UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LISA GUFFEY & CHRISTINE SMITH, Plaintiffs, v. JAMES C. DUFF, in his official capacity, Defendant.	No. 18-cv-1271

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Director Duff does not dispute that to justify *ex ante* restrictions on public employees' expression, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) *("NTEU")* (citation and internal quotation marks omitted). But Director Duff never explains why the nine Identified Restrictions that are challenged in this case satisfy this standard, because he does not — and cannot — demonstrate that these restrictions are needed to serve the government's interest in the perception of judicial integrity. The fact that a government interest is important does not mean that the government may pursue it through any and all means. The extraordinary step of stripping hundreds of rank-and-file government employees of virtually every opportunity (other than the act of voting itself) to participate in the process of electing most of the officials who represent them at every level of government is both disproportionate and unconnected to the government's

interest, as Plaintiffs have shown. Plaintiffs are therefore likely to succeed on the merits of their challenge.

The Director's reliance on *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), is misplaced because that case concerned different restrictions, imposed based on an extensive history of actual corruption that is entirely absent from this case. Most of the Director's remaining arguments, including his reliance on *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), rest on the faulty premise that administrative employees of the federal judiciary, no matter how far removed they are from the process of deciding cases, should be lumped together with federal judges for the purpose of determining what restrictions are needed to ensure the perceived integrity of the judicial branch. But the Director never explains how any reasonable member of public could lose confidence in the judiciary because an administrative employee with no influence on case outcomes criticizes a presidential candidate on Facebook, donates money to her Senator's reelection campaign, or attends a reception for a gubernatorial candidate.

Finally, the Director's arguments regarding irreparable injury rest on two legal errors and ignore the factual record.

ARGUMENT

I. The Director Fails To Justify the Identified Restrictions.

As Plaintiffs have explained, the nine Identified Restrictions that they challenge strike at the heart of their ability to participate in the democratic process by forbidding them and an entire class of potential speakers (administrative employees of the judicial branch) from commenting publicly about, giving money to, displaying signs supporting, or attending fundraisers for candidates for the nation's most important elected officials (and many minor ones as well) —

including local, state, and federal legislators, state governors, and the President of the United States. *See* Memo. in Support of Pls.' Mot. for Prelim. Inj'n (Pls.' Memo.) 9-11. Additionally, the Identified Restrictions undermine core associative activity by prohibiting membership in a political party (other than registering as a member of a party for voting purposes) and attending party conventions, rallies, or meetings. *See id.* Plaintiffs have shown that these restrictions are unnecessary to serve the government's asserted interest in the perception of judicial integrity, as no reasonable member of the public could possibly believe that AOUSC employees — who do not decide cases or advise judges on deciding cases but instead perform tasks such as facilities management, information technology management, human resources administration, oversight and training of judicial-branch employees like probation officers and public defenders, and workload assessment — could express a partisan political bias through their work that could undermine the integrity of the courts' judicial functions. *Id.* at 13. The Supreme Court in *NTEU* found the government's hypothetical concerns about "class of workers with negligible power to confer favors" insufficient to justify a ban on federal employees' receipt of honoraria for speeches and articles. *NTEU*, 513 U.S. at 473. The nine Identified Restrictions, which cut much more deeply than the honoraria ban into the most "basic" of democratic rights — "to participate in electing our political leaders," *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality opinion) — *a fortiori* cannot be justified by speculation and platitudes.

Director Duff has little to say in response to these points and, remarkably, does not even address *NTEU* or any of Plaintiffs' authorities striking down employee-speech restrictions. The Director points to no evidence of corruption or politically-tinged performance of job duties in the nearly eighty-year history of the AOUSC, or to any public perception of such a problem. The more permissive pre-2018 AOUSC Code of Conduct was in effect for nearly twenty years, Bowden

