

SIXTH CIRCUIT REVIEW

The Sixth Circuit Forges a Path for Equal Protection Challenges to Ohio’s Judicial Campaign Finance Regulations

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Commenting on *O’Toole v. O’Connor*, 802 F.3d 783 (6th Cir. 2015).

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I. INTRODUCTION

The Supreme Court’s decision in *Williams-Yulee v. Florida Bar* rests on an intuitive, yet increasingly contested principle in our money-saturated electoral landscape: “Judges are not politicians”¹ The Court held that state restrictions on direct solicitation of contributions by judicial candidates do not violate the First Amendment because they are narrowly tailored to states’ compelling interest in maintaining the integrity of their judiciary.² The decision appears to, for the time being, mitigate the inconsistencies between the High Court’s campaign finance decisions, most notably *Citizens United v. FEC*³ and *McCutcheon v. FEC*,⁴ and states’ interests in an unbiased and minimally politicized judiciary.

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¹ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

² *Id.*

³ *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from placing restrictions on corporate independent campaign expenditures).

⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (holding unconstitutional limits on aggregate campaign contributions as impermissible restrictions on the First Amendment right to participate in democracy through political contributions).

The Sixth Circuit is the first appeals court to directly apply the *Williams-Yulee* standard. In *O'Toole v. O'Connor*,⁵ a unanimous panel rejected a facial challenge under the First Amendment and Equal Protection Clause to Rule 4.4(E) of Ohio's Code of Judicial Conduct, which prohibits judicial candidates from soliciting contributions more than ten months in advance of the election in most years and more than twelve months before the election during presidential election years.⁶ The court relied almost exclusively on *Williams-Yulee* in resolving the First Amendment claim and holding that Ohio's interest in maintaining the integrity of its judiciary was a compelling interest and that the restriction was sufficiently tailored to this interest.⁷

In contrast to this straightforward application of the *Williams-Yulee* standard, the court's resolution of the *O'Toole* plaintiff's Equal Protection claim raises as many questions as it answers. Part II of this Comment analyzes the plaintiff's Equal Protection argument and the Sixth Circuit's ruling on that claim in *O'Toole*. Based on that ruling, I argue that this may provide an early signal of problems to come in judicial campaign finance regulation in the wake of *Williams-Yulee*. Finally, in Part III of this Comment, I identify and analyze certain classes of plaintiffs that may bring cognizable Equal Protection challenges to Ohio's judicial campaign finance restrictions under the *O'Toole* ruling.

II. EQUAL PROTECTION: INCUMBENTS AND CHALLENGERS

The plaintiff, Colleen O'Toole, holds a seat on Ohio's intermediate court of appeals and is seeking nomination for election to the Ohio Supreme Court. She claimed that Rule 4.4(E) violated the Equal Protection Clause by discriminating in favor of candidates with significant retained funds, who may spend this money in support of their campaigns during the same period their challengers are prohibited from soliciting contributions.⁸

O'Toole argued that prohibiting fundraising results in a disparity of funds that, in the context of an election, results in a disparity of speech.⁹ Each of the identified Supreme Court candidates is a sitting judge who had previously run for election and retained funds in their campaign accounts.¹⁰ The plaintiff held \$93 in her account, while the three other announced candidates held funds

⁵ *O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015).

⁶ OHIO CODE OF JUDICIAL CONDUCT r. 4.4(E) (2015).

⁷ *O'Toole*, 802 F.3d at 789–91.

⁸ *Id.* at 791.

⁹ Principal Brief of Appellant Friends to Elect Colleen M. O'Toole at 48, *O'Toole*, 802 F.3d 783 (No. 15-3614).

¹⁰ *Id.* at 3, 6 (identifying Maureen O'Connor, the current Chief Justice on the Ohio Supreme Court, Patrick DeWine, a judge on Ohio's First District Court of Appeals, and Patrick Fischer, also a judge on Ohio's First District Court of Appeals).

ranging into five and six figures.¹¹ O'Toole argued that she was effectively muted until she was permitted to raise more money, while her opponents were free to spend (and therefore speak) voluminously.¹²

The Sixth Circuit rejected this David and Goliath portrayal. The disparity in speech, the court found, was “not from any lack of equality in the rule itself,” but simply from difference in the amounts that previous campaigns had raised and spent.¹³ Since it was O'Toole's own shortcomings in fundraising or frugality that was the true “cause of the disparity,” her Equal Protection argument failed.¹⁴ The court apparently did not believe that O'Toole had demonstrated that Rule 4.4(E) created two classes of candidates.

