

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

FULLY INFORMED JURY ASSOCIATION,
ETC., ET AL.,

Petitioners,

v.

CASE NO. 5D11-708

HON. CHIEF JUDGE OF THE NINTH
JUDICIAL CIRCUIT,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Honorable Chief Judge of the Ninth Judicial Circuit, pursuant to Florida Rule of Appellate Procedure 9.100, hereby submits its Response to this Court's March 7, 2011 Order to Show Cause and requests this Court deny the Petition.

I. RESPONSE TO PETITIONER'S PRESENTATION OF THE FACTS

We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.¹

¹ United States v. Grace, 461 U.S. 171, 177-78 (1983)(quoting Adderly v. Florida, 385 U.S. 39, 47-48 (1966)).

The Fully Informed Jury Association and James Cox (hereinafter referred to as “FIJA”)² filed a Petition for Writ of Common Law Certiorari with this Court alleging that Administrative Order 2011-03, entered by Chief Judge Belvin Perry, Jr., violates free speech principles. The Petitioners state that they desire to “educate individuals at or near courthouses in the Ninth Judicial Circuit, including potential jurors, as to their rights and responsibilities under Florida law.” Petition for Writ of Common Law Certiorari at 2, Fully Informed Jury Ass’n. v. Honorable Chief Judge of the Ninth Judicial Circuit, No. 5D11-708 (Fla. 5th DCA March 2, 2011).

As discussed in further detail below, it is apparent FIJA is not so much attempting to “educate” the public and jurors, but rather is simply attempting to espouse their views under free speech principles. The act of educating someone cannot be confused with merely distributing pamphlets and leaflets advocating a certain theory. Ninth Circuit Administrative Order 2011-03, which is very narrowly drawn, restricts a specific, limited action by not allowing the influencing or attempted influencing of summoned jurors, while allowing such advocacy to everyone else. As demonstrated below, the Administrative Order meets constitutional requirements under free speech principles and, in fact, is more

² The Ninth Circuit does not contest Petitioners’ standing to bring this action nor does it contest the issue concerns free speech principles.

accommodating than what is required by the United States Constitution and case law interpreting the First Amendment. The Administrative Order is a reasonable limitation on specific activities related to speech and is viewpoint neutral.

Importantly, it must be noted that the case of the Fully Informed Jury Association v. County of San Diego, 78 F.3d 593 (9th Cir. 1996)(unpublished opinion), is highly relevant and instructive to the issue posed herein.³ The Administrative Order is modeled upon the same language as used in the regulation reviewed and approved in the San Diego case specifically because the requirements as set forth in that case had met constitutional muster by a high level

³ Petitioners attempt to minimize the relevance of the opinion and point out that the opinion states “[t]his disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.” Rule 36-3, however, indicates the case is not precedent which is obvious as applying to a Florida state court and that it may not be cited in the California federal circuit except under limited circumstances. The California Ninth Circuit has set forth its criteria for publication in Rule 36-2 which states an opinion will be published:

only if it: (a) Establishes, alters, modifies or clarifies a rule or law, or (b) Calls attention to a rule of law which appears to have been generally overlooked, or (c) Criticizes existing law, or (d) Involves a legal or factual issue of unique interest or substantial public importance,

Clearly, the court did not find any of these factors present in the case and hence, did not officially publish the case. The inference is that the case involved clearly undisputed and “settled” law because it did not establish, alter, modify or clarify a rule or law requiring the opinion to be published.

federal court. Much like the Administrative Order contested herein, the disputed regulation in the San Diego case prohibited:

[t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn, or serving as a trial juror in these courts for purposes of so influencing, interfering, or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to the facilities within which Courts conduct jury trials within this County.

Id. at 593. Moreover, the appellants in that case were the same associational Petitioners as in the instant Petition. The court in San Diego found “the regulation [was] necessary to serve the state’s compelling interest in protecting the integrity of the jury system and [was] narrowly drawn to achieve that end.” Id. Even though it may not have precedential value to this Court, it is strong guidance for this Court because of the same party involved and the exact same issue involved as the instant case. Based upon the federal court of appeals’ finding the regulation was not a violation of FIJA’s free speech rights, the Administrative Order’s language is perfectly acceptable under free speech analysis.

