



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 31, 2023

The Honorable Kevin McCarthy
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *Guffey v. Mauskopf*, 45 F.4th 442 (D.C. Cir. 2022) (Nos. 20-5183 & 20-5208),
rehearing denied (Jan. 13, 2023)

Dear Speaker McCarthy:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek Supreme Court review of the above-referenced decision of the United States Court of Appeals for the District of Columbia Circuit. A copy of the decision is attached.

The case involves a First Amendment challenge to restrictions on partisan political activity by career employees of the Administrative Office of the U.S. Courts (AO). Until 2018, and for decades before then, the AO's restrictions on political activity by its employees were less strict than those the Judicial Conference of the United States imposed on employees working in federal courthouses. In 2018, the AO revised its restrictions to match those applicable to courthouse employees. Among other restrictions, the 2018 Code of Conduct for AO Employees prohibits the following:

1. Publicly expressing opinions about partisan candidates or political parties, including on social media;
2. Wearing or displaying partisan badges, signs, or buttons;
3. Contributing money to a political party, partisan candidate, or political action committee;
4. Attending partisan fundraisers;
5. Attending events for a partisan candidate;
6. Attending party conventions, rallies, and meetings;
7. Being a member of a partisan political organization;
8. Driving voters to the polls on behalf of a political party or partisan candidate; and
9. Organizing events for a partisan candidate.

Two employees of the AO filed a suit challenging those restrictions on the ground that they violate the First Amendment. The district court entered summary judgment in part for the plaintiffs and in part for the government. The court held that the first seven restrictions listed above were unconstitutional and enjoined their application to all AO employees except certain

senior officials. The court held that the last two restrictions were constitutional. The government appealed, and the plaintiffs cross-appealed.

The D.C. Circuit concluded that all nine restrictions were unconstitutional with respect to AO employees with roles similar to those held by the plaintiffs. The court accordingly affirmed the grant of summary judgment with respect to the seven enjoined restrictions and reversed the denial of summary judgment with respect to the other two restrictions. At several points, however, the court assumed without deciding that the restrictions could be constitutional with respect to AO employees with more sensitive roles—for example, “employees who make policy recommendations” on certain issues, Op. 12, “employees who work with the other branches” of government, Op. 13, and “employees who advise judges on sensitive matters like recusals and participation in outside activities,” Op. 14. The court accordingly narrowed the scope of the injunction to apply only to the two named plaintiffs. The court reasoned that “the AO may believe that employees who do different jobs than [the plaintiffs] should be subject to different restrictions” and stated that it could not “assess that belief on the record before us.” Op. 17. Judge Henderson dissented, reasoning that the AO had adequately demonstrated the need for all nine restrictions. Dissenting Op. 1-20.

The D.C. Circuit denied the government’s petition for rehearing en banc. Judge Henderson dissented from the denial of rehearing en banc for the reasons given in her panel dissent.

Although the Department of Justice disagrees with the D.C. Circuit’s decision, that decision does not squarely conflict with any decision of the Supreme Court or another court of appeals. In addition, the significance of the decision is limited. The D.C. Circuit narrowed the district court’s injunction to cover only the two plaintiffs, and it left open the possibility that the AO can impose the restrictions on employees with roles more sensitive than those held by the plaintiffs. The decision also does not address restrictions on other Judicial Branch employees, including employees who work in federal courthouses. Under the circumstances, the Department of Justice has determined not to seek Supreme Court review of the D.C. Circuit’s decision.

A petition for a writ of certiorari in this case would be due on April 13, 2023. Please let me know if we can be of any further assistance in this matter.

Sincerely,



Elizabeth B. Prelogar
Solicitor General

Enclosure