Decl. ¶ 2, yet the Director identifies no respect in which that version was inadequate in terms of preserving the reality or perception of judicial integrity or serving any other governmental interest. Instead, the Director repeats several times that public employees do not have an "absolute right" to speak, Def.'s Opp. to Pl.'s Mot. for Prelim. Inj'n (Def.'s Opp.) 1, 5, 11, 15, and that the government has an interest in the public's perception of judicial integrity, *id.* at 3, 5, 10, 11 — broad propositions that Plaintiffs do not dispute but that do not assist in deciding this concrete case. The Director insists that the challenged provisions of the Code strike an appropriate balance between the employees' interest and the AOUSC's interest, *id.* at 2, 3, 10, yet he never explains *why* the Identified Restrictions represent an appropriate balance, except to assert that they are the same as the restrictions on other employees and that the preservation of judicial integrity is important. *See id.* at 2, 10-11.

These conclusory assertions do not approach meeting the burden that the First Amendment places on the government, which "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU*, 513 U.S. at 475 (citation, internal quotation marks, and source's alteration marks omitted). Director Duff's failure to connect the interest in the perception of judicial integrity to the substance and operation of the Identified Restrictions is fatal to his defense of the Identified Restrictions. "[T]he courts must consider whether the challenged statute or regulation is tailored to address the harm that the government allegedly aims to protect." *Sanjour v. EPA*, 56 F.3d 85, 97 (D.C. Cir. 1995) (en banc); *see also* Pls.' Memo. 19-20 (citing further authorities).

Having failed to explain how the Identified Restrictions serve the government's asserted interest and alleviate "real, not merely conjectural" harms "in a direct and material way," Director

Duff attempts to take refuge in *Letter Carriers* and *Williams-Yulee*. But these cases are easily distinguishable. *Letter Carriers* concerned restrictions on political activity imposed in response to a long and well-documented history of political patronage in the federal government dating back more than a century. *See* 413 U.S. at 557-60. By contrast, the Director points to no such history at the AOUSC. Additionally, the restrictions at issue in *Letter Carriers* were less onerous than the new AOUSC Code in several critical respects: employees were permitted there to express opinions publicly regarding political candidates, display badges and buttons, be a member of a party, attend political functions including fundraisers, and donate money to parties. *Id.* at 560-61 & 576 n.21. Thus, *Letter Carriers* involved *less* severe restrictions than those challenged here, in service of preventing *more* concrete harms than any shown here.

Not only do these two points wholly distinguish the specific holding in *Letter Carriers* from this case, but the *Letter Carriers* approach to the question of public employees' political speech (an approach reflected in the Director's briefing, *see* Def.'s Opp. 11-13) has been eclipsed by nearly half a century of First Amendment jurisprudence taking a much more critical view than *Letter Carriers* did of both public-employee speech limits and political speech restrictions. First Amendment doctrine meaningfully evolved with the establishment of the *NTEU* test: as the Supreme Court has noted, *Letter Carriers* "did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech." *NTEU*, 513 U.S. at 467. Just last week, the Court reiterated how rigorous the current analysis is:

> A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, No. 16-1466, 2018 WL 3129785, at *18 (U.S. June 27, 2018) (quoting *NTEU*, 513 U.S. at 468 & 466, respectively) (citations omitted; alterations by the Court). And whereas *Letter Carriers* exhibited a deferential attitude toward congressional judgments regarding restrictions on political speech and merely "restated in balancing terms our approval of the Hatch Act in *Public Workers v. Mitchell*, 330 U.S. 75 (1947)," *NTEU*, 513 U.S. at 467, the Court has more recently applied much more rigorous examination to such judgments. *See McCutcheon*, 134 S. Ct. at 1441-42 ("Campaign finance restrictions that pursue other objectives [than preventing *quid pro quo* corruption], we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern." (citation and internal quotation marks omitted)); *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption."). Additionally, whatever deference might be due Congress as the most representative branch of government is far less warranted for Director Duff, an unelected official appointed by another unelected official.

