collins replied in essence,

"We appreciate what you did and no harm is going to come to you." (Glickstein dep., Page 25, lines 16-24; Page 26, lines 7-9; Appendix 8)

At the deposition of Judge Glickstein taken December 16, 1991, the following matters were established:

(A) Judge Glickstein never read 90-3. By his own testimony he was stunned when he first read 90-3 on the morning of his deposition. (Glickstein dep., Page 14, lines 3-4); Appendix 8)

(B) Judge Glickstein expresses the opinion that a letter signed by a judge or a mayor is going to be looked at differently than a letter that is simply signed, Hugh Glickstein, Resident of Stuart. (Glickstein dep., Page 38, lines 2-6; Appendix 8)

(C) Judge Glickstein made no conscious decision prior to writing the letter on October 25 that the First Amendment or any other Constitutional amendments gave him the right to write the letter even though it was prohibited by the terms of Canon 7. (Glickstein dep., Page 35, lines 9-17; Appendix 8)

(D) Judge Glickstein is concerned that "Once you get into the scope of the JQC you are dead...and I don't mean just at the JQC level, I mean at the Supreme Court level as well." (Glickstein dep, Page 27, lines 9-13; Appendix 8)

(E) Judge Glickstein asserted that he has "lost a year in terms of emotional distress in this thing and there is no

question in my mind, that unless I can get relief from Judge Gross there is no way in the world that I am ever going to get this JQC to do other than recommend to the Supreme Court of this State that I be publicly reprimanded for what I did...I am going to wind up with a public reprimand which will be affirmed by the Supreme Court of Florida which has affirmed every decision that the JQC has made as best I can see." (Glickstein dep, Page 31, lines 2-17, Appendix 8)

I. Canon 7A(1)(b) is a reasonable limitation on the free speech rights of a public employee who is a member of the judiciary.

A. The State may restrict the free expression of its employees, particularly of judges, to a greater degree than it may restrict the free expression of private citizens.

II. There are compelling State interests served by prohibiting a Judge or Justice from publicly endorsing a candidate for public office.

At the outset, it should be noted that Respondents have cast the issues in this case in such a manner that obscures the true questions involved. This case is manifestly not about "public discussion of governmental offices" (Initial Brief at 5), "the ability to speak on public issues without fear of having to answer to government" (Id. at 10), or even "whether a judge may claim constitutional protection for a dignified, truthful letter supporting another judge..." (Id. at 15). The issues before this Court are (1) whether the State of Florida has a sufficient state interest in prohibiting the use of judicial office to endorse a candidate standing for election; and (2) whether Canon 7A(1)(b)

("the Canon") has been tailored narrowly enough to serve this state interest; and (3) whether application of the Canon to Judge Glickstein in this case is constitutional. The response to all three of these issues should be affirmative.

A. The State may restrict the free expression of its employees, particularly of judges, to a greater degree than it may restrict the free expression of private citizens.

Respondent's brief, while discussing at length the laudable purposes behind our Nation's right of free expression, completely disregards an entire line of cases concerning the free speech rights of public employees. The U.S. Supreme Court has long recognized this distinction:

> "The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in [regulating] the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interests of the State as an employer, in promoting the efficiency of the public services it provides through its employees."

Pickering v. Bd. of Education, 391 U.S. 563, 568 (1968)(emphasis supplied). In United Public Workers v. Mitchell, 330 U.S. 75 (1947), the Supreme Court held that Congress can restrict the First Amendment rights of federal employees by regulating their political activities "within reasonable limits." Id. at 102. United Public Workers was specifically reaffirmed in Civil Service Commission v. Letter Carriers, 413 U.S. 548. The Court in Letter Carriers analyzed the interests served by the restriction and concluded that were sufficient to overcome the interests of the government employees:

> "Although Congress is free to strike a different than it has, if it so chooses, we think that the balance that it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities contained in the Hatch Act."

Id. at 564. The Court has also upheld similar restrictions on the political activities of State employees. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Thus, the Supreme Court has concluded that the First Amendment rights of public employees may be restricted if the restrictions are reasonably related to public functions and serve important state interests. The governing standard in this case is therefore not "strict scrutiny," as Respondents suggest (Initial Brief at 5). However, even if the correct standard is "strict scrutiny," the Canon meets that standard, and the interests the Canon serves are "compelling," and the Canon is narrowly tailored to serve these interests.

It is not enough to say, however, that the Canon should stand because it regulates public employees. The persons regulated by the Canon are more than mere government functionaries; they are the protectors of our laws and liberties.

