

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA DIVISION

ERIC R. YOST,

Plaintiff,

v.

MIKE L. STOUT, in his official capacity as
a Member of the Kansas Commission on
Judicial Qualifications; JENNIFER L. JONES,
in her official capacity as a Member of the
Kansas Commission on Judicial Qualifications;
NANCY ANSTAETT, in her official capacity
as a Member of the Kansas Commission on
Judicial Qualifications; PATRICK
BRAZIL, in his official capacity as
a Member of the Kansas Commission on
Judicial Qualifications; THEODORE
B. ICE, in his official capacity as a
Member of the Kansas Commission on
Judicial Qualifications; CHRISTINA
PANNBACKER, in her official capacity
as a Member of the Kansas Commission on
Judicial Qualifications; WILLIAM B.
SWEARER, in his official capacity as a
Member of the Kansas Commission on
Judicial Qualifications; CAROLYN
TILLOTSON, in her official capacity as a
Member of the Kansas Commission on
Judicial Qualifications; ROBERT
FLEMING, in his official capacity as a
Member of the Kansas Commission on
Judicial Qualifications; BRUCE BUCHANAN,
in his official capacity as a Member of the
Kansas Commission on Judicial Qualifications;
MARY DAVIDSON COHEN, in her
official capacity as a Member of the Kansas
Commission on Judicial Qualifications;
ROBERT A. CREIGHTON, in his official
capacity as a Member of the Kansas
Commission on Judicial Qualifications;

Civil Action No. _____

(VERIFIED COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF)

DAVID J. KING, in his official)
capacity as a Member of the Kansas)
Commission on Judicial Qualifications;)
LAWRENCE E. SHEPPARD, in his official)
capacity as a Member of the Kansas)
Commission on Judicial Qualifications;)
EDWARD G. COLLISTER, JR., in his official)
capacity as Commission Examiner for the)
Kansas Commission on Judicial Qualifications;)
))
Defendants.)

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

COMES NOW Plaintiff Eric R. Yost and, for his Complaint against the Defendants, states the following:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of portions of Canon 5A(1)(b) and (e), and Canon 5C(2).

2. Canon 5A(1)(b) (“endorsement clause”) provides that a judge or judicial candidate may not “publicly endorse or publicly oppose another candidate for public office.” Canon 5C(1)(b)(iv) makes one exception to this provision, providing that a judge or judicial candidate, “when a candidate for election,” may “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.”

3. Canon 5A(1)(b)’s overbroad language burdens and chills judicial candidates’ free speech by restricting judicial candidates’ right to engage in political speech by, without compelling reason, forbidding judicial candidates from endorsing candidates in other races.

4. Canon 5A(1)(e) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization” A campaign committee is a “political organization” within the meaning of the definition of the term. *See Advisory Opinion JE 82* (May 29, 1998). Thus, judges and judicial candidates cannot solicit funds for their own campaign committees.

5. Canon 5C(2) provides, in relevant part, that “a candidate shall not personally solicit or accept campaign contributions”

6. The solicitation clauses of both Canons 5A(1)(e) and 5C(2), on their face and as applied to Judge Yost, violate the constitutionally protected rights of freedom of speech and association in that they each prohibit judicial candidates from personally soliciting campaign contributions from those who wish to support them. The solicitation clauses are not narrowly tailored, but are instead overbroad, preventing judicial candidates from exercising their free speech rights.

Jurisdiction and Venue

7. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

8. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

9. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b).

Parties

10. Plaintiff, Eric R. Yost, is an individual and resident of Kansas. He lives in Wichita, Kansas, in Sedgwick County.

11. The Defendants are the members of the Kansas Commission on Judicial Qualifications, sued in their official capacities: Jennifer L. Jones, Nancy S. Anstaett, J. Patrick Brazil, Theodore B. Ice, Christina Pannbacker, William B. Swearer, Carolyn Tillotson, Robert J. Fleming, Bruce Buchanan, Mary Davidson Cohen, Robert A. Creighton, David J. King, Lawrence E. Sheppard, and Mike L. Stout, as well as the Commission Examiner, Edward G. Collister, Jr. The Commission, created pursuant to the Kansas Constitution, Article 3, § 15 and the inherent power of the Kansas Supreme Court, is empowered to receive and order the investigation of complaints regarding judicial conduct, to determine whether to bring formal charges against a judicial officer, and to present its case in support of the charges before the Commission hearing Panel. *See Kan. S. Ct. R. 602-607.*

Facts

12. Plaintiff, Eric R. Yost, is presently a state district court judge in Sedgwick County, Kansas. He publicly states that he is a candidate for re-election in 2008 – thus, he is a “judicial candidate” as defined by Kansas Code of Judicial Conduct, *Terminology* – and he intends to run in future judicial elections thereafter. In the immanent November 2006 election and in elections thereafter, he would both like to endorse Kansas state candidates for public office other than his own and to personally solicit funds from non-lawyers but will not do so because he fears discipline under the Kansas Canons.