The government's reliance on *Williams-Yulee*, which upheld a state ethics rule prohibiting judges and judicial candidates from personally soliciting contributions, is doubly misplaced. First, the rule at issue there concerned only the act of soliciting campaign contributions — a restriction that Plaintiffs Guffey and Smith do not challenge here. *Williams-Yulee* emphasized that the solicitation-ban "restrict[ed] a narrow slice of speech," because judges and judicial candidates could otherwise express their campaign message to the public and fundraise through campaign committees. 135 S. Ct. at 1670. Indeed, the rule left judges "free to discuss any issue with any person at any time." *Id.* In stark contrast, the broad prohibition of political speech and activity for

AOUSC employees — including bans on public statements about candidates, donating money, wearing buttons, attending events, and more — cuts Plaintiffs off from a large swath of political activity. Second, and more fundamentally, the rule *Williams-Yulee* upheld was "aim[ed] squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money *by judges and judicial candidates*." *Id.* at 1668 (emphasis added). The entire focus of the Court's analysis was the effect of judges' own actions on judicial integrity. Noting the solemnity of the oath of neutrality that judges take, *id.* at 1666, the Court expressed concern that "judges' decisions [would] be motivated by the desire to repay campaign contributions" from "donors [like] lawyers and litigants who may appear before the judge they are supporting." *Id.* at 1667. By contrast, judicial administrative employees have no power to punish "lawyers and litigants who may appear before" them because of course no one "appear[s]" before any AOUSC employee. The government has offered no reason (beyond its own *ipse dixit*) why off-duty political speech by rank-and-file AOUSC employees would affect "public confidence in the integrity of judges" and judicial decision-making. *Id.* at 1666. Indeed, when *Williams-Yulee* considered whether solicitations for the judge by others raised the same concerns as a judge's own solicitations, the Court concluded that they did not, because "[t]he identity of the solicitor matters" and solicitation by judges themselves creates pressure that the same conduct "by a third party does not." *Id.* at 1669. The vast gulf between judges and employees of the administrative agency that supports them renders *Williams-Yulee* entirely inapposite here.

II. The Restrictions Applicable to Other Government Employees Bolster Plaintiffs' Showing That the Identified Restrictions Are Unconstitutional.

Director Duff's failure to satisfy the *NTEU* standard alone suffices to show that Plaintiffs are likely to succeed on the merits. Nonetheless, as Plaintiffs have explained, the disproportionality of the Identified Restrictions is underscored by the contrast between the Code's limitations on

AOUSC employees and the lesser restrictions applicable to executive-branch employees with greater and more sensitive responsibilities than those of AOUSC employees. *See* Pls.' Memo 15-19. And the Director's attempt to compare the AOUSC Code to the rules applicable to other judicial-branch employees is both undeveloped and unpersuasive.

Director Duff cannot deny that Plaintiffs face more onerous burdens on their political speech and association than their counterparts in the executive branch — even high-ranking or powerful officials like DOJ prosecutors, FBI agents, CIA analysts, FEC staff, and a Special Counsel appointed by the Attorney General. *See* Pls.' Memo 15-16. Instead, the Director asserts that judiciary and executive employees are differently situated because the former "work for courts that must be viewed as independent and neutral arbiters of justice for our democratic system of government to succeed." Def.'s Opp. 10. This argument is a non sequitur. While it is true that executive branch employees "work for an elected official" (the President), *id*. at 3, the vast majority are not political appointees but civil servants, and the government has a comparably strong interest in upholding the perception that the laws are being faithfully and apolitically *enforced* by the executive branch as in upholding the perception that they are being faithfully and apolitically *interpreted* by the judicial branch. *See Letter Carriers*, 413 U.S. at 565 (recognizing the "critical" interest in avoiding the perception that executive branch employees are "practicing political justice"). And even if it did not, the different responsibilities of the executive- and judicial-branch employees that the Plaintiffs highlight go to the fundamental question of whether the Identified Restrictions will truly alleviate some clearly identified harm. If Congress is satisfied that the Identified Restrictions are in large part unnecessary for powerful executive branch employees who implement the nation's election laws, investigate individuals (including politicians) for criminal activity, and charge individuals (again including politicians) with crimes, then the Director's

contrary judgment as applied to relatively low-level employees of the judicial branch, far removed from the decisions of federal judges themselves, is impossible to justify.

