

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEITH FANGMAN, *et al.*

Plaintiffs,

v.

CITY OF CINCINNATI

Defendants.

: **Case No. 1:08-CV-702**
:
:
: **Judge Michael R. Barrett**
:
:
:
:
:
:
:
:
:

**PLAINTIFFS' PRELIMINARY INJUNCTION HEARING BRIEF AND REPLY
TO CITY MEMORANDUM**

ALPHONSE A. GERHARDSTEIN
JENNIFER L. BRANCH
ANDREA REINO
Gerhardstein & Branch LPA
Attorney for the Plaintiff
432 Walnut Street Suite. 400
Cincinnati, OH 45202
(513) 621-9100
(513) 345-5543
agerhardstein@gbfirm.com
jbranch@gbfirm.com
areino@gbfirm.com

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION - L.R. § 7.2(a)(3)	1
II. FACTS	2
A. History of Article V, Section 4	2
1. Cincinnati Politics Prior to the Enactment of the City Charter	2
2. The 1924 Movement Against the Political Machine and the Enactment of the City Charter.	4
4. Summary	7
B. 82 Years of Reforms have Improved Controls on Public Officials, Political Parties and Candidates	8
1. Limits on Donations by and Solicitations of Public Employees	8
2. Civil Service Reform	9
3. Campaign Reporting Laws	9
4. Public Contracts	10
5. Criminal Laws	11
C. Plaintiffs and the 2008 Fall Election	12
III ARGUMENT	12
A. Plaintiffs Have a Likelihood of Success on the Merits of Showing that Defendants’ Restrictions on Campaign Donations and Distributing Literature as Private Citizens Violate The Right to Free Speech	13

1. The Government’s Interest in Restricting Political Speech of Classified Employees	13
1. The City’s Charter and Policies are Overbroad Under the Supreme Court’s Decision in <i>Broadrick v. Oklahoma</i>.....	14
2. Appropriate Remedy when Charter Section and Human Resources Policy are Overbroad	17
2. In the Alternative, If the Charter Provision and Policy 2.2 are not Overbroad, the Restrictions on Donations and the Private Distribution of Literature Nonetheless Violate the Constitution.....	17
B. All of the Other Factors Supporting and Injunction Have Been Satisfied.	27
IV. CONCLUSION.....	27

Table of Authorities

Cases

ACORN v. City of Tulsa, Oklahoma,
835 F.2d 735, 744 (10th Cir.1987) 15

Broadrick v. Oklahoma,
413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)..... 13, 14, 15

Buckley v. Veleo,
424 U.S. 1, 96 S.Ct. 612 (1976)..... 18

Cincinnati v. Ohio Council 8, AFSME
61 Ohio State 3d 683 (1991)..... 17

Cincinnati v. Ohio Council 8, AFSME
93 Ohio App. 3d 162, 165 (1st Dist. Ct. App. 1994)..... 17

Connick v. Myers,
461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)..... 14

Fed. Election Comm’n v. Mass. Citizens for Life, Inc.
479 U.S. 238, 251-52, 107 S.Ct. 616, 624-25 (1986)..... 18

Federal Election Comm'n v. Nat'l Conservative Political Action Comm.,
470 U.S. 480, 495, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)..... 19

Garrison v. Louisiana,
379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)..... 14

Gray v. City of Toledo,
28 Ohio Misc. 141, 323 F.Supp. 1281, 57 O.O.2d 239, N.D. Ohio 1971 19

Grutter v. Bollinger,
539 U.S. 306, 123 S. Ct. 2325 (2003)..... 2

Horstkoetter v. Dept. of Public Safety,
159 F.3d 1265 (10th Cir.1998) 23

Hudak v. Cleveland Civil Service Comm’n,
549 N.E.2d 741 (8th Dis. OH 1988) 22

Kruse v. City of Cincinnati,
142 F.3d 907, 912 (6th Cir. 1997) 18

McIntyre v. Ohio Elections Comm’n.

514 U.S. 334, 360 24, 25

Melton v. City of Oklahoma City,
879 F.2d 706, 713 (10th Cir.1989) 14

Members of Council v. Taxpayers for Vincent,
466 U.S. 789, 801, 104 S.Ct. 2118, 2126-27, 80 L.Ed.2d 772 (1984)..... 14

NAACP v. Claiborne Hardware Co.,
458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)..... 14

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377, 386-88, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) 19

Philadelphia Fire Fighters' Union Local 22 v. City of Philadelphia,
286 F.Supp.2d 476 (E.D. Pa. 2003) 19

Pickering v. Board of Education,
391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)..... 13, 14

Pollard vs. Board of Police Com'rs,
665 S.W.2d 333 (Missouri 1984)..... 22

Reeder v. Kansas City Bd. of Police Comm'rs,
733 F.2d 543 (8th Cir.1984) 22

Roth v. United States,
354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957) 24

Ruff v. City of Leavenworth,
858 F.Supp. 1546 (D. Kansas 1994)..... 27

State Bd. for Elementary and Secondary Education v. Howard,
834 S.W.2d 657, 76 Ed. Law Rep. 1211 (Ky. 1992)..... 19

State ex rel. Spink v. Kemp,
365 Mo. 368, 283 S.W.2d 502 (en banc 1955)..... 23

State v. Moses,
655 So.2d 779, 94-0489 (La.App. 4 Cir. 1995) 25

Terminiello v. Chicago,
337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949) *Id.* at 348..... 24

United Auto Workers, Local Union 1112 v. Philomena,

121 Ohio App. 3d 760, 700 N.E.2d 936, 158 L.R.R.M. (BNA) 2615 (10th Dist. Franklin County 1998)..... 20, 21

United Public Workers of America v. Mitchell,
330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947)..... 13