Our government was founded on the doctrine of separation of powers, the notion that Judges are and should be removed from the political process, and that Judges are held to more rigorous standards of conduct than other mortal men and women. "There can be but few men in the society who will have sufficient skill in the laws to qualify them for the station of judge ... the number must be still smaller of those who unite the requisite integrity

with requisite knowledge." The Federalist Papers, No. 78 (2nd Ed. 1966). Both "integrity" and "moderation" are prerequisites to the holding of judicial office. Id.

A judge is a public office holder. His or her conduct is public property. Clemons v State, 141 So.2d 749, 753, (Fla 1st DCA 1962). A judge stands apart by virtue of his contract with the state and its people:

> When a lawyer dons the ermine and mounts the woolsack he assumes a very serious obligation to the people he serves. Nothing more seriously affects their lives, their property, and their safety than his decisions, the weight of which is determined by his wisdom and integrity. The ermine is the symbol of purity, honor, and wisdom, the brand of wisdom which is the flower of years of experience. From the time he is clothed with judicial authority he is a marked man.

Cone v. Cone, 68 So.2d 886,888 (Fla.1953)(en banc).

There can be no more compelling interest that a state has than safeguarding its judiciary from the appearance of impropriety. See Cox v Louisiana, 379 U.S. 559, 565 (1965) (upholding state statute barring picketing near the courthouse, and noting that "A state may also properly protect the judicial process from being misjudged in the minds of the public.") "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." Landmark Communications, Inc. v Virginia, 435 U.S. 829, 848 (1978) (Stewart, J. concurring). See also Buckley v Valeo, 424 U.S. 1, 30 (1976) (upholding congressional limits on campaign contributions because "Congress was justified in concluding that the interest in safeguarding the appearance of impropriety

requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated"; Cone v Cone, 68 So2d at 888. "The administration of justice is the most important business of the State."

The state may thus restrict the speech of elected judges in ways that it may not restrict the speech of other elected officials. See Morial v Judiciary Commission of La, 565 F.2d 295, 305 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013, 98 S. Ct. 1887, 56 L.Ed.2d 395 (1978). "Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind." See also Stretton v Disciplinary Board of the Supreme Court of Pennsylvania, 944 F.2d 137, 142 (3rd Cir. 1991) (upholding Canon 7 of the Pennsylvania Code of Judicial conduct prohibiting a candidate for judicial office from making pledges or promises, after giving narrow construction prohibiting "announcing views" with regard to matters that may come before them), and noting that:

> The functioning of the judicial system differs markedly from those of the executive and legislative. . .
>
> * * *
>
> The fact that a state chooses to select its judges by popular election, while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.

Id. at 142.

Judge Glickstein argues that his is the purest of motives -- the desire to support another judge who has been targeted for

removal under merit retention system (Initial Brief at 15). Accepting such assertions as true, it highlights the subjective approach to the Canon urged here. This Court is thus urged to rule that -- as Justice Shaw is a "good" political candidate -- his endorsement constitutes speech which seeks to uphold the integrity of the judiciary" (Initial Brief at 16). However, it should be added that the identical endorsement of a subjectively "bad" political candidate (One of the judges targeted in Operation Court Broom, for example) could well have the opposite effect. As in Buckley v Valeo, 424 U.S. at 30, it is this "interest in safeguarding the appearance of impropriety [which] requires that the opportunity for abuses inherent in the process...be eliminated." The constitutionality of the Canon thus does not turn on whether Judge Glickstein is prohibited from saying all that he desires about a judicially acceptable political candidate -- but whether a blanket prohibition of judicial imprimaturs on political candidates is reasonably related to the compelling state interest in protecting its judiciary from the appearance of impropriety .

Clearly, it is. The Canon is intended to preclude a judge from lending the judicial seal of approval to any candidate regardless of beliefs. Just as a judge is a "marked man" when he or she assumes judicial office, a judge's conduct is required to beget confidence in the bar and the public. By its very nature, a judge's office "engenders in the public an exalted and merited admiration..." Cone v Cone, 68 So2d 886 (Fla. 1953) (en banc).

Canon 7(A)(1) precludes the use of this "exalted and merited admiration" as a means to procure votes for another. Only by such blanket prohibition can the public be protected from political candidates who are neither as scrupulous nor as deserving as Justice Shaw.

Violation of the Canon politicizes the judiciary, and damages the integrity of the judicial election process. Without a rule such as Canon 7A(1)(b) it is possible to have judges divided into opposing political camps over retention elections. This can seriously erode the independence of the judiciary.