To the extent the Director is arguing that political restrictions on *judges themselves* and their chambers staff may properly be more onerous than those on ordinary executive branch employees, he knocks at an open door. Plaintiffs wholly agree that judges and chambers staff may be subjected to more restrictive requirements. The problem for the Director is, again, that AOUSC employees are simply not in that category. They do not need to be seen by the public as "independent and neutral arbiters of justice" because that is not their role. *NTEU* reflects the importance of rank and function in assessing the appearance of impropriety:

> Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [the] appearance of improper influence. Congress could not, however, reasonably extend that assumption to all federal employees below grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles.

513 U.S. at 473. The Identified Restrictions are far out of proportion to the government's interest in perceived judicial integrity.

Turning to other judicial-branch employees for comparison, Director Duff notes that similar restrictions apply to some other judicial-branch employees who are not judges or chambers staff (and who are not public defenders). *See* Def.'s Opp. 2, 5-6. The Director does not provide the text of — or even a citation to — what he refers to as the "Employees' Code"; Plaintiffs assume he is referring to Canon 5 of this document: http://www.uscourts.gov/sites/default/files/vol02a-ch03_0.pdf. Although the texts of Canon 5 of this code and the new AOUSC Code are quite similar, the Director's interpretation of the new AOUSC Code goes far beyond the plain meaning of the text, *see* Pls.' Memo 5, and the Director has provided no indication whether the Employees' Code is interpreted or applied in analogous fashion. And no matter how the Employees' Code is

interpreted, the Director never identifies which categories of staff subject to the Employees Code are relevant comparators for AOUSC employees and why their functions would make them comparable for purposes of the perception of judicial integrity. Indeed, what little detail the Director provides undercuts his argument. For example, the Director mentions that the Employees' Code applies to probation officers, *see* Def.'s Opp. 6, but these employees have quite a different function from that of AOUSC employees. Probation officers prepare presentence reports that are highly influential to judges in the criminal sentencing process. *See* U.S. Sentencing Comm'n, Federal Sentencing: The Basics 5 ("The federal sentencing process … revolves around the presentence report (PSR), which includes a proposed application of the sentencing guidelines."), *at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf. Thus, like chambers staff — but unlike AOUSC staff — probation officers directly influence judges in the process of deciding cases. The Director suggests no reason to believe that AOUSC employees are comparable to probation officers. The Director *does* provide a basis to distinguish public defenders from AOUSC employees — that they are not "neutral and impartial arbiters of disputes," Def.'s Opp. 4 — but of course, as noted, neither are AOUSC employees. Ultimately, the Director fails to explain why any reasonable member of public would see an AOUSC employee comment on social media about a partisan political candidate, wear a political lapel pin while off duty, or attend a partisan candidate's event on their own time (none of which activity is prohibited by the language of either Code, but all of which are prohibited by Director Duff), and leap to the conclusion that the work of the judicial branch is compromised by partisan political bias. The Director's invocation of the Employee's Code, applicable in an unspecified way to a range of employees whose functions are

not described or analyzed, falls far short of carrying the government's "heav[y] burden" under *NTEU*. *Janus*, 2018 WL 3129785, at *18.