United States Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)..... 13

United States v. National Treasury Employees Union (NTEU)
513 U.S. 454 (1995)..... 27

Wachsman v. City of Dallas 704 F.2d 160 (1983)..... 26

Statutes

L.R. § 7.2(a)(3) 1

R.C. 3517.092(F)(2)..... 21

R.C. § 124.57 1, 17, 20, 28

R.C. § 2921.02 11

R.C. § 2921.03 12

R.C. § 2921.05 12

R.C. § 3517.029 28

R.C. § 3517.091 10

R.C. § 3517.092 8, 9, 18, 21

R.C. § 3517.092(C)..... 8

R.C. § 3517.10 10

R.C. § 3517.13 11

Other Authorities

J. Mill, *On Liberty and Considerations on Representative Government* 1, 3-4 (R. McCallum ed. 1947) 23

Constitutional Provisions

First Amendment. 424 U.S. at 14-19, 96 S.Ct. at 632-645 18

I. INTRODUCTION - L.R. § 7.2(a)(3)

This civil rights case challenges two restrictions on the private, off-duty political speech of city employees: (1) the ban on donations to federal, state and county candidates and (2) the ban on the private distribution of partisan political literature for federal, state and county candidates. Plaintiffs do not seek to engage in any of these acts with respect to city candidates. Nor do plaintiffs seek to engage in these acts at the workplace or while on duty. This case is solely about private, personal political acts.

The City defends the restrictions by saying that *all* partisan political activity at every level of government is appropriate to ban because “all politics is local” and that the “connections in Ohio are [a] seamless web¹.” Doc. 4, p. 10.

Plaintiffs seek an order enjoining Article V, Section 4 of the Charter and Political Activity Policy 2.2 1.B as overbroad. That will leave in place R.C. § 124.57 which does not prohibit donations to partisan candidates or the private distribution of candidate literature. When these two core First Amendment activities are permitted, then, as suggested by the City, an administrative process for determining other questions about permissible political activity will be appropriate. The administrative rulings on those other questions should be public in order to ensure consistency. The record made by the City of those rulings, however, should protect the identity of the class members who seek to pursue this political activity privately.

The City’s defense assumes that facts don’t matter; that the political world of 2008 is no different than the politics of the City when the charter was adopted in 1926.

¹ Last week the City must have concluded that presidential candidates and non-Ohio federal candidates were not in this web since the ban was amended to permit donations to those candidates. The ban on distributing literature for president and Ohio federal candidates remains in place.

That is wrong. In the past eighty-two years numerous reforms have been instituted that shield city workers from political coercion. The campaign reporting laws; civil service laws; union protections; public record laws and stiffer criminal laws all brought about improved controls on political parties. These facts must be reviewed before continuing restrictions that silence core political speech. This principle was clearly stated in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003) when the Court anticipated that its holding on affirmative action would change as facts changed: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” The same careful attention to facts is needed in this case.

II. FACTS

A. History of Article V, Section 4

1. Cincinnati Politics Prior to the Enactment of the City Charter

Corruption ran rampant in the city of Cincinnati from the 1880s until the city charter was amended in 1924. For much of this time, George “Boss” Cox ran the city politics. Though Cox only served two terms on city council himself, he was a major player in the Cincinnati political arena. Cox used gifts and money to become an extremely powerful man. In the late 1800s, a person had to receive Cox’s endorsement if he wanted to hold a political office in Cincinnati. In exchange, Cox required the elected official to show his gratitude by appointing loyal Cox followers to other government positions, such as police officers, firefighters, street cleaners and secretarial positions. These city employees were then required to turn over 2.5% of their salaries to the Hamilton County Republican Committee. This money was used to buy votes, including paying residents of nearby states to come to the city and vote illegally.

The “ward system” in Cincinnati also played a role in the corruption of the city and the exploitation of city employees. In 1905 there were 24 wards in the city. Each ward had a “ward captain.” Twenty-three of these ward captains held important positions throughout the city and county government, including four members of city council. As city employees, these ward captains were under pressure to show their loyalty to Boss Cox.

Boss Cox retired in 1914 and died on May 20, 1916 following a stroke earlier that year. He was succeeded by Rudolph Hynicka, who continued the spoils system in Cincinnati politics.

In 1921 there were 26 wards in the city. Each ward elected a member of city council, and there were also six at-large council members. Each ward contained approximately 500 voting precincts. The precinct committeeman, who was consistently a public employee, was charged with the responsibility to see that all of the voters necessary to control the election went to the polls. Additionally, approximately 9 or 10 city employees lived in each precinct. Each city employee was expected to vote, and produce three or four more votes. Failure to do so would result in the city employee losing his job. This system ensured that at least 25,000 people would vote in favor of the Republican political machine. This number was enough to control every election in the city.

During the pre-charter era, candidates of city offices were listed under the partisan national party emblem on the city ballot. Thus, Republican candidates were listed under a picture of an eagle, and Democratic candidates were listed under a picture of the rooster. Illiterate voters were instructed to vote for all of the candidates listed under a

particular picture. Through this way, the political machine was able to coerce Cincinnati's poor and uneducated to vote along the political machine's lines.

2. The 1924 Movement Against the Political Machine and the Enactment of the City Charter.

While there had always been opposition to the Cincinnati political machine, the opposition movement strengthened during the early part of the 1920s. Rudolph Hynicka, Boss Cox's successor, began to spend increasing amounts of time in New York City and away from Cincinnati. His absence made it more difficult for him to maintain control of the city.

The Cincinnati Association formed in 1920. The association was formed to advance the city, and began investigating matters involving the city government. This association was bipartisan, and many of its members were actually members of the Republican party.

