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Via U.S. and electronic mail

March 21, 2018

Dear Director Duff:

I am writing on behalf of two employees of the Administrative Office of the United States Courts (AOUSC), Lisa Guffey and Christine Smith. We are concerned that the provisions of the AOUSC Code of Conduct — particularly as that Code has been revised effective March 1, 2018 — violate AOUSC employees' First Amendment rights by unduly restricting their political participation. Specifically, Ms. Guffey and Ms. Smith are concerned about nine restrictions, identified below. We ask that these prohibitions be rescinded.

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As you know, AOUSC employees carry out a variety of tasks in support of the federal judiciary but do not themselves decide individual cases or assist with the decision process (in contrast to, for instance, a judge's law clerks). Instead, AOUSC employees provide administrative support, program management, and policy development for the judicial branch. For instance, Ms. Guffey's job is to regularly assess whether federal defender offices and court panel attorney programs are properly resourced, operating effectively, and complying with relevant administrative policies and procedures. Ms. Smith's job is to plan a training event in information technology (IT) and cybersecurity for IT professionals of the federal public defender and community defender offices, and to make recommendations to the Chief of the Defender Services Office concerning defender IT and cybersecurity policy. Neither Ms. Guffey nor Ms. Smith has any influence regarding the outcome of any individual case pending before Article III judges; indeed, they do not come into contact with judges more than a handful of times a year, much less are in a position to implement any sort of partisan agenda of their own.

Under the new Code of Conduct adding a prohibition on "partisan political activity," AO Code of Conduct § 260 Canon 5(a)(1),

and the interpretive guidance issued by your office, the following political activities are forbidden, even when an AOUSC employee is not at work, not using government facilities for her speech, and not identifying herself as an AOUSC employee:

(1) expressing opinions publicly, including on social media or via articles or letters to the editor, regarding a political party or partisan candidate for office;
(2) wearing or displaying partisan political badges, signs, or buttons;
(3) driving voters to polls on behalf of a political party or partisan candidate for office;
(4) contributing funds to a political party, political action committee, or partisan candidate for office;
(5) attending partisan fundraisers;
(6) being a member of a partisan political organization (other than registering as a member of a party for voting purposes);
(7) attending events for a partisan candidate for office;
(8) organizing events for a partisan candidate for office; and
(9) attending party conventions, rallies, or meetings.

See "Examples of Permissible and Impermissible Political Activities," App. to Memo. of James C. Duff, Dir. of the Admin. Office of the U.S. Courts, to All Administrative Office Employees, July 10, 2017, at 1-3.

Your office has identified the reasons for imposing the new Code of Conduct containing these heightened restrictions as: (1) sending the message to the courts conveying "the unity of purpose between the AO and the courts" and demonstrating "that the AO is very much an integral part of the Judicial Branch and not an independent, isolated agency"; and (2) "to align ourselves more consistently with the Court Code," i.e., the Code of Conduct for judges. Memo. of James C. Duff, Dir. of the Admin. Office of the U.S. Courts, to All Administrative Office Employees, July 10, 2017.

Although the government has more latitude to regulate the speech of its employees than of the public at large, the Supreme Court has for fifty years rejected the premise that public employees may by virtue of their employment "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). When the government imposes an *ex ante* restriction on employee speech (as distinguished from

disciplining an employee for her speech after it occurs), its rule has "widespread impact" that "gives rise to far more serious concerns than could any single supervisory decision," as "such a ban chills potential speech before it happens." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) *("NTEU").* Accordingly, 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." *NTEU*, 513 U.S. at 468 (citation and internal quotation marks omitted). Under this balancing test, the nine restrictions identified above cannot constitutionally be applied to AOUSC employees.

The political activities restricted are at the heart of what the First Amendment protects. "There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality opinion). The nine restrictions identified do not involve AOUSC employees' right to vote or run for office (the former is not restricted; the latter is not a right Ms. Smith or Ms. Guffey wishes to exercise at this time), but the other political activities that the Court has identified as "basic" — urging others to vote, working on a campaign, and contributing to a campaign — are severely restricted under the AOUSC's Code of Conduct, even though they burden "speech about the qualifications of candidates for public office," which 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). "Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation and internal quotation marks omitted). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (citation and internal quotation marks omitted).

The Code also prohibits a broad range of associational activities — including attending and organizing events and being a member of a partisan political organization — that have long been

recognized as fundamental First Amendment freedoms. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." (citation and internal quotation marks omitted)).