Ninth Judicial Circuit Administrative Order No. 2011-03 basically does not allow summoned jurors to be approached in an attempt to influence those jurors on any matter, cause or proceeding which may come before the jurors for decision in

their role as a juror. Any such contact could unreasonably disrupt and interfere with the fair and orderly conduct of jury trials. Importantly, the Administrative Order does not prohibit approaching anyone and everyone else about any issue, thereby allowing Petitioners or any other group to advance their cause to the general public.

Additionally, FIJA cites to a memorandum from an administrative judge of the Fifth Judicial Circuit which is also obviously not controlling on this Court, has no precedential value, and is completely irrelevant to the issue *sub judice*. Moreover, it does not appear to reflect any significant analysis of the legal issues involved, but rather an initial reaction of the administrative judge at that time.

II. LEGAL ARGUMENT IN SUPPORT OF DENYING PETITION FOR WRIT OF CERTIORARI

A. BECAUSE THE COURTHOUSES AND RELATED GROUNDS ARE NONPUBLIC FORA, ANY RESTRICTION ON SPEECH THEREIN MUST ONLY BE REASONABLE AND VIEWPOINT NEUTRAL

The U.S. Supreme Court has dealt extensively with free speech issues as related to government property. It has clearly set forth the standard by which to determine whether the First Amendment protects particular speech on government property and has consistently held that free speech rights are not unfettered. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985);

United States v. Grace, 461 U.S. 171 (1983); United States v. Kokinda, 497 U.S. 720 (1990). In Cornelius, the Court held:

Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.

Cornelius, 473 U.S. at 799-800. The Administrative Order is a constitutionally sound regulation of government property enacted to avoid disruption to one of the core tenets of American free society - a reliable, trustworthy system of justice, ensuring the rights of all.

1. Standards of Review of Speech Restriction on Government Property

The U.S. Supreme Court has directed the starting point for analysis of First Amendment disputes occurring on or involving government property is to determine the nature of the particular forum where the speech is taking place. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). Once determined, a varying level of review is applicable to each particular forum. The Court has identified three different fora applicable to government property - the traditional public forum, the public forum created by government designation and the nonpublic forum. Id. at 802. The Ninth Judicial Circuit Courthouses and

surrounding ingress and egress areas are squarely within the definition of a nonpublic forum.

Traditional public fora are such things as public streets, parks and public sidewalks which “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Hague v. Comm’n for Industrial Org., 307 U.S. 496, 515 (1939). Notably, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” Cornelius, 473 U.S. at 802. Restrictions on speech in traditional public fora must be examined under strict scrutiny. Perry Educational Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).

The second type of fora is public property created by purposeful governmental action. The government must knowingly open the property specifically to accommodate private speakers. Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998). Examples of such designated public fora are: university meeting facilities (Widmar v. Vincent, 454 U.S. 263 (1981)); school board meetings (City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm’n, 429 U.S. 167 (1976)); and municipal theaters (Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)). Restrictions on

speech in this type of fora are also examined under strict scrutiny. Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

Most relevant for the matter at issue herein, is the third type of fora, typically labeled as a nonpublic forum. "This forum exists when publicly-owned facilities have been dedicated to use for either communicative or non-communicative purposes but have never been designated for indiscriminate expressive activity by the general public." Gregoire v. Centennial School Dist., 907 F.2d 1366, 1370-71 (3d Cir. 1990). The standard of scrutiny for nonpublic fora has been concisely stated by the U.S. Supreme Court:

[I]t is also black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.

Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 189 (2007).

2. The Ninth Judicial Circuit Courthouses and Grounds are Nonpublic Fora

Courts, including the U.S. Supreme Court, have uniformly recognized courthouses and courthouse grounds (with the exclusion of perimeter public sidewalks) are nonpublic fora. See United States v. Grace, 461 U.S. 171 (1983); Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2004); Sammartano v. First Judicial

Dist. Court, 303 F.3d 959 (9th Cir. 2002); and Comfort v. MacLaughlin, 473 F. Supp. 1026 (C.D. Cal. 2006).

