

**STEVEN WAYNE SMITH, VS. THOMAS R. PHILLIPS, ET AL.**

**Civil Action No. A-02 CV 111 JRN**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
TEXAS, AUSTIN DIVISION**

**2002 U.S. Dist. LEXIS 14913**

**August 5, 2002, Decided**

**August 6, 2002, Filed**

**DISPOSITION:** [\*1] Defendants enjoined from enforcing Canon 5(1) of the Texas Code of Judicial Conduct. Case dismissed.

**COUNSEL:** For Steven Wayne Smith, PLAINTIFF: Steven W Smith, Law Offices of Steven W Smith, Austin, TX USA.

For Thomas R Phillips, Nathan L Hecht, Craig T Enoch, Priscilla R Owen, James A Baker, Deborah G Hankinson, Harriet O'Neill, Wallace Jefferson, Xavier Rodriguez, DEFENDANTS: James Carlton Todd, Office of the Attorney General State of Texas, Austin, TX USA.

For Dawn Miller, DEFENDANT: Robbi B Hull, Vinson & Elkins, LLP, Jennifer Barrett Poppe, Ryan D Clinton, Vinson & Elkins, Austin, TX USA.

**JUDGES:** JAMES R. NOWLIN, CHIEF UNITED STATES DISTRICT JUDGE.

**OPINIONBY:** JAMES R. NOWLIN

**OPINION:**

**ORDER**

Before the Court is the above styled cause of action. A stay was issued on March 22, 2002, to await the outcome of the Supreme Court's consideration of *Republican Party of Minnesota v. Kelly*, U.S. , 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002). On June 27, 2002, the Supreme Court held that Minnesota's Code of Judicial Conduct 5(A)(3)(d)(i), which prohibited candidates for judicial election from announcing their views on disputed legal and political issues, violated the

First [\*2] Amendment. In light of the Supreme Court's decision, the Court issues the following Order.

Plaintiff Steven Wayne Smith filed suit challenging the constitutionality of Canon 5(1) of the Texas Code of Judicial Conduct. Smith claims Canon 5(1) violated his right to free speech by restricting what issues he could discuss while campaigning for judicial office. Canon 5(1) of the Texas Code of Judicial Conduct governs the conduct of both sitting judges and judicial candidates and provides that

"a judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individuals' judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

TEX. CODE OF JUDICIAL CONDUCT  
Canon 5(1).

Defendants contend that Canon 5(1) limits speech only to the extent necessary to preserve the integrity of the judiciary. Defendants argue that the state has a compelling interest in Canon 5(1) as its means of maintaining a democratically elected but independent judiciary. [\*3]

After reviewing this case and the applicable law, this Court finds no distinction between Minnesota's Code of Judicial Conduct 5(A)(3)(d)(i) and Texas' Code of Judicial Conduct 5(1). For the reasons stated in

*Republican Party of Minnesota v. Kelly*, U.S. , 122 S. Ct. 2528 (2002), this Court finds that Texas Code of Judicial Conduct 5(1) violates the First Amendment. Additionally, the Court finds that Plaintiff Smith, who won the primary election and is the current Republican nominee for Place (4) on the Texas Supreme Court, suffered no damages as a result of Canon 5(1) of the Texas Code of Judicial Conduct.

IT IS THEREFORE ORDERED that Canon 5(1) of the Texas Code of Judicial Conduct is DECLARED unconstitutional.

IT IS FURTHER ORDERED that the Defendants are ENJOINED from enforcing Canon 5(1) of the Texas Code of Judicial Conduct.

IT IS FURTHER ORDERED that each party shall bear his own costs.

FINALLY, IT IS ORDERED that this case be DISMISSED.

SIGNED and ENTERED this the 5th day of August 2002.

JAMES R. NOWLIN

CHIEF UNITED STATES DISTRICT JUDGE