However, the Sixth Circuit panel, speaking through Judge Clay, indicated how a future plaintiff could demonstrate that Rule 4.4(E) discriminates against certain classes of candidates. In dicta, the court noted that the fundraising restriction “may have a differential effect on [some] candidates.”¹⁵ The court identified plaintiffs “who have not previously sought judicial office” as potentially being disfavored under Rule 4.4(E), since those candidates “could not have retained any funds in a prior election cycle to spend in a subsequent cycle.”¹⁶ And the court did not stop there. In dismissing O'Toole's Equal Protection claim, the court noted that she had not challenged Rule 4.4(I)(1),¹⁷ which sets tiered caps on individual contributions to candidate committees based on the court to which the candidate seeks election.¹⁸

The court seemed to reject O'Toole's Equal Protection challenge because she had not properly delineated between a favored class of candidates and those disfavored by Rule 4.4(E). Essentially, O'Toole had only demonstrated that she had limited money, not that Rule 4.4(E) was discriminatory. The court's discussion of Rule 4.4(I)(1), which reaches beyond what was necessary for the court to resolve the issue before it, indicates that the court sensed an Equal Protection issue lurking within Canon 4 (or Rule 4.4) but that O'Toole had failed to properly frame the argument. The court's dicta on this point conspicuously leaves the door open for future plaintiffs to bring a successful Equal Protection challenge to Rule 4.4.

The court's discussion of O'Toole's Equal Protection claim is brief, but it provides a sufficient window for future litigants to challenge Ohio's judicial campaign finance rules. While the *Williams-Yulee* decision seems to present a solid obstacle to First Amendment challenges to these laws, *O'Toole* may provide an avenue for litigants to challenge these restrictions on Equal

¹¹ *Id.* at 6 (stating that the identified candidates reported that, as of December 31, 2014, their campaign committees held between \$21,674.37 and \$245,493.50).

¹² *Id.* at 49.

¹³ *O'Toole*, 802 F.3d at 791.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 791 n.1.

¹⁸ OHIO CODE OF JUDICIAL CONDUCT r. 4.4(I)(1) (2015).

Protection grounds. Some potential classes of litigants who might bring such challenges are discussed in the next section.

III. CHALLENGING RULE 4.4: THE OUTSIDER AND THE LADDER CLIMBER

The language discussed in the previous section may serve as a stepping-stone for further challenges to Ohio's system of regulating judicial campaign finances by way of the Equal Protection Clause. The challenges outlined in this Comment may hold special appeal to legal critics of campaign finance regulation, as they reinforce the notion that such regulations have the effect, possibly even the design, of protecting incumbents.¹⁹ Two classes of potential plaintiffs are profiled below.

A. *The Outsider*

The ideal Outsider has never before sought judicial office. The Outsider, however, is not a *true* outsider: she is a successful attorney with a large firm who maintains a stellar professional reputation and is well-qualified for the Ohio bench. Standing in her way is Judge Incumbent. He has held a seat on the court of common pleas for decades, and has rarely faced a serious challenge due to his exceptional fundraising ability.

The odds are against the Outsider in her challenge against Judge Incumbent. He has retained significant funds from previous races. Meanwhile, the Outsider is hobbled in her effort to begin laying the groundwork of her campaign. Because the race takes place during a presidential election year, Rule 4.4(E) prohibits her from raising funds until January.²⁰ She is forced to maintain her practice full time until she is able to raise enough funds to support her candidacy.

In her as-applied challenge to Rule 4.4(E), the Outsider will argue that the fundraising restriction creates two classes of candidates: incumbents and challengers. She will seek to demonstrate that the restriction on fundraising operates as a restriction on speech for challengers, while permitting incumbent judges to speak through their retained funds. She will argue that Ohio has no

¹⁹ See Transcript of Oral Argument at 45, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (No. 10-238) (concerning Arizona's public financing system, Justice Scalia stated, "It seems to me it's very much pro-incumbent rather than anti-incumbent[,] . . . which one should expect campaign finance restrictions to be."); Sarah Childress, *James Bopp: What Citizens United Means for Campaign Finance*, FRONTLINE (Oct. 30, 2012), <http://www.pbs.org/wgbh/frontline/article/james-bopp-what-citizens-united-means-for-campaign-finance/> [<https://perma.cc/5H8T-VQJT>]; Bradley A. Smith, *The Myth of Campaign Finance Reform*, NATIONAL AFFAIRS, Winter 2010, <http://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform> [<https://perma.cc/KTK3-6VP3>].