A turning point for the old political machine came in late 1923 and the early part of 1924. The city began to face economic turmoil, and eventually, because of a lack of funds, proposed to shut down the Branch Hospital. This hospital housed over 400 people who were dying of tuberculosis. When the hospital closed, these dying people were to be put out onto the streets. Henry Bentley, a member of the Cincinnati Association, began to advocate against the closing of the hospital, and argued that the county should pay for the hospital, as was done in other cities in Ohio. Bentley involved the public, and began to mobilize the citizens of Cincinnati against the political machine. After a short time, the county and the city came to an arrangement that kept the hospital open.

Bentley's next issue of reform was to attack the use of political emblems on the voting ballot. Through his initiative, he created the "Birdless Ballot League." Bentley

reasoned that this would not interfere with the strength of political party association, but would required the parties to appeal to the more intelligent portion of society and not rely upon people who vote the party ticket without consideration. Bentley and members of the Birdless Ballot League quickly realized that more reform was necessary, and in a short amount of time, the Birdless Ballot League dissolved, and Charter Committee was formed.

The Charter Committee called for four major reforms of the city government: 1) reduce city council from 32 members (26 from each city ward and 6 at large) to 9 members elected by proportional representation, 2) nominations of candidates by petition and abolish city primaries and party emblems on ballots, 3) replace the mayor-council form of government with the city-manager form of government, and 4) institute a civil service system for all future city employees, replacing the Boss Cox spoils system.

Each of these changes was geared towards dismantling the political machine established by Boss Cox and ridding the city of corruption. The Amended Charter was passed by the citizens of Cincinnati in 1924 by an overwhelming majority: 92,510-41,015.

3.Immediate Effects of the New Charter

The 1924 city charter dismantled the ward system in Cincinnati. Since individual wards no longer directly elected individuals to city council, the position of precinct committeeman lost its power to control the vote, and it became less important that public employees produce 3 or 4 votes for each election in addition to their own vote.

Most importantly, the charter created the Civil Service Commission to protect the city from the spoils system that had run rampant throughout the city for nearly 50 years.

The commission was charged with enforcing state civil service laws and creating its own rules of civil service. Under the new charter, City council was no longer able to amend, modify or repeal rules created by the Civil Service Commission. The Civil Service Commission passed rules to ensure that the spoils system never returns to Cincinnati. These rules regulate all facets of public employment, including: applications and the city hiring process, probation periods upon hiring, promotions, transfers, layoffs, disciplinary procedures and termination of employment. Significantly, these civil service rules give public employees the right to due process upon termination, including a public hearing. Additionally, the Civil Service Commission also imposes penalties when its rules are violated.

As an immediate measure to disarm the political machine, Article V, Section IV was part of the charter that was passed in 1924. This section of the charter, although being declared unconstitutional in 1994, has never been amended. This portion of the charter prohibits city employees from donating money to all political campaigns and from distributing literature in these campaigns. This section of the charter was included as a direct result of the spoils system and the exploitation of city employees under the Boss Cox political machine.

This section was enacted specifically to dismantle the old political machine. Before the charter, the political machine was largely funded by the mandatory “donation” that city employees were forced to pay to show their appreciation. This charter provision made those mandatory contributions illegal, as they made all contributions illegal. Additionally, city employees could no longer be forced to produce votes in order to keep their jobs. These broad, sweeping restrictions were deemed to be necessary because of

the broad nature of the corruption in the city. These restrictions were immediately put into place and in a sense demobilized the old political machine. The immediate restrictions enabled the Civil Service Commission to have time to create their rules and to provide further protection to city employees.

4. Summary

The Cincinnati City Charter was enacted in response to the overwhelming political corruption that occurred under Boss Cox's political machine. The charter safeguarded the city from ever experiencing corruption like this by dismantling the ward system, creating fairer ballots, creating the city-manager form of government and creating the Civil Service Commission to stop the spoils system that ran rampant throughout the city. Article V, Section IV was drafted broadly in order to immediately destroy the old political machine's financial and human resources. At the time, the provision needed to be broad and sweeping in order to combat the overwhelming corruption in city government, and to ensure that the amended charter would have time to work and become the essential part of the city's governance that it is today.

While perhaps the broad restrictions found in Article V, Section IV were necessary in 1924, the new charter successfully destroyed the corruption that was present in city politics. City employees, under the Civil Service Rules, enjoy great job security and are entitled to due process of the law if faced with an adverse employment action. The protection that Article V, Section IV was intended to prevent is now provided, in much more detail, through the Civil Service Commission Rules and other laws.

See Declaration of Judith Spraul-Schmidt, PhD., attached; Charles P. Taft, *City Management*, Farrar & Rinehart: New York, 1933; Adele Bentl Stegner, *Cincinnati Awaken*, Reference Material, Cincinnati Public Library, 1950.

B. 82 Years of Reforms have Improved Controls on Public Officials, Political Parties and Candidates

1. Limits on Donations by and Solicitations of Public Employees

In 1995, the legislature enacted a law limiting solicitation or acceptance of contributions by elected officers or candidates. R.C. § 3517.092. The law acknowledges the right of employees to be free of employer pressure to affiliate with a particular candidate. The law also prevents politicking for superiors. R.C. § 3517.092(C) provides:

(C) (1) No elected officer of a political subdivision of the state, no campaign committee of such an officer, no employee of such an officer's office, and no other person or entity shall knowingly solicit a contribution to an elected officer of a political subdivision of the state or to such an officer's campaign committee from any of the following:

(a) An employee of that political subdivision whose appointing authority is that elected officer;

(b) An employee of that political subdivision whose appointing authority is authorized or required by law to be appointed by that elected officer;

(c) An employee of that political subdivision who functions in or is employed in or by the same public agency, department, division, or office as that elected officer.