United States v. Grace, 461 U.S. 171 (1983), involved whether a statute which prohibited the “display [of] . . . any flag, banner, or device designed or adapted to bring into public notice any party, organization or movement in the United States Supreme Court building and on its grounds” violated the First Amendment. Id. at 172-73 (internal quotes omitted). Two individuals had been prohibited from either attempting to display a sign or distributing leaflets on the grounds of the U.S. Supreme Court. The Court held the statute was unconstitutional only as it applied to the public sidewalks surrounding the perimeter of the courthouse, but was permissible as it applied to the grounds and building itself. The Court stated “[p]ublicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.” Id. at 177. The Court added:

[t]here is little doubt that in some circumstances the Government may ban the entry on to public property that is not a “public forum” of all persons except those who have legitimate business on the premises. The Government, “no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.”

Id. at 178 (quoting Adderly v. Florida, 385 U.S. 39, 47 (1966)).⁴

In Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005), a protestor had been prohibited from appearing in or around a Vermont state courthouse. The protestor argued the prohibition violated his First Amendment rights. While the court eventually invalidated the restriction on reasonableness grounds, the court found the courthouse and the grounds, including the parking garage were nonpublic fora. The court stated “[c]ourts have not been traditionally held open for the use of the public for expressive activities.” Id. at 91 (citing United States v. Grace, 461 U.S. 171 (1983)). Specifically addressing the issue as to whether the parking lot was a nonpublic forum, the court stated:

We conclude, moreover, that Huminski has not shown that the parking lots adjacent to the courthouse (and the courthouse grounds generally) are public forums. Other than abutting public streets and sidewalks, the parking lots do not fall within the class of traditional public forums—they are not historically associated with the free exercise of expressive activities, as are streets, sidewalks, and parks. Nor is there any genuine issue of material fact as to whether Vermont did anything to designate the parking lots as public forums. It did not. The evidence before us uniformly indicates that these parking lots, with

⁴ All sidewalks are not created equally, however, as discussed in United States v. Kokinda, 497 U.S. 720 (1990), where the U.S. Supreme Court found a sidewalk contained within a nonpublic forum, used solely for access to the government building, was also nonpublic. Therefore, free speech activities could be banned from said sidewalk. The Court stated “the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.” Id. at 728-29.

their marked spaces for automobiles, serve as a convenient space for the courthouse staff and visitors to park their vehicles. Inasmuch as they are adjacent to the courthouse, moreover, the reasons that lead us to conclude that the purposes of the courthouse are not compatible with those of expressive activities suggest to us, if less powerfully, that there are various kinds of expressive activities that, if conducted in these lots, might well interfere with courts' attendance to their business.

Id. at 91-92 (citations omitted).

In Comfort v. MacLaughlin, 473 F. Supp. 2d 1026 (C.D. Cal. 2006), two preachers sought an injunction against a state court order prohibiting speech activity on the courthouse grounds. The petitioners had argued that because the courthouse grounds were like a park - it contained a large grassy area - the grounds were a traditional public forum. The court, however, disagreed and held the courthouse grounds were a nonpublic forum. In doing so, the court noted "mere physical characteristics of a property cannot dictate forum analysis." Id. at 1028 (citing United States v. Kokinda, 497 U.S. 720 (1990)). The court indicated in deciding whether a government site is a nonpublic forum, "the Court must consider whether the forum has been traditionally made available for speech, whether the primary purpose of the forum is for expressive activity, and finally, the extent to which speech is incompatible with the usual functioning of the forum." Id. It is interesting to note the court in Comfort specifically found "the Court is aware of

no instance in which another court has found that courthouse grounds constitute a public forum.” Id. at 1028 n.1 (citations omitted).⁵