III. Plaintiffs Have Plainly Demonstrated Irreparable Harm, and the Remaining Factors Favor Relief As Well.

Director Duff's claim that Plaintiffs have failed to show irreparable injury rests on three faulty premises, two legal and one factual. On the law, Director Duff is incorrect that the lapse in time between the announcement of the new Code and the filing of this action undercuts Plaintiffs' claims of irreparable harm. In general, "a delay in filing is not a proper basis for denial of a preliminary injunction." *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). Although delay can be *a factor* in analyzing irreparable injury, the fact that Plaintiffs tried to pursue changes to the new Code through informal means such as internal questions and lobbying and then a letter to Director Duff, *see* Guffey Decl. ¶¶ 15-17, 19; Compl. ¶¶ 26-27, rather than immediately running to court, does not negate their evidence of irreparable injury. For instance, in *Texas Children's Hospital v. Burwell*, 76 F. Supp. 3d 224 (D.D.C. 2014), this Court rejected the claim that plaintiffs' years-long delay in filing suit undermined their entitlement to preliminary relief where "plaintiffs reasonably pursued non-litigation avenues first." *Id.* at 245. Here, Plaintiffs filed their suit just two months after Director Duff rejected their attempt to resolve the matter informally via letter. *See also id.* (citing with approval a Tenth Circuit decision that found irreparable injury notwithstanding a three-month lapse between plaintiffs' unsuccessful attempt at pre-litigation settlement and their filing suit). A contrary rule for plaintiffs who negotiate first and sue later would discourage informal dispute resolution and turn the federal courts into a first resort instead of a last one.

Director Duff is also mistaken in claiming that Plaintiffs must satisfy a higher standard to obtain an injunction changing the status quo (known as a "mandatory" injunction, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014)) than one maintaining it. The

D.C. Circuit has in fact "rejected any distinction between a mandatory and prohibitory injunction." *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016).

In any event, whatever the standard, Plaintiffs have met it; Director Duff is simply wrong on the facts that Plaintiffs have failed to show irreparable injury. As Plaintiffs point out and Director Duff does not dispute, "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)). Plaintiffs provide specific and uncontroverted evidence that they are *now* refraining from political activities because of the new Code: The Code has induced Plaintiff Guffey to avoid attending a reception for a Maryland gubernatorial candidate and to refrain from donating money to a national party committee and a PAC. Guffey Decl. ¶¶ 14-15. The Code has prevented Plaintiff Smith from publicly wearing clothing expressing support for a partisan candidate, donating to her own U.S. Senator's reelection campaign, and commenting on Facebook about particular partisan candidates. Smith Decl. ¶ 11. Plaintiffs Guffey and Smith would continue to engage in conduct prohibited by the Identified Restrictions if not for the Code. Guffey Decl. ¶ 14; Smith Decl. ¶¶ 10-11. And they face discipline if they do not comply with the Code. Guffey Decl. ¶¶ 15-17; Smith Decl. ¶¶ 12-14. It is not sufficient that the Code permits Plaintiffs to express their views regarding issues in the abstract outside the context of the specific campaigns about which they would like to speak. Speech concerning the election of our political leaders is not the same as generic discussions of issues; rather, "speech about the qualifications of candidates for public office" is "at the core of our First Amendment freedoms." *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (citation and internal quotation marks omitted); *see also* Pls.' Memo 10 (citing additional authorities).

Finally, the Director's arguments regarding the public interest and balance of harms all rely on the premise that the Identified Restrictions are needed to preserve the perception of judicial integrity. *See* Def.'s Opp. 15-16. Because this premise is incorrect, as demonstrated above, these factors favor Plaintiffs, not Defendant.

* * *

In sum, Director Duff has not come close to meeting the *NTEU* standard — i.e., demonstrating "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government," and "that the regulation will in fact alleviate [real] harms in a direct and material way." *NTEU*, 513 U.S. at 468, 475. As in *NTEU*, mere recitation of the government's interests cannot demonstrate that they are met. *Accord Janus*, 2018 WL 3129785, at *18 (in this context, "the government … is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights"). Director Duff points to no evidence of corruption or politically-tinged performance of job duties in the nearly eighty-year history of the AOUSC. Nor can he explain why prohibiting employees who are far removed from the process of deciding cases from posting on Facebook about political candidates, giving candidates the modest amounts of money permitted by law, or attending their rallies, would affect in any way the public's perception of the judiciary's integrity. Accordingly, as in *NTEU*, "[t]he speculative benefits" cited by the Director "are not sufficient to justify this crudely crafted burden on [Plaintiffs'] freedom to engage in expressive activities." *Id.* at 477.

CONCLUSION

Plaintiffs' requested preliminary injunction should issue. Plaintiffs respectfully request the opportunity for oral argument to elaborate on these points and answer any questions the Court might have.

July 2, 2018

Respectfully submitted,

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