13. Judge Yost wishes to publicly endorse and publicly oppose certain political candidates for public office who are not candidates running for his judicial office. Campaigning for an elected public office “necessarily entails . . . endorsements.” *Weaver v Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (citation omitted). Crucially, the endorsement clause “depends wholly upon the subject matter

of the speech for its invocation” and, moreover, the clause prohibits speech that is of the highest order – political speech. *Republican Party of Minnesota v. White*, 416 F.3d 738, 763-64 (8th Cir. 2005). ““It 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.”” *Id.* at 764 (*quoting Buckley v. Valeo*, 424 U.S. 1, 15) (1976) (other quotation omitted) (alteration in original). As Canon 5A(1)(b) forbids Judge Yost from publicly endorsing or opposing candidates of any kind running for any public office other than his own, the canon violates his freedom of speech and association rights both on its face and as applied to Judge Yost.

14. Judge Yost would also like to personally solicit funds from those non-attorneys who wish to support him by going door-to-door, making personal phone calls, and signing letters asking for financial support. Judge Yost does not wish to solicit funds in his official capacity as a judge, to use any official facility, instrument, or personnel in order to gain support or contributions, or to solicit funds from those he knows to be attorneys, but only wishes to exercise his constitutional rights to free speech and association as a judicial candidate. However, Canons 5A(1)(e) and 5C(2), both on their faces and as applied to Judge Yost as a judicial candidate, prohibit Judge Yost from doing so, and as a result, his freedom of speech and association rights are violated.

15. On May 24, 2006, a related case challenging the constitutionality of Canon 5A(3)(d)(i) and (ii), the solicitation-for-support clause of Canon 5C(2), and Canon 3E(1) of the Kansas Judicial Canons was filed in Kansas district court. On July 19, 2006, Judge Julie A. Robinson entered a preliminary injunction in that case, enjoining the enforcement of Canons 5A(d)(3)(i) and (ii), and 5C(2). A motion to amend adding Eric R. Yost as a plaintiff, and adding challenges to Canons 5A(1)(b) and

(e), as well the solicitation-for-funds clause of Canon 5C(2), was filed on September 1, 2006. That motion was denied on October 23, 2006, and a stay of the proceedings in the case pending an appeal of Judge's Robinson's preliminary injunction was issued on October 26, 2006.

16. Immediate and irreparable injury, loss, and damage has occurred and will continue to occur as a result of the endorsement clause of Canon 5A(1)(b), and the solicitation-for-funds clauses of Canon 5C(2) and Canon 5A(1)(e), thus chilling Plaintiff's free speech and free association rights.

17. Plaintiff has exhausted all extra-judicial means at his disposal to resolve this matter before proceeding to file this Complaint.

18. Plaintiff has no adequate remedy at law.

COUNT I

The Endorsement Clause of Canon 5A(1)(b) On its Face Unconstitutionally Prohibits Judicial Candidates' Protected Political Speech.

19. Plaintiff realleges the preceding paragraphs.

20. The endorsement clause of Canon 5A(1)(b) provides that a judge or judicial candidate may not "publicly endorse or publicly oppose another candidate for public office" other than in the candidate's own election, as provided by Canon 5C(1)(b)(iv).

21. An overbroad law is to be facially invalidated if the burden it places on protected speech is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Jordan v. Pugh*, 425 F.3d at 820, 828 (10th Cir. 2005) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); see *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1038 (D. N.D. 2005).

22. Canons 5A(1)(b) sweeps constitutionally protected speech within its scope, and is not narrowly tailored but is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 416 F.3d at 766; *Weaver*, 309 F.3d at 1322.

COUNT II

The Endorsement Clause of Canon 5A(1)(b) As Applied to Judge Yost Unconstitutionally Prohibits Judicial Candidates' Protected Political Speech.

23. Plaintiff realleges the preceding paragraphs.

24. The endorsement clause of Canon 5A(1)(b) provides that a judge or judicial candidate may not “publicly endorse or publicly oppose another candidate for public office” other than in the candidate’s own election, as provided by Canon 5C(1)(b)(iv).