(2) No candidate for an elective office of a political subdivision of the state, no campaign committee of such a candidate, no employee of the candidate's office if the candidate is a state elected officer or elected officer of a political subdivision of the state, and no other person or entity shall knowingly solicit a contribution to a candidate for an elective office of a political subdivision of the state or to such a candidate's campaign committee from any of the following:

(a) An employee of that political subdivision at the time of the solicitation, whose appointing authority will be the candidate, if elected;

(b) An employee of that political subdivision at the time of the solicitation, whose appointing authority will be appointed by the candidate, if elected, as authorized or required by law;

(c) An employee of that political subdivision at the time of the solicitation, who will function in or be employed in or by the same public agency, department, division, or office as the candidate, if elected.

The law contains multi-level bans on soliciting contributions by extending the ban beyond the employee's superiors to the officials who appoint the soliciting employee's boss, *or* even further, to any person who will function in or be employed in or by the same public agency, department, division, or office as the employee. *Id.*

Public employees are also banned from soliciting or contributing to political parties or campaigns while performing their official duties or in areas of a public building where official business is transacted or conducted. *See* R.C. § 3517.092(D), effective since 2005.

2. Civil Service Reform

In December 2006, the Ohio General Assembly passed Substitute House Bill 187, the culmination of a long endeavor to reform Ohio's law and regulations governing civil service employment. This Act^[1] was the end result of more than ten years of legislative discussions and public hearings over various ways of reforming the civil service. It contains protections for employee rights in areas such as civil service testing, layoffs, benefits, discipline, whistle-blowing, disability, appeals and layoffs, among many others. *See* Generally, Declaration of V. Daniel Radford, attached.

3. Campaign Reporting Laws

Federal and State laws restrict and monitor the activities of candidates for office, political parties, unions and individual campaign contributors.

R.C. § 3517.10, effective in its current form since 2002, is an extensive statute that aims to create transparency in the financial matters of parties and campaigns. The party or campaigns must file extensive information about every financial or in-kind contribution it receives on a regular and timely basis. These contributions are available

on the internet.

http://www2.sos.state.oh.us/portal/page?_pageid=34,56478,34_56508&_dad=portal&_sc_hema=PORTAL.

Cincinnati has its own ordinance requiring public reports of all campaign contributions. See CMC § 117, “Campaign Finance Disclosure.” All contributions to candidates for Mayor and City Council are available on the internet. http://city-egov.cincinnati-oh.gov/menu_ec.html.

In 1987 the state enacted a law regulating door-to-door solicitations for political purposes by mandating that the person being solicited be given written notices about the solicitation, including a list of any purposes for which money contributed might be used; the amount of compensation, if any, being paid to the solicitor; and a statement that the person being solicited may refuse to make a contribution without suffering any reprisal. R.C. § 3517.091.

4. Public Contracts

Transparency and accountability is also at the heart of R.C. § 3517.13, regulating awarding of public contracts. The law was passed in 1999 and has been revised on an annual basis.

On April 4, 2007, House Bill 694 became effective. Ohio Revised Code §3517.13 imposes statutory limits on political contributions made by individuals and entities to state and local government officials “having ultimate responsibility” for the award of a government contract. The law tightened the restrictions on pay to play contracting for vendors seeking state contracts and contracts awarded by local governments, including boards of township trustees, boards of education and county commissioners. Under the

new law, any bid or unbid contract, purchase order or collective bargaining agreement with a value of more than \$500 requires the vendor to certify to the contracting authority that the vendor has not made a contribution to the contracting authority in an amount that exceeds the limits provided by law. The limits are \$1000 per an individual and \$2000 for individuals, partners and shareholders of the same firm. The contributions are aggregated among owners, partners, family members and shareholders so that even if the contributions are less than \$1000, they may trigger the prohibition if they exceed \$2000 in the aggregate.

5. Criminal Laws

Ohio has passed numerous criminal laws in recent years that reduce the risk of political corruption. In 1972 HB 511 was enacted. R.C. § 2921.02. This statute prohibits bribery and makes it a crime to improperly influence a public servant. As amended in 1986, the law now states in part:

(A) No person, with purpose to corrupt a public servant or party official, or improperly to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

(B) No person, either before or after he is elected, appointed, qualified, employed, summoned, or sworn as a public servant or party official, shall knowingly solicit or accept for himself or another person any valuable thing or valuable benefit to corrupt or improperly influence him or another public servant or party official with respect to the discharge of his or the other public servant's or party official's duty.

Passed in 1972 and amended in 1986 and 1996, R.C. § 2921.03 **also** makes it a crime of intimidation to,

force, by unlawful threat of harm to any person or property, or by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a public servant, party official, or witness in the

discharge of the person's duty.

In 1996 Ohio also enacted R.C. § 2921.05, prohibiting retaliation,

(A) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against a public servant, a party official, or an attorney or witness who was involved in a civil or criminal action or proceeding because the public servant, party official, attorney, or witness discharged the duties of the public servant, party official, attorney, or witness.

C. Plaintiffs and the 2008 Fall Election

Plaintiffs seek, as private individuals, to donate to and distribute literature for federal, state and county candidates. They do not seek to engage in this activity at work or while on the job. They do not seek to identify themselves as city workers when they engage in this activity. There are no city elections this Fall. City elections therefore are not at issue. The Charter and Policy 2.2 expressly prohibit the activities that the plaintiffs seek to pursue. Only action by this court will permit them to engage in this expressive activity before the election on November 4, 2008.