Based on the cases cited above and the relevant analysis contained therein, the Ninth Judicial Circuit courthouses, the grounds surrounding the courthouses, including interior sidewalks and the parking garages and lots, are, without doubt, nonpublic fora. The grounds surrounding the courthouses have not been purposefully and specifically opened to public free speech activities nor are they conducive for such activities. The grounds, parking garages and lots are provided solely for the ingress and egress for those persons involved in litigation before the court or requiring the services of the court and the related entities such as the clerk of court. Consequently, because the courthouses, the grounds and the parking garages and lots are nonpublic fora, the Administrative Order at issue herein must be examined simply by whether the Order is reasonable in light of the purpose served by the forum and is viewpoint neutral. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

⁵ Petitioners may point to United States v. Gilbert, 920 F.2d 878 (11th Cir. 1991), to negate this statement. In Gilbert, the court found an unenclosed plaza next to the courthouse in question was on government property that was not a traditional public forum but that the government had specifically dedicated the space as a place for expressive activity. It was clear that the area had been continuously open by the government as a place for public expression and in fact, demonstrations had occurred there quite often. The open portico, connecting the plaza and the courthouse, however, was a nonpublic forum.

B. THE ADMINISTRATIVE ORDER IS REASONABLE

A “Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808 (1985)(emphasis original). “The reasonableness of the Government’s restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.” Id. at 809. “The government is not required to choose the least restrictive alternative, it need only choose one that reasonably fulfills a legitimate and demonstrated need.” Comfort v. MacLaughlin, 473 F. Supp. 2d 1026, 1029 (C.D. Cal. 2006)(citing Swarner v. United States, 937 F.2d 1478, 1482-83 (9th Cir. 1991)). Importantly, “[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker’s message. Rarely will a nonpublic forum provide the only means of contact with a particular audience.” Cornelius, 473 U.S. at 809 (citation omitted).

There have been a myriad of reasons for restricting expressive conduct on government property which have been found constitutional under the reasonableness standard. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808 (1985)(avoiding the appearance of political favoritism and

preventing interruptions to employees' work); United States v. Kokinda, 497 U.S. 720 (1990)(preventing the physical obstruction of public access to government facilities); Comfort v. MacLaughlin, 473 F. Supp. 2d 1026, 1029 (C.D. Cal. 2006)(ensuring courts remain free of actual or perceived partiality).

In the case at bar, the Administrative Order is reasonable because it does not restrict FIJA from getting their message out; rather it only restricts the delivery of that message to a limited group of people actually on courthouse grounds, summoned for jury duty. FIJA has not been barred the opportunity to spread their message elsewhere and has done so by distributing materials at various locations off courthouse grounds including restaurants frequented by jurors. FIJA retains the right to advocate its message in any manner it chooses, anywhere else in the area except on the actual courthouse grounds.

As discussed above, the court's responsibility is to provide for the orderly administration of justice and to ensure all litigants have their "day in court" - a day which is free from those influences outside of the courtroom. The Order is a reasonable means to provide that day in court.

C. THE ADMINISTRATIVE ORDER IS VIEWPOINT NEUTRAL

"[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses" Cornelius, 473 U.S.

at 806. This, the Ninth Circuit did not and does not do. To assert that only FIJA's actions are restricted is false. The Administrative Order is viewpoint neutral because the focus of the restriction is on the act of influencing the jurors and not on what specific topic or the content of what a person is trying to influence them about. The Administrative Order applies to any materials having the proscribed effect - influencing a juror on a matter that may come before the juror. The Administrative Order's prohibitions equally apply to any group advocating any position so long as it is directed to summoned jurors and concerns anything which might possibly be presented to the juror at trial. Any group advocating for or against any topics ranging from tort reform, abortion, drug laws, to the protection of animals would not be allowed to contact summoned jurors on courthouse grounds to influence them on whatever position the group was advocating - either for or against. The prohibition would even apply to a group which opposes FIJA's beliefs and which might try to distribute leaflets to summoned jurors arguing against FIJA's position. That group, just like FIJA, would be prohibited from doing so. It is not relevant what position or subject matter a group or person is advocating - the group or person cannot advocate to summoned jurors on courthouse grounds to try to influence them on a subject which may come before them as jurors or is involved in the jury process.

The Administrative Order's purpose is to preserve the integrity of the jury system and to let jurors do their jobs without outside interference. The Order is unrelated to specific content. The U.S. Supreme Court has specifically recognized:

There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which [First Amendment activities] near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammelled functioning of our courts is part of the very foundation of our constitutional democracy. . . . A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence.

