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COURT OF APPEALS

Special Committee on Judicial Election Campaign Intervention
2020 Judicial Elections

2020-05

The Special Committee on Judicial Election Campaign Intervention (“Special Committee”) received requests for reconsideration with respect to the complaint addressed in Special Committee Opinion 2020-04. More specifically, the Special Committee considered the request for reconsideration, denied the request, and then the Special Committee received a request for an opinion on denial. The underlying complaint at issue pertains to the use of the title “judge” and a picture of the judge on campaign yard signs by a judicial candidate who is currently a sitting judge that is running for a judicial office on a different court wherein the judicial offices have been legislatively designated as “justices.” As set forth in special Committee Opinion 2020-04, the Committee found the content of the campaign yard sign to be truthful and not misleading. The campaign yard sign at issue contains the word “elect,” not re-elect, and the sign announces support and does not present a claim. Special Opinion 2020-04 also acknowledges that the campaign yard sign is of limited space. As set forth herein, the judicial candidate’s right during an election to First Amendment free speech with respect to truthful speech was the controlling issue and not the title of the judicial office sought.

As noted, Special Committee Opinion 2020-04 explains that the campaign sign of the judicial candidate at issue uses the title judge, and that the judicial candidate is currently a sitting judge. The judicial candidate is using the title of the current office held in the campaign yard sign. The Special Committee determined that this information is not false, constitutes a true statement, and is not misleading in the context used. The First Amendment of the U.S. Constitution protects true speech, even in the context of judicial elections. See *O’Toole v. O’Connor*, 260 F. Supp. 3d 901, 912 (S.D. Ohio 2017), *aff’d*, 733 F. App’x 828 (6th Cir. 2018). The court in *O’Toole v. O’Conner* explained that while states may adopt narrowly tailored restrictions on speech of judicial candidates, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Id.* at 913. We acknowledge that judicial precedent establishes that strict scrutiny applies under the First and Fourteenth Amendments of the U.S. Constitution to any state’s efforts to regulate the campaign speech of a sitting judge or an aspiring judge. *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 443-44 (2015)). The court in *Winter v. Wolnitzek*, in applying the strict scrutiny test, instructively distinguished true accurate speech from reckless false statements that were material to a campaign and found only the latter may be prohibited under First Amendment strict scrutiny. *Id.* at 693-94. In applying the strict scrutiny required by the First Amendment, the Special Committee determined that the judicial candidate possessed a First Amendment right to free speech during an election to communicate truthful speech of the title and picture of the current judicial position held when running for a different position with a different legislatively designated judicial title.

Based upon the foregoing and upon the decision set forth in Special Committee Opinion 2020-04, we decline the request for reconsideration. As set forth in Special Committee Opinion 2020-04, we found that the matter addressed in this supplemental opinion constitutes a matter of

sufficient general interest and importance, and the Special Committee therefore issues this formal opinion.

This opinion is limited to the scope and authority of the Special Committee under the Mississippi Code of Judicial Conduct.

Any questions should be in writing and directed to the following:

Special Committee on Judicial Election Campaign Intervention

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