Former Civil Service Commission Member V. Daniel Radford, has testified that the existing laws and regulations provide ample protection from any corrupting influence that may exist when a privately employee donates to a candidate and when an employee privately distributes a candidate's literature. See Radford Declaration, Attached.²

III ARGUMENT

² [\[1\]](#) Amending sections 9.84, 119.12, 124.01, 124.03, 124.04, 124.07, 124.09, 124.11, 124.133, 124.134, 124.14, 124.15, 124.20, 124.22, 124.23, 124.26, 124.27, 124.271, 124.30, 124.31, 124.32, 124.321, 124.322, 124.323, 124.324, 124.325, 124.326, 124.327, 124.33, 124.34, 124.341, 124.38, 124.383, 124.384, 124.385, 124.386, 124.388, 124.40, 124.44, 124.45, 124.46, 124.48, 302.202, 325.19, 329.02, 329.021, 1513.03, 1513.34, 4111.03, 4112.01, 5107.52, 5119.09, 5155.03, and 5703.17, to enact sections 124.12 and 124.141, and to repeal section 124.311²

A. Plaintiffs Have a Likelihood of Success on the Merits of Showing that Defendants' Restrictions on Campaign Donations and Distributing Literature as Private Citizens Violate The Right to Free Speech

1. The Government's Interest in Restricting Political Speech of Classified Employees

Plaintiffs agree that the City has a legitimate governmental interest in restricting political activities of classified employees. *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Such restrictions are designed to ensure advancement based on merit in the governmental service and to protect employees from improper political influence. *Mitchell, supra*.

Although the Supreme Court has recognized the unique interests of the government in regulating its employees, it has also held that public employees do not relinquish First Amendment rights by virtue of accepting government employment. *Pickering v. Bd. of Edn. of Twp. High School Dist.* 391 U.S. 563, 566-568 (1968).

The plaintiffs in the case at bar want to engage in conduct that is within the core of First Amendment protection. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); see also *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (emphasizing “the Constitution's special concern with threats to the right of citizens to participate in political affairs”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (“Speech concerning public affairs is more than self-expression; it is the essence of self-government.”). The government bears the burden of demonstrating the constitutionality

of its actions. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35; *Melton v. City of Oklahoma City*, 879 F.2d 706, 713 (10th Cir.1989), *reh'g on other grounds*, 928 F.2d 920, *cert. denied*, --- U.S. ----, 112 S.Ct. 296, 116 L.Ed.2d 241 (1991).

1. The City's Charter and Policies are Overbroad Under the Supreme Court's Decision in *Broadrick v. Oklahoma*.

For a court to find an enactment unconstitutionally overbroad, there must be a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *Members of Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126-27, 80 L.Ed.2d 772 (1984). The mere fact that one can conceive of some impermissible applications of an enactment is not sufficient to render it susceptible to an overbreadth challenge. A party must show that the enactment reaches a substantial amount of protected conduct. Particularly where conduct and not pure speech is involved, "the overbreadth must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601 at 615 (1973). An enactment will be considered substantially overbroad if the number of applications of the provision to protected conduct is substantial in relation to the number of applications to conduct that is not protected. *ACORN v. City of Tulsa, Oklahoma*, 835 F.2d 735, 744 (10th Cir.1987).

The Supreme Court's decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) established the contours of government regulation of public employee speech. *Broadrick* was brought by three Oklahoma civil service employees who challenged the constitutionality of Section 818 of the state's Merit System Act, which stated in part that "[n]o employee in the classified service . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution

for any political organization, candidacy or other political purpose." The law also banned employees from taking an active role in the management or affairs "of any political party or in any political campaign, except to exercise his right privately as a citizen to express his opinion and cast his vote." *Id.* at 2912.

The employees worked for Oklahoma's Oil and Gas Conservation Division. They were charged with violating several provisions of the law by actively participating in the reelection campaign of their supervisor, state corporation commissioner Ray C. Jones. On several occasions, while they were at the workplace they asked other corporation commission employees to take part in campaign work or to recommend others who might participate in the campaign. Two of the three were charged with soliciting campaign funds from commission employees at the workplace, and one was charged with receiving and distributing campaign posters in bulk. *Id.* 609.

The Supreme Court declined to find the act unconstitutionally overbroad. The Court found that the three employees were clearly engaged in partisan political activities at work that the state could constitutionally limit. The Court noted that the Oklahoma law also applied to constitutionally protected activity such as wearing political buttons and displaying bumper stickers, but since that activity was not before the Court, it declined to invalidate the law on those grounds. *Id.* 609-611.

The Oklahoma law is similar to the City of Cincinnati's Charter. But the facts are clearly distinguishable from *Broadrick* because in the case at bar, the law is unconstitutional as applied to plaintiffs and on its face. The three employees in *Broadrick* were actually involved in corrupt activities by soliciting votes and contributions from

their coworkers, at the workplace, on behalf of their supervisor. The employees even used the workplace to distribute bulk posters.

In contrast, the conduct Plaintiffs Fangman and Graves are banned from participating in is clearly within the zone of constitutionally protected conduct. The plaintiffs want to engage in expressive conduct away from the workplace, in their private lives, *in non-city* elections. They want to express their opinions privately by distributing literature about the candidates and issues. They want to make individual contributions, not solicit contributions from their coworkers. They fear that showing a family member or friend an article about a candidate will expose them to discipline by the City. (Decl. of plaintiffs). None of the conduct by the plaintiffs will be related to candidates for city offices. The ban on these activities represents a ban on core First Amendment speech.

Moreover, the City's Charter provision was already declared unconstitutionally overbroad. See Plaintiffs Memorandum in Support of Motion for Temporary Injunction, p. 8-10; *Cincinnati v. Ohio Council 8, AFSME* 61 Ohio State 3d 683 (1991), *Cincinnati v. Ohio Council 8, AFSME* 93 Ohio App. 3d 162, 165 (1st Dist. Ct. App. 1994). The Court of Appeals held that restricting donations to federal and non-local races "does not directly relate to the city's goal of insuring the integrity of the civil service system and preventing a return of corrupt spoils system politics: candidates for federal office and federal officeholders do not supervise the daily work of employees." *Id* at 165. The City's amended policies are still not within the holding of *Ohio Council 8*. The City's ban on political speech is *substantial* in relation to the regulation's legitimate sweep. *Broadrick* at 615-616.