Cox v. Louisiana, 379 U.S. 559, 562 (1965). The Administrative Order recognizes the axiom that the right to trial by jury is fundamental to the lawful and orderly administration of justice. Outside influence or interference with a jury has absolutely no place or justification within the justice system. Any decision by a jury which is later found to have been influenced or interfered with by forces outside the courtroom would be called into question. No one could fully rely on a jury's verdict without questioning what happened outside the courtroom. Such unreliability would greatly harm this country's justice system in its entirety by undermining the public's confidence in the impartiality of justice and would wreak havoc with the individual litigants placing their trust in the courts and deny them

due process as guaranteed by the United States Constitution and the Florida Constitution. “A State may . . . properly protect the judicial process from being misjudged in the minds of the public.” Id. at 565. In short, the integrity of the jury system is vital to our judicial system. Because the Administrative Order prohibits the act of propagandizing to jurors and not the content of the propaganda, it is evident the Administrative Order is viewpoint neutral.

In conclusion, the Administrative Order is clearly constitutional. The Order is reasonable and is viewpoint neutral which is all that is required under constitutional review for restrictions involving nonpublic fora. The U.S. Supreme Court has stated “the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum” and “[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.” Cornelius, 473 U.S. at 810-11. The Ninth Circuit seeks to prevent disruption to the everyday functions of the court - resolution of disputed issues by a jury of one’s peers, not influenced by evidence or forces outside the courtroom. The Administrative Order reasonably and neutrally ensures the court functions as it should.

D. PETITIONERS' SUGGESTIONS THE ADMINISTRATIVE ORDER IS OVERBROAD, VAGUE, CONFLICTS WITH STATE LAW AND IS A PRIOR RESTRAINT ARE WITHOUT MERIT

1. The Administrative Order is Not Overbroad

Petitioners aver the Administrative Order is overbroad by encompassing more speech than is necessary to serve the government interest. The Administrative Order, however, is narrowly drawn to achieve the court's and the public's interest in protecting the administration of justice. As discussed earlier, the Order is directed only at a limited activity expressed to a very limited, specific group of people - summoned jurors. The Order is both more narrow and more specific than the statute upheld by the U.S. Supreme Court in Cox v. Louisiana, 379 U.S. 559 (1965)(statute prohibiting picketing on or near a courthouse upheld). The valid regulation in Cox banned certain communications with "any judge, juror, witness, or court officer," while here, the Administrative Order pertains to communications only with jurors. In Cox, the applicable area where the activity could not occur was described as "near" the courthouse, while the Administrative Order painstakingly describes the area where communication is proscribed and limits that communication to only the actual courthouse grounds excluding the

perimeter sidewalks. The Order is more narrow and more specific than what was approved in Cox. Because the Administrative Order is precisely tailored to a specific set of actions directed to a specific set of people, the Order is not overbroad.⁶

2. The Administrative Order is Not Vague

The Administrative Order, as stated, was drawn as narrowly and specifically as possible. It limits specific conduct targeted to specific people. Petitioners complain they might not know if the person to whom they are distributing information to is a summoned juror, but all Petitioners have to do is ask the person first prior to giving out the information. Moreover and of note, the vast majority of summoned jurors prominently carry their jury summons when entering the courthouse for service, and in at least Orange County, they park in the one garage on-site and take the one paved access way to the courthouse entrance. Most of the time, summoned jurors are readily identifiable but the simple solution is for FIJA to simply ask a person before handing out its materials. A reasonable alternative solution would be simply to ban any activity which would influence a juror from

⁶ Interestingly, in alleging the Order is overbroad, the Petitioners state the Order would apply to a variety of topics such as the legalization of marijuana to the use of excessive force by law enforcement officers. Later, however, in their Petition, they aver the Order imposes a content-based restriction on speech. Petitioners cannot have it both ways.

the courthouse grounds or at least regulate such activity away from the courthouse entrance and nearer to the perimeter sidewalks. Such a solution would meet the government's goals in protecting the judicial processes but here, the Administrative Order balances free speech rights with the legitimate goals and purposes of the court system.