25. Judge Yost would like to endorse candidates in races other than his own, both in the 2006 election and in future elections.

26. The endorsement clause forbids Judge Yost from making endorsements. As a consequence, these clause, as applied to Judge Yost, constitutes an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT III

The Solicitation Clauses of Canon 5A(1)(e) and Canon 5C(2), Are On Their Face Unconstitutionally Overbroad, Prohibiting and Chilling Plaintiff's Freedom of Speech and Association.

27. Plaintiff realleges the preceding paragraphs.

28. The solicitation clause of Canon 5A(1)(e) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization”

29. The solicitation clause of Canon 5C(2) provides, in relevant part, that “a candidate shall not personally solicit . . . campaign contributions”

30. An overbroad law is to be facially invalidated if the burden it places on protected speech is “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Jordan*, 425 F.3d at 828 (citing *Broadrick*, 413 U.S. at 615); see *Bader*, 361 F. Supp. 2d at 1038.

31. Canons 5A(1)(e) and 5C(2) sweep constitutionally protected speech within their scope, and are not narrowly tailored but are overbroad, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *White*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

COUNT IV

The Solicitation Clauses of Canon 5A(1)(e) and Canon 5C(2) As Applied to Judge Yost Unconstitutionally Prohibit and Chill Plaintiff’s Freedom of Speech and Association.

32. Plaintiff realleges the preceding paragraphs.

33. The solicitation clause of Canon 5A(1)(e) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization”

34. The solicitation clause of Canon 5C(2) provides, in relevant part, that “a candidate shall not personally solicit . . . campaign contributions”

35. Judge Yost would like to solicit funds from non-attorneys by going door-to-door, making personal phone calls, and signing letters seeking contributions to his campaign throughout election cycle. He is prohibited from doing so by the solicitation clauses.

36. The solicitation clauses on their face sweep judicial candidates' protected speech into the sphere of speech prohibited by the Kansas Judicial Canons and, thus, are not narrowly tailored, but constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *Weaver*, 309 F.3d at 1320, and are in direct violation of *White*, 536 U.S. at 788.

37. The solicitation clauses forbid Judge Yost from personally soliciting contributions as a candidate from non-attorneys by going door-to-door, making phone calls, and signing letters requesting campaign contributions in a non-judicial capacity. As a consequence, these clauses, as applied to Judge Yost, constitute unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests this Court to:

- (1) Declare Kansas Judicial Canon 5A(1)(b) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;
- (2) Declare Kansas Judicial Canon 5A(1)(b) unconstitutional as applied to Judge Yost because it prohibits judicial candidates from making endorsements in violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;
- (3) Declare Kansas Judicial Canon 5A(1)(e) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;

(4) Declare Kansas Judicial Canon 5A(1)(e) unconstitutional as applied to Judge Yost because it prohibits judicial candidates from soliciting contributions in violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;

(5) Declare Kansas Judicial Canon 5C(2) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;

(6) Declare Kansas Judicial Canon 5C(2) unconstitutional as applied to Judge Yost because it prohibits judicial candidates from soliciting contributions in violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;

(7) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors from enforcing Kansas Judicial Canons 5A(1)(b), 5A(1)(e), and 5C(2), and from filing or considering complaints based on these Canons against judicial candidates who make endorsements or personally solicit campaign contributions in a non-official capacity and all others similarly situated;

(8) Grant Plaintiff's costs and attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(9) Grant Plaintiff such other relief as may be just and equitable.

Dated: October 31, 2006

Respectfully submitted,

James Bopp, Jr., Ind. #2838-84
Thomas J. Marzen, Ill. #3122693
Anita Y. Woudenberg, Ind. #25162-64
Josiah Neeley, Tex #24046514
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
Ph.: (812) 232-2434
Fx.: (812) 234-3685
Lead Counsel for Plaintiffs

/s/Austin K. Vincent
Austin K. Vincent
Attorney at Law
2222 Pennsylvania Ave.
Topeka, KS 666051255
Ph.: 785-234-0022
Fax: 785-234-2927
Local Counsel for Plaintiffs

VERIFICATION

ISWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS MADE IN THE FOREGOING VERIFIED COMPLAINT CONCERNING ME ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: 10/31/2006

/s/Eric R. Yost
Honorable Eric R. Yost
525 N. Main St.
Wichita, KS 67203