The AOUSC's reasons for imposing these restrictions — the hortatory purpose to "communicate with the courts about the unity of purpose between the AO and the courts" and the desire to "align" the AO Code with rules applicable to judges — do not come close to demonstrating a "necessary impact on the actual operation of the Government" that "outweigh[s]" the core First Amendment freedoms of the hundreds of employees whose political participation are sharply curtailed by the Code. *NTEU*, 513 U.S. at 468. Indeed, the AOUSC's justifications do not suggest that the nine types of political activity identified have any impact on the operation of the Government in any form or fashion. The Code revisions are, at best, attempts to build agency morale (the communicative rationale) and to promote administrative convenience (the alignment rationale). Putting aside the fact that these restrictions will actually harm employees' morale and burden the agency with intrusive enforcement responsibilities, such ephemeral interests cannot justify the significant restrictions the AOUSC is now imposing on its employees' First Amendment rights.

Unless the AOUSC can demonstrate how an AOUSC employee's public expression of her political views, donation of resources and time, membership in a political party, and participation in partisan events, all on her own time, necessarily affect the performance of her duties or the efficiency or integrity of the agency, these restrictions are not justified and cannot be imposed consistent with the First Amendment. As the Court explained in *NTEU*, "a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms." *Id.* at 475. There, in striking down a ban on federal employees' receipt of honoraria for speeches and articles, the Court described the government's burden in these terms: "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it 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." *Id.* at 475 (citation, internal quotation marks, and source's alteration marks omitted); *accord Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (en banc) (applying *NTEU* test in striking down prohibition on EPA employees' receipt of travel expense reimbursements from private sources); *Lodge No. 5 of the Fraternal Order of Police v. City of Phila.*, 763 F.3d 358, 368-69 (3d Cir. 2014) ("*Fraternal Order*") (applying *NTEU* test in striking down prohibition on police officers' contributions to their union's political action committee). The government's speculation in *NTEU* itself was insufficient to meet that standard:

> 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.

NTEU, 513 U.S. at 473; *see also Sanjour*, 56 F.3d at 98 ("[T]he government's failure to demonstrate that the challenged regulatory scheme addresses genuine harms also contributes to our reluctance to weigh its interest heavily in the *Pickering* balance."). Likewise, here, the AOUSC cannot reasonably extend the assumptions underlying the Code of Conduct for judges to a "class of workers with negligible power to confer favors." *NTEU*, 513 U.S. at 473. The AOUSC should instead follow the Supreme Court's advice to credit "the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants." *Id.* at 476.

Perhaps the most factually on-point precedent is one that long predates *NTEU* but nonetheless applies similar reasoning to a ban like the one the AOUSC has imposed. In *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971), the court considered an effort by the city of Macon, Georgia, to bar its firefighters from engaging in political speech in support of a candidate (including displaying candidate bumper stickers), soliciting votes, or contributing money to a candidate. *Id.* at 457-58. The court found the unconstitutionality of these restrictions "patently obvious," as they "proscribe[d] a great deal of political activity which is unrelated to the effective workings of the fire department." *Id.* at 471. Anticipating the approach of *NTEU*, the court focused on the mismatch between the broad sweep

of the regulations and the vague interests the city had asserted to justify them:

> Under the Macon regulatory scheme firemen are effectively rendered political eunuchs. The very fact that the scheme has been construed to forbid political bumper stickers — a particularly innocuous form of political activity — points out clearly the broadside nature of the Macon prohibitory regulations. We might ask whether a fireman's bumper stickers are so politically inflammatory that they would inhibit his firefighting ferocity or does the proscription of bumper stickers prevent extortion of political contributions? We think not. Macon has simply not aimed precisely at particular, specific evils which might justify political regulation. Bland assurances that the Macon scheme contributes to the "reasonable neutrality" of public employees or constitutes a "worthy aim" do nothing to overcome the fatal overbreadth of the charter and ordinance provisions in question.

Id. Like the restrictions at issue in *Hobbs*, the AOUSC code prohibits speech — right down to the bumper stickers and their 21st-century equivalent, the social media post — about candidates and candidate contributions, along with a host of other expressive and associative activities. And as in *Hobbs*, the AOUSC relies on bromides (here, about "unity" and "alignment") rather than evidence of a problem in need of solving. More recently, other courts have held or suggested that the *NTEU* balancing test is not met in the absence of a concrete showing of harm. *See Castle v. Colonial Sch. Dist.*, 933 F. Supp. 458, 461-62 (E.D. Pa. 1996) (striking down school district policy that prohibited off-duty school employees from engaging in political activity at polling places that happened to be located on school grounds); *Goodman v. City of Kansas City*, 906 F. Supp. 537, 544 (W.D. Mo. 1995) (striking down city prohibition on city employees' display of bumper stickers, buttons, and yard signs).