2. Appropriate Remedy when Charter Section and Human Resources Policy are Overbroad

When this court determines that Article V, Section 4 of the City Charter is unconstitutionally overbroad the sky will not fall. Instead, since the Charter will no longer have a more specific and/or inconsistent provision compared to state law, those relevant provisions of state law that apply to the activity at issue will be applied to the city. City Charter Article 2, Section 1. First, the City will be regulated by R.C. § 124.57 which does not limit private donations by public employees to candidates in any way. Nor does it prohibit private, anonymous distribution of candidate literature³. Second, the City will be regulated by R.C. § 3517.092(B) and (D), described above, which reasonably prohibits a supervisor from soliciting and receiving contributions from those in his/her employ and prohibits political activity in the workplace. These reasonable restrictions can guide the City going forward and form a basis for revising Policy 2.2.

2. In the Alternative, If the Charter Provision and Policy 2.2 are not Overbroad, the Restrictions on Donations and the Private Distribution of Literature Nonetheless Violate the Constitution.

a. The City's Ban on Giving Financial Contributions to Non-City Candidates and Issues is Unconstitutional

The law on campaign finance restrictions begins and ends with the Supreme Court's decision in *Buckley v. Veleo*, 424 U.S. 1, 96 S.Ct. 612 (1976), where the Court

³ R.C. 124.57 states that classified employees shall not solicit contributions for political parties and candidates for office. Nor shall classified employees "take part in politics" but permits public employees to "*express freely political opinions.*" The balance between these statements is surely the off duty, anonymous distribution of literature as private citizens. Note that OAC § 123:1-46-02 interprets this law too severely to restrict classified employees from "distributing political material" only "when such activities are directed toward party success." Even this interpretation, however, does not prohibit an employee from privately passing along literature for a particular candidate when that employee's name is not on the literature.

announced that spending money on political campaigns is political speech protected by the First Amendment. 424 U.S. at 14-19, 96 S.Ct. at 632-645. Restrictions burdening political speech can survive only if they are justified by a compelling state interest that is narrowly tailored to serve that interest. *Id.* 39, 44-45, 96 S.Ct. 644-645, 646-47; *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 251-52, 107 S.Ct. 616, 624-25 (1986); *Kruse v. City of Cincinnati*⁴, 142 F.3d 907, 912 (6th Cir. 1997).

A contribution to a political cause constitutes speech and association that the First Amendment protects. See *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-88, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000); see also *Buckley* at 21, (observing that “[a] contribution serves as a general expression of support for the candidate and his views”); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) (noting that “contributors obviously like the message they are hearing ... and want to add their voices to that message; otherwise they would not part with their money”).

A public employee’s right to make financial donations to political campaigns has been repeatedly recognized. See *Gray v. City of Toledo*, 28 Ohio Misc. 141, 323 F.Supp. 1281, 57 O.O.2d 239, N.D. Ohio 1971 (invalidating Toledo rule banning police officers from giving money to political parties or candidates. Rule was overbroad and vague, “[m]ention should also be made of the fact that the City has no legitimate interest in

⁴ The City of Cincinnati directly challenged *Buckley* in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1997). The City ignored the advice of the City Solicitor and passed an Ordinance limiting the amount of money that candidates for city council could spend on their campaigns. The Sixth Circuit held that the law was unconstitutional. The Circuit Court explained that the Supreme Court identified prevention of corruption as the only interest justifying restrictions on campaign financing. *NC-PAC*, 470 U.S. at 496-97, 105 S.Ct. at 1468-69. However, the Circuit found that the City could not show that spending limits were linked to corruption.

restricting an employee's right to make voluntary contributions to a regularly constituted partisan political organization. *Id.* at 1288, citing United States Civil Service Commission, Political Activity of Federal Officers and Employees, #20; *see also Philadelphia Fire Fighters' Union Local 22 v. City of Philadelphia*, 286 F.Supp.2d 476 (E.D. Pa. 2003)(Philadelphia Home Rule Charter section prohibiting members of the fire department from giving financial contributions violated First Amendment, noting that “banning political contributions muzzles political voices” *Id.* at 483); *State Bd. for Elementary and Secondary Education v. Howard*, 834 S.W.2d 657, 76 Ed. Law Rep. 1211 (Ky. 1992) (Kentucky laws prohibiting school employees from engaging in political “activities” were unconstitutionally vague and overbroad, plaintiff teachers had the right to participate in school board elections in their county of residence and county of employment, including making financial donations).

While the contributions were not at stake in *Broadrick*, it is notable that the Oklahoma law was nearly identical to R.C. § 124.57, which is concerned with preventing *solicitation* of contributions. Neither Section 818 nor R.C. § 124.57 prohibit state employees from giving financial contributions to candidates, parties or causes.

Although all fifty states proscribe forms of solicitation by public employees, restrictions on giving financial contributions have all but been eradicated. As the Court in Philadelphia observed, public confidence in government could not possibly be undermined by political contributions by public employees because the vast majority of public employees are free to make political contributions, including most federal employees, Pennsylvania's state employees and most of the city's non-firefighters. *Id.* 483.

Indeed, the Hatch Act has permitted contributions by most federal workers since the 1970s. Ohio state employees are not banned from making donations. R.C. § 124.57. In 1998 Ohio's Campaign Finance Reform Act was challenged by public employees and unions because it banned employees from making political contributions through a payroll deduction and prohibited them from soliciting coworkers for contributions while at work (among other provisions). *United Auto Workers, Local Union 1112 v. Philomena*, 121 Ohio App. 3d 760, 700 N.E.2d 936, 158 L.R.R.M. (BNA) 2615 (10th Dist. Franklin County 1998), *stay denied*, 81 Ohio St. 3d 1508, 692 N.E.2d 615 (1998) and *dismissed, appeal not allowed*, 82 Ohio St. 3d 1450, 695 N.E.2d 1148 (1998). *Philomena* explores the distinction between solicitation and contribution. The Appeals Court could find no connection between the state's interests in protecting employees from coercion and the *method* of making political contributions. It struck down the section of the law that prohibited employees from taking advantage of the payroll deduction. (Private employees were not so limited).