Petitioners state that law enforcement officers are provided with unbridled discretion to arrest individuals who engage in any expressive activity if in the subjective judgment of the police officer, the expressive activities "tend to influence" a summoned juror. Nowhere in the Administrative Order does it direct law enforcement officers to arrest persons violating the Order. Generally, administrative orders alone do not give law enforcement officers authority to arrest solely based on the administrative order. Here, law enforcement is directed to provide a copy of the Order to the person distributing materials to summoned jurors and simply instruct the person to cease and desist. It is clearly and unequivocally stated in the Order that enforcement of the Order will be by indirect civil contempt proceedings. Indirect civil contempt proceedings are instituted by a court, utilizing proper due process procedures, and do not involve criminal

penalties.⁷ As the Order is specific as to what activities are proscribed, the Order is not vague and hence, is constitutionally valid.

3. The Administrative Order Does Not Conflict with State Law

Petitioners allege the Ninth Circuit Administrative Order impermissibly conflicts with § 918.12, Florida Statutes, by removing the element of scienter in that, in order for a violation to occur, a defendant must have engaged in the prohibitive communication with the intent to obstruct justice. The Administrative Order, however, does not conflict with the statute nor does it create a new offense.

Essentially, while Petitioners clearly concede they possess the intent to reach and influence jurors with their message, they contend they must also have the intent to obstruct the administration of justice to be held in contempt or to be found guilty of a violation of § 918.12. Petitioners are engaging in a semantics shell game. The intent to influence a juror is synonymous with the obstruction of justice and has been specifically addressed by the Supreme Court of Florida in Baumgartner v. Joughin, 141 So. 185, 187 (Fla. 1932).

⁷ Petitioners also improperly suggest this alleged “unbridled discretion to arrest individuals” causes them irreparable injury for which there is no adequate remedy on appeal. As demonstrated herein, there is no “unbridled discretion” for officers to act as Petitioners claim and thus, the injuries they claim will occur simply have not and will not materialize. Furthermore, Petitioners’ reliance on *Columbo v. Legendre*, 397 So. 2d 1043 (Fla. 5th DCA 1981) is completely misplaced because the petitioner in that case had already been the subject of a motion for contempt. Nothing like that has occurred in this instance.

In Baumgartner, a person was found in contempt of court for contacting and trying to influence a summoned juror. The Court stated “[t]he essential characteristic of an alleged act of contempt, such as that here charged, is its tendency to obstruct the administration of justice. Such a contempt does not depend so much upon the particular intent of the contemnor as upon his act.” Id. at 187 (emphasis added). The Court further stated:

Trial by capable juries is the bulwark of the administration of the criminal law. Exercise of calm, unbiased, and informed judgment is essential to proper functioning of juries, and without it the administration of justice in cases requiring jury trials is grievously impaired if not wholly defeated.

From time immemorial the right to trial by jury has been regarded as one of the most sacred heritages of Anglo-Saxon jurisprudence. The fundamental law recognizes the jury as an appendage of the court, and that it is indispensable as an agency to pass upon guilt or innocence of the accused in criminal cases. Consequently the jury is of unusual importance as an administrative factor in the American judicial systems, whether state or federal.

Therefore, whatever tends to obstruct the due administration of justice in the courts, by bringing undue influences or temptations or corruption to bear upon those who are likely to be selected for duty on juries, is an act calculated to obstruct the fair and impartial trial of jury cases in the courts, and as such, is a direct obstruction to the proper administration of justice which is punishable as a contempt.

* * *

Tampering with a member of a general jury panel, or with members of a jury panel selected to try a case, or with prospective jurors before they are sworn, is universally regarded as a contempt of court to the same extent as tampering with jurors actually sitting in the trial of a case. And it is also generally considered that the act of influencing or corrupting a juror, or attempting the same, need not be committed in the presence of the court, in order to make it punishable as a contempt.

The fact, also, that jury tampering is by statute made an indictable offense, for which the accused may be prosecuted criminally, does not deprive the court of its inherent power to punish the guilty party for contempt.