The Canon prevents higher court judges from soliciting public endorsements from lower court judges. This is an important goal for a number of reasons.

If a lower court judge publicly endorses a higher court judge, lawyers may seek to curry favor with the lower court judge by endorsing and contributing to the judge endorsed by the lower court judge, i.e. Lawyers desiring to curry favor with Judge Glickstein may well contribute to and campaign for a candidate publicly endorsed by Judge Glickstein.

When Judge X is running for retention you have the problem of lawyers currying favor with Judge X. This is unavoidable. If Judge X is running for retention and is publicly supported by Judges A, B, C, D, E, F, and G, then you have broadened the realm of favor currying from one courtroom into seven courtrooms.

When a person publicly endorses or publicly speaks out in favor of a candidate, the candidate may be perceived as indebted

or owing a favor to the person who endorsed him. The person giving the endorsement often feels he is entitled to a favor or some return benefit for the public support or public endorsement.

When a judge publicly endorses a candidate, and particularly a judicial candidate, lawyers, litigants and citizens may come to believe that the Judge will be influenced in the future by direct knowledge of who has contributed or supported the candidate publicly endorsed by the judge. The Canon also serves to protect members of the bar and judiciary from direct pressure and solicitation by judges before whom they may appear on a regular basis.

Assume judges are allowed to publicly endorse candidates. Suppose Circuit Judge Able Jurist publicly endorses Appellate Judges A, B, and C for merit retention. Will Judge Jurist expect that his decisions will be less critically viewed by the appellate judges he endorsed. Will the attorneys and parties involved in the appeal believe that they face an additional burden in overturning Judge Jurist's decision if Judges A, B, and C or any of them are on the panel deciding the case?

If judges publicly endorse a candidate, opponents of the candidate may well fear that they will not receive a fair trial before the endorsing judge or that they are at best disadvantaged in actions decided by the judge.

Consider the case in question. Judge Glickstein did Justice Shaw a favor. He publicly endorsed the Justice. Did Judge Glickstein expect a return of the favor? Did Judge Glickstein

feel that Justice Shaw was obligated to him because of his endorsement? Did Judge Glickstein demand a return of the favor? Let there be no doubt that the answer is "Yes" to all three questions. Judge Glickstein demanded expressions of "appreciation" and "protection", i.e., assurances that "...harm won't come to me from this." He became very disturbed and upset with Justice Shaw when the Justice stated that he would have to recuse himself. (Glickstein dep., Page 24, line 6 - Page 25, line 24; Appendix 8) Judge Glickstein's conduct in this matter illustrate just why there is a reasonable basis for or compelling need for the canon.

III. Canon 7A(1)(b) is not vague or overbroad so as to be unconstitutional "as applied" to Judge Glickstein.

As a matter of due process, a law is void on its face if it is so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application. Connaly v General Construction Co., 269 U.S. 385, 391 (1926). Canon 7A(1)(b) is not in the least bit vague. It clearly states "a judge. . .should not publicly endorse a candidate for public office. . ."

Reduced to its essence as applied to Judge Glickstein in this case, the Canon states as follows: "...A judge...should not publicly ...endorse a candidate for public office." Note that nowhere does the Glickstein brief suggest that Justice Leander Shaw was not a candidate for public office. Clearly Justice Shaw was a candidate. He was running on his record or against his

record.

Judge Glickstein knows of no other Judge or Justice who publicly endorsed Justice Shaw in 1990. (Glickstein dep., Page 38; Appendix 8) Clearly, Judge Glickstein is the only member of the Florida Judiciary who publicly endorsed a candidate for public office. His inability to point to others who violated the Canon is persuasive evidence that the Canon is not vague.

The Canon is not overbroad. It does not totally proscribe a judge's right to all expression regarding a candidate for public office. It simply prohibits public endorsement of the candidate. The Canon does not proscribe all speech. It does not prohibit private non-public activity. A judge may speak and write privately on behalf of a judicial officer under attack.

Judge Glickstein's "endorsement letter" did not inform the electorate about his views on various disputed legal and political issues. By the terms of the letter he simply endorsed Justice Shaw for retention and stated reasons for his endorsement. Yet he seeks to strengthen his injunction action by injecting allegations tracking language from decisions that found Canon 7B(1)(c) unconstitutional.

It is important to distinguish the 7B(1)(c) cases and the reasoning of those cases from the instant case at the outset. Those cases establish the unconstitutionality of any speech restrictions on "candidates." Those cases do not apply to restrictions on free speech of persons other than the candidates.

