

boards of election,¹ to place designations of Plaintiffs' choosing upon the ballots for the general election to be held November 2, 2010.

b. Non-Partisan Elections in Hamilton County.

Within Hamilton County there are numerous other political subdivisions which fill administrative and legislative positions through popular election. The vast majority of these positions are filled through non-partisan elections. Such elections are non-partisan by virtue of state law or by local charter. Such elections are conducted in nine cities, thirteen villages, twelve townships, and twenty-two school districts.

More importantly – and perhaps more to the point – each of Hamilton County's fourteen municipal court judges is nominated by petition and stands for election on the non-partisan ballot. While this originally was mandated by Ohio law,² it is now mandated by order of this Court. *See, Mallory v. Eyrich*, No. C-1-86-1056, (S.D. Ohio June 7, 1993)(Remedial Order).

While none of the foregoing subdivisions and offices are directly at issue here, any ruling altering the non-partisan nature of the constitutional court elections involved herein will necessarily implicate future elections for each and every one.

II. ARGUMENT

a. Challenges to the Judicial Canons

The interest of Defendant Board of Elections of Hamilton County, Ohio (herein the "Board") in this matter is solely with the electoral process. The Board has no interest in the

¹ In Ohio, all matters pertaining to the conduct of elections are state functions. *State ex rel Columbus Blank Book Mfg. Co. v. Ayers*, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (paragraph 1 of the syllabus). The Boards of Election act under the direct control of the Secretary of State in his capacity as the chief election officer of the state. *Id. at* (paragraph 2 of the syllabus). They are simply his agents, appointed by him to act in any given county. See Ohio Ethics Opinion 74-007. See also: ORC §§ 3501.04- 3501.16.

² ORC § 1901.07

controversy regarding the effect of the challenged Rules of Court and the impact of such rules on the conduct of the individual judicial candidates maintaining this action. The Board believes that the candidates, the Supreme Court of Ohio, and the various boards and officers charged with enforcing the challenged Rules of Court will responsibly and adequately address all issues related to those Rules. Consequently the Board will not offer further argument on these issues.

b. Non-Partisan Ballot Challenge

The role of the Board with respect to this challenge is limited as well. The challenge is to particular provisions of state law as opposed to a local policy of the Board. The Secretary of State is Ohio's chief election officer and the Board is charged with administering the election laws challenged herein as directed by the Secretary. To the extent that relief is ordered for or against the Secretary with respect to Title 35 of the Ohio Revised Code, the Board will also be obligated to so abide.

That said, the Board offers the following:

The power to control state and local elections is constitutionally reserved to the States. *Oregon v. Mitchell*, 400 U.S. 112, 134-135, 91 S.Ct. 260, 269 - 270 (1970). "The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-125. And: "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892).

In this context, the Supreme Court of the United States has recognized that "substantial" state regulation of elections is necessary to assure that elections are "fair and honest;" and that "some sort of order, rather than chaos;" accompany the electoral processes. *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974). In the same decision, the Court recognized that the States have evolved comprehensive and complex election codes regulating the manner in

which elections are conducted and the qualifications of voters and candidates for office. *Id.* While this power is broad, it “does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.” *Rosen v. Brown*, 970 F.2d 169, 174 (6th Cir. 1992) quoting : *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986).

All elections schemes affect to some degree the individual's right to vote and to associate with others to achieve political ends. *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570 (1983). “Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Id.* Parties challenging non-discriminatory election regulations “bear a heavy constitutional burden.” *Schrader v. Blackwell*, 241 F.3d 783, 790-791 (6th Cir. 2001). Generally speaking, the presence or absence of a party label for a particular candidate on a general election ballots does not unfairly burden associational rights. See, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997) (upholding Minnesota's anti-fusion law); *Schrader, supra*.

In this matter, all of the candidates in the parties' respective elections will appear without party labels on the general election ballot. Requiring judicial candidates to appear without party labels is thus non-discriminatory. The reasons behind Ohio's regulatory interest in the non-partisan judicial ballot were clearly stated nearly a century ago in *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 48, 99 N.E. 1078, 1085 (1912):

The purpose of this law is to withdraw candidates for judicial offices from partisan politics. It still leaves to political parties the right to place candidates for judicial offices in nomination, and when so nominated the names of these candidates must be placed upon a separate nonpartisan ballot. . . . In order to determine the reasonableness or unreasonableness of this classification, it is necessary to compare the respective duties of the officers of these different branches of government. Legislative and executive officers are selected for the avowed purpose of promulgating definite principles and methods of government advanced by the respective parties that place them in nomination, and to this end

party platforms are written for the purpose of enunciating the principles for which that party and its candidates stand, and the candidates for these offices so placed in nomination are pledged to the support of these principles; therefore it is highly important that the electors of the state should know the political affiliation of the candidates for these offices, for in this respect it is perhaps not so much the personality of the candidate, as the measures they advocate and are pledged to support, that influence the individual voter. No partisan political platform can be written for the judge. He is charged with the interpretation and the administration of the law as he finds it. He has no voice in framing it. He must not depart from the plain provisions thereof, no matter how much he may be opposed to the principles or purposes of it. In the discharge of his duty a judge is not concerned with party platforms or party expediency. In his official capacity he can serve no party, promulgate no partisan theories of government, encourage no partisan economic measures.

Such justifications are reasonable and Ohio's non-partisan judicial ballot is a permissible exercise of the State's power to regulate its own elections.

There is no special "harm" being endured by plaintiffs in this matter that necessitates immediate relief. The absence of party labels for individual candidates on the general election ballot is the same for the plaintiffs and their opponents alike. There is no constitutional requirement that political designations appear on any ballot. *Rosen v. Brown*, 970 F.2d 169 (1992). *Rosen* observed:

With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns.

Id. at 175

It is also worth considering what harm may result from compelling the State to include language of a candidate's choice on the ballot. While this case involves only party labels, future cases may well involve position statements, entire platforms, campaign puffery, and disparaging statements regarding an opponent. Unfortunately, these are not idle musings. *See, Giffin v. Governmental Accountability Board, et al.*, No. 2:10-cv-00617, (E.D. Wisconsin, July 22, 2010)(Petition).

Finally, with the possible exception of AFSCME, all of the plaintiff parties have known since February 8, 2010, when the declarations of candidacy for the judicial positions were filed that no party labels would appear on the general election ballot should the individual candidates survive the primary. Now, at the eleventh hour, they have decided that the party label is of overwhelming importance to their election. Had plaintiffs brought this action following the primary on May 3, 2010, the matter could have been presented in a deliberative manner and this Court would have arrived at a decision well before now. Scurrying about helter-skelter to resolve it now does not do justice to the questions that have been raised.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs' request for a temporary restraining order and preliminary injunction are not well-taken and ought to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2010 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ David Stevenson

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