Id. at 187-88 (citation omitted)(emphasis added).

Simply because the Administrative Order touches upon conduct or activity that may also have criminal penalties associated with it, does not make the Order conflict with state law.

4. The Administrative Order is not a Prior Restraint

Petitioners aver the Administrative Order constitutes a prior restraint. “A prior restraint seeks to suppress speech because of its content. A regulation is not a prior restraint if it is merely a valid time, place, or manner restriction on the exercise of protected speech.” 16B C.J.S. Constitutional Law § 808 (2011). “Reasonable time, place, or manner restrictions on speech are recognized exceptions to the general prohibition against prior restraints.” 16A Am. Jur. 2d Constitutional Law § 473 (2010). As readily shown herein, the Administrative

Order is content neutral and even under the strict scrutiny standard is a proper time, place and manner restriction. Hence, a prior restraint analysis is inapplicable to the instant dispute.

In any event, even if the doctrine of prior restraint is applicable, this Court has found cases involving an allegation of prior restraint are to be examined under the strict scrutiny standard. Animal Rights Found., Inc. v. Siegel, 867 So. 2d 451 (Fla. 5th DCA 2004). As shown herein in the following discussion of strict scrutiny, the Administrative Order meets all requirements of the strict scrutiny standard. The Order “furthers a compelling state interest through the least intrusive means.” Id. at 457. Consequently, even if the Administrative Order could seem like a prior restraint on certain limited speech, the Order is valid and constitutional.

**E. EVEN IF STRICT SCRUTINY APPLIED,
THE ADMINISTRATIVE ORDER IS
CONSTITUTIONALLY PERMITTED**

Petitioners contend the Administrative Order is a content based restriction on speech which does not meet the standard of strict scrutiny. As previously shown, the standard of strict scrutiny does not apply to the Ninth Circuit’s Administrative Order because the courthouses, grounds, and parking garages/lots are nonpublic fora and hence, the question is only whether the Order is reasonable and viewpoint neutral which was plainly demonstrated. Nevertheless, even under

the strict scrutiny standard required for restriction of speech on a traditionally public forum, the Administrative Order is still constitutionally valid. The standard of review for strict scrutiny was set forth by the U.S. Supreme Court in Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983):

For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

As already shown, the Administrative Order is content neutral and therefore, under the strict scrutiny standard, the Order must only be examined as to whether the regulation of the time, place and manner of expression is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.⁸ Essentially, as demonstrated herein, the Administrative Order

⁸ Even if the Order was considered not to be content neutral, its regulations are clearly necessary to serve a compelling state interest, and hence, would be valid even under the strongest scrutiny. The protection of the American jury system is crucial. "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. Louisiana, 379 U.S. 466, 472 (1965). "[A] defendant has a constitutional right to be tried by an impartial jury, 'unprejudiced by extraneous influence . . .'" United States v. Schwarz, 283 F.3d 76, 97 (2d Cir. 2002). It has long been recognized that "[j]urors have the power, but not the right, to ignore the judge's instructions." Braun v. Baldwin, 346 F.3d 761, 764 (7th Cir. 2003)(see case for discussion of jury's power). Attempting to

is a legitimate, constitutionally correct, regulation of time, place and manner which serves a significant government interest while recognizing Petitioners have abundant other means to get out their message. The Order is required to protect the integrity of the jury system which is at the core of our democratic society; its reach is limited to a small area; only a small group of individuals is prohibited from being contacted; and distribution of materials and advocacy can occur anywhere off courthouse grounds.