7B(1)(C) cases all involve the right of the candidate to speak and the right of the public to be informed of the candidate's views. There is a recognized importance or value in allowing the public to hear the candidate's views on disputed matters, etc. There is not the same public interest in knowing what the candidate's supporters have to say. There is a vital public interest in allowing the voters to know what Justice Shaw has to say. There is not the same vital public interest in knowing what Judge Glickstein has to say. Buckley v Valeo, 421 U.S. 1 (1976).

Judge Glickstein argues that the Canon violates the Equal Protection Clause because it does not punish a public statement of opposition to a candidate rather than an endorsement of a candidate. (Initial Brief at 9). Although this argument is relegated to a footnote in the Initial Brief, it demands reply because the brief elsewhere makes reference to the "distinction." See Initial Brief at 9. ("Those revisions cured one obvious flaw, eliminating the distinction between endorsing and opposing."); Id at 17 ("The irony of this case is that the speech designed to oust Justice Shaw is clearly covered by the First Amendment, but speech supportive of his candidacy is said to be blanketly condemned").

Underinclusiveness is not a ground for an Equal Protection challenge. The drafters of the Canon are entitled to conclude that endorsing candidates poses a greater threat to the interests served by the Canon than opposing candidates. Moreover,

Respondents have not demonstrated that a judge who publicly opposed a candidate for public office would not be subject to discipline under the Canons of Judicial Conduct. For example, in In re Katic, 549 NE 2d 1029 (1990), the Indiana Supreme Court disciplined a judge for publicly opposing a candidate without endorsing anyone. The court considered the activity to be "Inappropriate political activity" in violation of Canon 7. Thus, Respondents cannot show that the so-called "distinction" has any practical significance whatever.

There are several specious arguments made in Judge Glickstein's brief that are briefly replied to follows:

-His brief cites the most recent model canon for the proposition that a judge is permitted to make facts public when false information about a candidate has been made public.

-The Glickstein brief also cites cases like Gentile and Landmark Communications for the proposition that truthful information should not be suppressed.

-He implies throughout his brief that his letter was designed to inform the public regarding "administration of justice" issues. This argument apparently attempts to apply the "administration of justice" exception of Canon 7A(4). However, the substance of Judge Glickstein's letter is not "truthful information." It is an endorsement of Justice Shaw, along with Judge Glickstein's personal assessment of Justice Shaw's qualities. As far as the new Model Canon is concerned,

the letter does not rebut a single piece of information, false or otherwise, made by Justice Shaw's detractors. Lastly, endorsing a justice does not fall within the 7A(4) exception.

IV. There is no pending issue concerning whether or not Canon 7A(1)(b) violates Article I., Section 4, of the Florida Constitution.

At page 11 of the Glickstein brief, respondents argue that "the Canon also violates Article I, Section 4 of the Florida Constitution..." There is no pending issue as to whether or not Canon 7A(1)(b) violates Article I, Section 4... That issue was raised in Count III of the complaint. The trial court dismissed Count III for failure to state a cause of action. The dismissal was with prejudice. No appeal was taken from the Court's order. Therefore, when this action was transferred to this Court, the only pending constitutional questions were those pertaining to the U. S. Constitution.

CONCLUSION

This Court should deny the petition to declare Canon 7A(1)(b) unconstitutional on its face and as applied.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was mailed this April 24, 1992, to BRUCE ROGOW, 2441 S.W. 28th Avenue, Ft. Lauderdale, FL 33312; EDNA L. CARUSO, Barristers Bldg., Suite 4-B, 1615 Forum Place, West Palm Beach, FL 33401; ROBERT M. MONTGOMERY, JR., P. O. Box 3086, West Palm Beach, FL 33402-3086; JAMES K. GREEN, 250 Australian Ave., S., Suite 1300, West Palm Beach, FL 33401; and NINA E. VINIK, 225 N.E. 34th St., Suite 102, Miami, FL 33137.

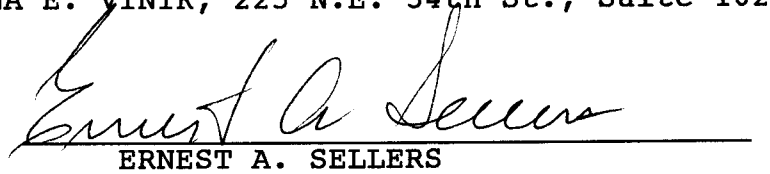
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TABLE OF CONTENTS FOR APPENDIX