The Court of Appeals in *Philomena* cited R.C. § 3517.092 as adequately addressing the state's interest in preventing corruption. R.C. § 3517.092 prohibits accepting or soliciting campaign contributions to an elected officer or candidate for office from a public employee whose appointing authority is the officer or whose appointing officer is appointed by the elected officer, or when the employee functions in or is employed in or by the same public agency, department, division or office as the elective office. *Id.* 946. The Court also found that the payroll deduction was not a public act, nor was it intertwined with performance of the employee's duties. *Id.*

The *Philomena* decision upheld the anti-solicitation sections of the law, which only prohibit employees from soliciting for a political contribution while the employee is working or in areas of a public building where official business occurs⁵. R.C. 3517.092(F)(2). *Id.* The City's interests in transparency and the appearance of impropriety are simply not advanced by banning contributions by public employees. The state anti-solicitation laws adequately protect the City and its workers.

b. The Defendant Has Failed to Identify Any Case Law That Supports Cincinnati's Ban on Donations to Candidates

None of the cases cited by Defendants persuasively calls for this Court to allow the City to ban donations. The employee restrictions "unhesitatingly" affirmed by the Supreme Court in *Letter Carriers* (Doc 4 at 7) did not include banning contributions by federal employees. Federal employees are permitted to give financial contributions to political candidates. 5 CFR § 734.208(a). ("An employee may make a political contribution to a political party, political group, campaign committee of a candidate for public office in a partisan election and multi-candidate political committee of a Federal labor or Federal committee organization.").

Although defendant cites *Hudak v. Cleveland Civil Service Comm'n*, 549 N.E.2d 741 (8th Dis. OH 1988), as having a nearly identical charter to Cincinnati, the defendant admits the case did not rule on a contribution issue. The Appeals Court only found that

⁵ Although solicitation of political contributions is protected speech, the Supreme Court applies a forum test to determine when the government interest in limiting use of its property outweighs the individual's interest in using the property. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 7799 (1985). To deny access to non-public fora, the government only needs to meet a reasonableness standard. The Appeals Court held that the state had met its burden. *Id.* 780. The Court of Appeals said certain use of government property, such as after-school union meetings, may raise constitutional issues but the issue was not before the court. *Id.* 780.

the city charter prohibited a civil service employee from becoming a candidate in a municipal election and city could properly discharge the employee. *Id.* 744-45.

The City urges the Court to follow *Reeder v. Kansas City Bd. of Police Comm'rs*, 733 F.2d 543 (8th Cir.1984), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 951, 93 L.Ed.2d 1000 (1987). The Eighth Circuit did uphold a ban on political contributions by police officers and employees of the Kansas City Police Department. But in that case the majority of the Kansas City Board of Police Commissioners was made up of persons appointed by the governor of the state, causing the Department to not be a truly local department and causing the Court to find that politics in that state were a “seamless web.” *Id.* at 547. In so ruling the Court relied in part on the Missouri Supreme Court’s decision in *Pollard vs. Board of Police Com’rs*, 665 S.W.2d 333 (Missouri 1984), which upheld the state statute even as applied to donations to a federal congressional candidate. The Missouri Supreme Court said the “interest of the State of Missouri in regulating contributions by police officers to national candidates is all the stronger insofar as the Kansas City Police Department is concerned because the department has been substantially removed from local control and constituted an instrumentality of the state by the legislation of which § 84.830 is a part. *See State ex rel. Spink v. Kemp*, 365 Mo. 368, 283 S.W.2d 502 (en banc 1955).” *Id.* at 340. “The Kansas City police department operates under the exclusive direction and control of the board of police commissioners which was created by state statute and whose members are appointed by the governor.” *State ex rel Spink* at 374. The “seamless web” referred to by Reeder is premised on a very different political structure than that facing the parties in this case.

The Tenth Circuit decision in *Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265 (10th Cir.1998) dealt with political signs, not with contributions or distribution of literature. The City acknowledges that its own regulations allow the employee to display yard signs. *Horstkoetter*, then, is simply not on point.

c. The City's Ban on Distributing Campaign Literature is Unconstitutional

A private citizen's right to distribute anonymous leaflets expressing political opinions is among the most sacred freedoms protected by the First Amendment. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. Mill, *On Liberty and Considerations on Representative Government* 1, 3-4 (R. McCallum ed. 1947)." Anonymous pamphleteering was the most important and characteristic writing during the Revolution and Ratification of the United States Constitution. *McIntyre v. Ohio Elections Comm'n.* 514 U.S. 334, 360 *Thomas, J. concur.* (1995)

In *McIntyre* the Supreme Court struck down an Ohio law prohibiting anonymous leafleting. The plaintiff was fined for distributing anonymous pamphlets about a school levy. The statute required every written political document to contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." *Id.* at 345. The Supreme Court held that the law's reach was too broad, encompassing activity on the eve of elections in addition to well in advance, to candidate and issue elections, and "[i]t applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources." *Id.* at 345.

In striking down the law, the Supreme Court held that it impermissibly regulated the core of expression that is protected by the First Amendment:

“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ *Roth v. United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957).

...

Id. at 347-8, 1158-1159.

