IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

BRYON R. AVEN,

Respondent.

______________________________/

Supreme Court Case No. SC19-1879
The Florida Bar File No. 2019-30,108(18A)

ANSWER TO COMPLAINT AND MOTION TO DISMISS

COMES NOW, Respondent, BRYON R. AVEN, by and through his undersigned counsel and files this his Answer to The Florida Bar's Complaint and Motion to Dismiss, pursuant to Rule 3-7.6(h)(2) of the Rules Regulating The Florida Bar, and states the following:

ANSWER TO COMPLAINT

1. Admitted.
2. Admitted.
3. Without knowledge; therefore, denied.
4. Admitted.
5. Denied.
6. Denied.
7. Denied. Campaign materials speak for themselves.

8. Denied. Campaign materials speak for themselves.

9. Denied.

10. Denied. Campaign materials speak for themselves.

11. Denied. Campaign materials speak for themselves.

12. Denied. Campaign materials speak for themselves.

13. Denied.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18.
    a. Denied.

    b. Denied.

    c. Denied.

MOTION TO DISMISS

The Florida Bar has charged Mr. Aven with a violation of Florida Judicial Canon 7 based upon statements made on Mr. Aven's judicial campaign website. A summary of these statements is set forth in the Bar's paragraphs 7, 8, 10, 11 and 12.

The United States Supreme Court has held and "frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First

Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). A candidate's speech during an election campaign "occupies the core of the protection afforded by the First Amendment." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995).

The United States Supreme Court has emphasized that regulation of judicial campaign speech must conform to the First Amendment. Republican Party of Minnesota v. White, 536 U.S. 765, 787-88 (2002); see also ACLU of Fla., Inc. v. The Fla. Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) ("[A] person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office.").

"The proper test to be applied to determine the constitutionality of restrictions on 'core political speech' is strict scrutiny." Weaver v. Bonner, 309 F. 3d 1312, 1319 (11th Cir. 2002) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995)). "[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." Republican Party of Minnesota. v. White, 536 U.S. 765, 781 (2002). "There is room for debate about whether the election of state court judges is a good idea or a bad one. Yet there is no room for debate that, if a State opts to select its judges through popular elections, it must comply with

the First Amendment in doing so." Carey v. Wolnitzek, 614 F. 3d 189, 209 (6th Cir. 2010).

In Williams-Yulee v. Florida Bar, 191 L.Ed.2d 570, 135 S. Ct. 1656 (2015), the United States Supreme Court addressed the narrow issue of whether the State has a compelling interest in restricting speech regarding the solicitation of campaign funds. The Court first explained that it has "long recognized" that "speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." Id. at 1665. In determining that such a restriction was permissible, the Court explained, "[b]y any measure, [prohibition on "personal appeals for money by a judicial candidate"], restricts a narrow slice of speech." Id. at 1670-1671. The Court "emphasized" that "'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." Id. at 1665-1666 (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)).

The allegations brought against Respondent do not involve solicitation of campaign funds. Rather, accepting the facts asserted in the Complaint as true, the Bar argues, "[o]verall, the statements on respondent's campaign website attempted to mislead voters about the proper role a judge plays in our justice system and the integrity of his judicial opponent." (Complaint, para. 13) (*emphasis added*). The Florida Bar also argues that Respondent's statements "implied that Judge Landt

was too lenient and that respondent, if elected, would impose harsher sentences." (Complaint, para. 9) (*emphasis added*).

The Florida Bar's prosecution violates Mr. Aven's First Amendment speech protections. The Eleventh Circuit has held that restrictions on judicial campaign speech are "not narrowly tailored" if it prohibits "false statements negligently made and [or] true statements that are misleading or deceptive." Weaver at 1319. The Florida Bar has not alleged that Respondent's statements were false; rather, the heart of its argument is that Respondent's true statements could be "implied" to be "misleading" when considered "overall." The Florida Bar's application of these facts to the Judicial Canons and the Rules Regulating The Florida Bar result in unwarranted restrictions on Respondent's free speech and should be dismissed.

Respectfully submitted,

SCOTT K. TOZIAN, ESQUIRE
Florida Bar No. 253510
Primary: stozian@smithtozian.com
Secondary: email@smithtozian.com
GWENDOLYN H. DANIEL, ESQUIRE
Florida Bar No. 83062
Primary: gdaniel@smithtozian.com
Secondary: email@smithtozian.com
SMITH, TOZIAN, DANIEL & DAVIS, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
813-273-0063
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Answer to Complaint and Motion to Dismiss has been furnished this 25th day of November, 2019, by email to the Honorable Craig C. DeThomasis, Referee, hagans@circuit8.org; and that a copy has been furnished via email to Laura N. Gryb, Esquire, Bar Counsel, The Florida Bar, lgryb@floridabar.org, orlandooffice@floridabar.org, and Patricia Ann Savitz, Esquire, Staff Counsel, The Florida Bar, psavitz@floridabar.org.

SCOTT K. TOZIAN, ESQUIRE