The AOUSC Code operates to strip an entire class of potential speakers — administrative employees of the judicial branch — of the right to participate in the political conversation concerning any partisan election, a category that includes local, state and federal legislative races in addition to, of course, the U.S. presidential election. The Supreme Court has expressed concern that government regulation not operate to disadvantage a particular class of speakers and thus silence a particular point of view. *Citizens United v. FEC*,

558 U.S. 310, 314 (2010) ("The Government may not … deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.") And the interest in hearing public employees' perspectives on political issues "is manifestly great" given their particular insight into the workings of government. *Sanjour*, 56 F.3d at 94.

A comparison between the AOUSC Code and the restrictions imposed on executive-branch employees under the Hatch Act and its implementing regulations is instructive. Of the nine types of political activity identified in this letter, all of them are permitted for ordinary executive-branch employees as long as the employees are not engaging in these activities on duty or using government property, and seven of the nine are permitted in some manner even for "further restricted" employees such as FBI agents, CIA analysts, and FEC staff. *See* 5 U.S.C. §§ 7323-24; 5 C.F.R. 734.302, 734.303, 734.306. Thus, the AOUSC's new Code imposes more severe restrictions on a judicial-branch IT specialist than Congress has imposed on employees of the Federal Election Commission. The potential for mischief or appearance of impropriety arising out of federal employees' partisan activities is not difficult to recognize when the employees in question are responsible for enforcing the nation's election laws, whereas such mischief is nearly impossible to imagine when the employees in question are responsible for protecting federal public defenders' email from hackers.

In upholding the Hatch Act, the Supreme Court concluded that it served the following interests: (1) "that employment and advancement in the Government service not depend on political performance;" (2) "to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs;" (3) "[that civil servants] administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party;" and (4) "that the Government and its employees [not only] in fact avoid practicing political justice, but . . . also . . . that they appear to the public to be avoiding it." *U S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564-66 (1973). The AOUSC's reasons for the revised Code of Conduct do not reflect that the political-activity restrictions identified are needed to serve any of these interests.

And even if such interests were implicated here, they could be addressed by lesser restrictions, such as a prohibition on pressuring coworkers or subordinates to hold, disavow, act on, or refrain from acting on any political views, along with a prohibition on engaging in partisan political activity at work, when using government resources, or when identifying oneself with the AOUSC. "In performing the *Pickering* balance . . . the courts must consider whether the challenged statute or regulation is tailored to address the harm that the government allegedly aims to protect." *Sanjour*, 56 F.3d at 97; *accord McCutcheon*, 134 S. Ct. at 1456 ("In the First Amendment context, fit matters."); *NTEU*, 513 U.S. at 476-77 (noting that the ban was "crudely crafted" and not "a reasonable response to the [government's] posited harms"); *Fraternal Order*, 763 F.3d at 375 (noting that a "tailoring requirement" was "implicit" in *NTEU*'s analysis); *see also Sanjour*, 56 F.3d at 95 (finding "the obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions" to be of "[f]oremost" concern).

The D.C. Circuit's recent decision in *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), is not to the contrary. There, the court upheld restrictions on political contributions by federal contractors. *Id.* at 3. Unlike the AOUSC Code, the ban at issue was justified by a demonstrated problem: "Congress enacted [the provision] in the aftermath of a national scandal involving a pay-to-play scheme for federal contracts. … And it was followed by subsequent scandals that led to further legislative refinements, again motivated by concerns over corruption and merit protection." *Id.* at 14. Moreover, the court explicitly distinguished the circumstances of contractors from those of employees: "Because regular employees do not generally need new contracts or renewals with the frequency required by outside contractors, permitting them to make contributions carries less risk of corruption or its appearance: employees have less to gain from making contributions and less to lose from not making them." *Id.* at 31. The court also observed that the contribution ban there left the plaintiff contractors "free to volunteer for candidates, parties, or political committees; to speak in their favor; and to host fundraisers and solicit contributions from others." *Id.* at 25. None of these alternative avenues for political participation remains open to Ms. Guffey or Ms. Smith under the AOUSC Code.

In sum, the nine restrictions identified above unnecessarily impinge on the free speech rights of AOUSC employees like Ms. Guffey and Ms. Smith. We ask that you rescind them.

If there are any facts or circumstances of which you think we should be aware and which bear on the constitutionality of the Code restrictions, we would welcome the opportunity to review such information and would be open to modifying our position if appropriate.

We look forward to your response by Wednesday, April 11.

Sincerely,

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