Notably, even under the strict scrutiny standard in the context of a traditional public forum, it has been held that restricting the handing out of pamphlets advocating jury nullification to jurors is a reasonable time, place and manner restriction. In Braun v. Baldwin, 346 F.3d 761, 763 (7th Cir. 2003), the court held “[a]lthough advocacy of jury nullification could no more be flatly forbidden than advocacy of Marxism, nudism, or Satanism, we cannot think of a more reasonable regulation of the time, place, and manner of speech than to forbid its advocacy in a courthouse.” The court continued by stating “[a] State may adopt safeguards

influence a juror in any manner, be it direct solicitation to rule a certain way to general advocacy of a viewpoint to jurors, has been dealt with in the strongest manner possible. See Braun; Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005)(conviction for jury tampering affirmed); United States v. Ippolito, 313 F. Supp. 2d 1310 (M.D. Fla. 2003)(court forced to empanel an innominate jury based on danger of improper influence); United States v. Luisi, 568 F. Supp. 2d 106 (D. Mass. 2008)(extensive discussion of jury’s role); United States v. Funches, 135 F.3d 1405 (11th Cir. 1998)(jury nullification discussion).

necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence.” Id. (quoting Cox v. Louisiana, 379 U.S. 559, 562 (1965)). See also Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007)(total ban on free speech within a specific area approved).

It is interesting to note the Administrative Order’s limitations are akin to many state statutes that ban the solicitation of votes and the display of campaign materials within so many feet of polling places on election day. Those statutes have been exhaustively examined under the strict scrutiny standard and have been found to be proper time, place and manner restrictions. Burson v. Freeman, 504 U.S. 191 (1992). Those statutes generally do not allow any type of political speech, including signage, within a certain area even though the advocates of such speech are trying to reach the exact persons entering the facilities. In Burson, the U.S. Supreme Court found such a statute was subject to “exacting scrutiny: The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” Id. at 198 (quoting Perry Educ. Ass’n v. Perry Local Educ. Ass’n, 460 U.S. 37, 45 (1983)). The Court held the state’s interest in protecting the right to vote in an election conducted with integrity and reliability was a compelling state interest and the restrictions on the

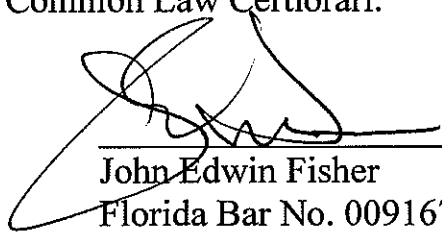
area surrounding the polling locations were valid even under the exacting scrutiny standard.

The right to a impartial jury, free from outside influences, is paramount and is a significant government interest which the government is entitled to protect by appropriate time, place and manner restrictions as set by the instant Administrative Order. As allowed in Burson and Braun, the requirements contained within the Administrative Order are proper and meet constitutional review even under the most exacting scrutiny standard.

CONCLUSION

As fully shown and discussed above, the Administrative Order meets all constitutional requirements concerning free speech including both under the strict scrutiny standard and the reasonableness standard. It has also been clearly demonstrated that the Order is neither overbroad nor vague. It also has been specifically shown why such Administrative Order is required in order to protect the very integrity of the judicial system for the very people we serve.

WHEREFORE, the Ninth Circuit requests this Court to issue an order denying the Petition for Writ of Common Law Certiorari.

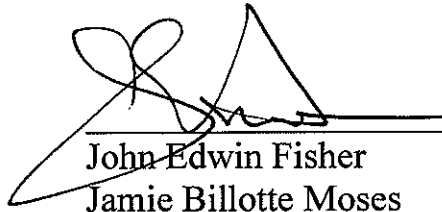


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CERTIFICATE OF SERVICE

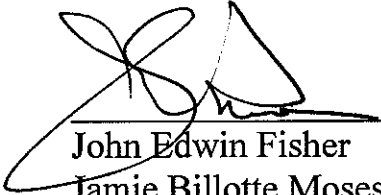
I HEREBY CERTIFY a copy hereof has been furnished to Lawrence G. Walters, Cooperating Attorney, ACLU Foundation of Florida, Inc., 781 Douglas Avenue, Altamonte Springs, Florida 32714-2566 and to Randall C. Marshall and Maria Kayanan, ACLU Foundation of Florida, Inc., 4500 Biscayne Blvd., Suite 340, Miami, Florida 33137, on this 25th day of March, 2011.



John Edwin Fisher
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CERTIFICATE OF COMPLIANCE

I hereby certify this Response complies with the font requirements of rule 9.100 of the Florida Rules of Appellate Procedure.



John Edwin Fisher
Jamie Billotte Moses