The fact that the controversy arose in the middle of a campaign, “only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.” See *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949) *Id.* at 348. The Supreme Court declared that Ohio has other laws that satisfy its interest in preventing false, fraudulent and misleading campaign statements. *McIntyre* at 350-351.

The plaintiffs in this case want to do the same: express urgent, important and effective speech in some of the most critical elections in our time. They want to be able to distribute literature for candidates in federal, state and county elections. They will not identify themselves on the literature or while distributing the literature. They will do traditional canvassing for their candidates. This is precisely the activity contemplated and engaged in by the Founding Fathers before, during and after the Revolution and ratification of the Constitution⁶.

⁶ The Court observed “[t]hat tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed ‘Publius.’ Publius's opponents, the Anti Federalists, also tended to publish under

Courts have recognized that distributing literature is one of the few ways a government employee can meaningfully express their political opinions without injuring the state's interest in efficient, transparent governance. In *State v. Moses*, 655 So.2d 779, 94-0489 (La.App. 4 Cir. 1995) a Louisiana appellate court followed *McIntyre* and struck down a law prohibiting anonymous campaign literature as violating the First Amendment. The Court cited the rights of public employees as one significant reason the law was overly broad. "As a practical matter, anonymous campaign literature may be the only way, for example, that unclassified government employees may be able to express political views without risking the loss of their jobs." *Id.* at 784.

In *Wachsman v. City of Dallas* 704 F.2d 160 (1983) the Fifth Circuit dealt with a more narrowly tailored Charter than Cincinnati's. The City of Dallas prevented employee participation in city council elections. The trial court upheld most of the Charter provisions, but invalidated the section banning city employees from publicly endorsing or actively supporting "candidates for the city council or any political organization or association organized to support candidates for the city council." *Id.* at 162. On appeal the Fifth Circuit affirmed the ruling, observing that the lower court was "obviously concerned with limiting an employee's right to endorse a candidate at a private and/or nonpolitical gathering (e.g., a Kiwanis Club meeting or a neighborhood barbecue). Such a setting suggests a public employee acting as a private citizen." *Id.* at 172. Moreover,

pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., *The Complete Anti Federalist* (1981)." *McIntyre* at fn. 6.

while the appeal was pending, the City conceded that the Charter had to yield to the First Amendment by allowing City employees to distribute campaign literature except while at work or in a city uniform or on city property⁷. *Id* 163 at fn. 3.

The Kansas District Court held that blanket restrictions on all public employee speech at all times were overbroad. *Ruff v. City of Leavenworth*, 858 F.Supp. 1546 (D. Kansas 1994). In *Ruff* the District Court struck down a Leavenworth statute as facially overbroad even though the plaintiff police officer publicly endorsed a candidate in his official capacity as a police officer. Although the city could ban public endorsements, the statute was overbroad because it prohibited employees from engaging in any "political activity" involving the election of candidates for any City office. *Id* at 1556. "The City's policies purport to prohibit any "public" statement made by a City employee which could be construed to endorse or as voicing support for a particular candidate in an election regardless of the time, place and manner in which the statement is made." *Id.* at 1557. The Court was concerned that the law would chill private speech even in non-partisan gatherings like picnics and barbecues. This is the very concern that plaintiff Graves has

⁷ The City also amended its interpretation of the Charter in the following respects:

“(A) city employees may place city council campaign signs in their yards and on the premises of their homes,“(B) city employees may place [city council campaign] bumper stickers on the vehicles which they own,“(C) the spouses of city employees may contribute to the campaign of a city council candidate and may solicit and receive contributions for a city council candidate,“(D) the spouses of city employees, and associations and organizations of spouses of city employees, may publicly endorse and actively support city council candidates,“(E) the spouses of city employees, and associations and organizations of spouses of city employees, may circulate petitions for city council candidates,“(F) city employees may work in campaign headquarters of city council candidates, and“(G) an association or organization of city employees may mail or otherwise distribute endorsements of city council candidates to the city employee members of such organization or association.” *Waschman* at 163, fn. 3

expressed about participating in private parties where the elections will be discussed and political literature may be distributed and shared.

The Supreme Court's ruling in *United States v. National Treasury Employees Union* (NTEU) 513 U.S. 454 (1995), is also instructive. In that case a federal statute prohibited government employees from accepting an honorarium for making a speech or writing an article, regardless of whether the speech or article had any nexus with the employee's official duties. *Id.* 457. Since the law had a "widespread impact" and "chills potential speech before it happens," "the Government's burden [was] greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." *Id.* at 468. The Court concluded the government could not meet this burden "because the vast majority of the speech at issue in this case does not involve the subject matter of Government employment and takes place outside the workplace." *Id.* at 468.

Therefore, the ban on the private distribution of campaign literature for federal, state and county candidates violates the Constitution.

B. All of the Other Factors Supporting and Injunction Have Been Satisfied.

In its memo in response to the motion for preliminary injunction, The City does not contest that plaintiff has met the other requirements for an injunction. Therefore the requirements of irreparable harm, balance of interests and the public interest are satisfied.

IV. CONCLUSION

Art V, Section 4 of the Charter and Section 2.2 1.B of the Human Resources Policies and Procedures should be declared unconstitutional as overbroad and enjoined. That holding will replace the Charter with R.C. § 124.57 which permits donations to county, state, and federal candidates and permits private distribution of literature. Also

controlling will be R.C. § 3517.029 which limits local contributions. Any future questions raised by city employees as to whether certain political conduct is permissible should be addressed through an administrative process that creates a public body of interpretations that will guide all city workers going forward.

Respectfully submitted,

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein # 0032053
Jennifer L. Branch #0038893
Andrea Reino
GERHARDSTEIN & BRANCH LPA
Attorneys for the Plaintiff
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 fax
agerhardstein@gbfirm.com
jbranch@gbfirm.com
areino@gbfirm.com
www.gbfirm.com