²⁰ OHIO CODE OF JUDICIAL CONDUCT r. 4.4(E).

legitimate interest in preventing the speech of nonjudge candidates while simultaneously allowing sitting judges to speak.

B. *The Ladder Climber*

The Ladder Climber has served two terms on the Ohio Court of Appeals and now is seeking a seat on the Supreme Court. Although he has been a prodigious fundraiser, he has only retained a modest amount because he serves in an expensive media market and Rule 4.4(I) has prevented him from raising more than \$1,200 from any individual, \$3,600 from any organization, and \$72,700 from his political party.²¹

The Ladder Climber is challenging a two-term incumbent on the Supreme Court. The incumbent has served previously as a state senator and has always been a stellar fundraiser. She has retained a staggering amount of money because, as a previous Supreme Court candidate, Rule 4.4(I) has allowed her to receive contributions of up to \$3,600 from individuals, \$6,700 from organizations, and \$363,000 from her party in previous cycles.²² Rule 4.4(E) prevents the Ladder Climber from raising funds before November in the year prior to the election,²³ meaning he will almost certainly be disadvantaged in campaign expenditures. Meanwhile, the incumbent justice began using her retained funds a year before the general election to travel around the state and meet with potential supporters.

The Ladder Climber's Equal Protection challenge will focus on the cumulative effect of subsections (E) and (I) of Rule 4.4. He will argue that these provisions operate to discriminate against nonincumbents and function to protect sitting Supreme Court justices. The Ladder Climber will need to make a factual demonstration that subsection (E) prevents him from mounting an effective campaign by prohibiting him from raising the necessary funds.

C. *Evaluating the Challengers*

Both challengers will seek to characterize the rules as unfair and discriminatory, and as functioning to protect incumbents, but the two claims will have some analytical distinctions. The Outsider can claim that she is being silenced because she is prohibited from raising contributions, but the Ladder Climber can make no such claim because he is permitted to spend his retained funds from previous elections. The Ladder Climber will also have to overcome the heightened state interest in restricting the fundraising activities of sitting

²¹ *Id.* at r. 4.4(I).

²² *Id.*

²³ *Id.* at r. 4.4(E).

judges. The state has a reduced interest in restricting the fundraising of nonjudges who are seeking judicial office.²⁴

These distinctions give the Outsider the more compelling claim. She is being entirely silenced, and regulating the speech of a person who is not a sitting judge is, arguably, not narrowly tailored to the state's interest in preserving judicial integrity. To increase his chances of success, the Ladder Climber should attempt to make a factual demonstration that the fundraising restriction severely burdens his ability to effectively make his case to the voters.

IV. CONCLUSION

Chief Justice Roberts' maxim that "[j]udges are not politicians"²⁵ remains aspirational. As political dysfunction and policy stagnation continues to be the rule and not the exception in Washington, states will continue to be the primary arena for important policy decisions on labor, reproductive rights, and education. It is only natural that state courts, as the ultimate arbiters and interpreters of these laws, will receive increasing political pressure and political spending. The Sixth Circuit's decision in *O'Toole* is likely to inspire future candidates to challenge restrictions on judicial fundraising.²⁶ Whether that litigation will weaken the fragile peace ushered in by *Williams-Yulee* remains to be seen.

²⁴ See *Wolfson v. Concannon*, 750 F.3d 1145, 1157–58 (9th Cir. 2014) (holding that a state law restricting judicial candidates from personally soliciting campaign funds was not narrowly tailored as applied to judicial candidates who were not sitting judges).

²⁵ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

²⁶ In addition to Ohio, other states within the Sixth Circuit similarly restrict judicial campaign contributions monetarily and temporally. See KY. CODE OF JUDICIAL CONDUCT Canon 5(B)(2) (2005); MICH. CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (2013); TENN. CODE OF JUD. CONDUCT r. 4.4(B) (2012).