

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO COUNCIL 8 AMERICAN	:	
FEDERATION OF STATE,	:	
COUNTY AND MUNICIPAL	:	
EMPLOYEES, AFL-CIO, et al	:	
	:	
Plaintiffs,	:	Case No. 1:10-cv-00504-SJD
	:	
v.	:	Judge Susan J. Dlott
	:	
SECRETARY OF STATE	:	
JENNIFER BRUNNER, et al	:	
	:	
Defendant.	:	

**MEMORANDUM OF DEFENDANTS, SUPREME COURT OF OHIO,
OHIO DISCIPLINARY COUNSEL AND BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE, IN OPPOSITION TO PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (R. 2)**

I. Introduction

On July 13, 2010, the Sixth Circuit Court of Appeals invalidated three provisions of the Kentucky Code of Judicial Conduct. *Carey v. Wolnitzek*, 2010 U.S. App. LEXIS 14367 (6th Cir. July 13, 2010). This suit swiftly followed, launching a facial challenge against two similar provisions of the Ohio Code of Judicial Conduct: (1) §4.4(A), which prohibits judicial candidates from personally soliciting or receiving campaign contributions (“the solicitation clause”); and (2) §4.2(B)(4), which indicates that during the time between the primary election and the general election, a judicial candidate may not identify himself or herself in advertising as a member of or affiliated with a political party.

The decision in *Carey* is not dispositive of the claims brought in this case, both because the cases are postured differently and because substantive differences exist between the language

used in the Ohio and Kentucky provisions. As set forth below, Defendant, the Ohio Supreme Court, respectfully asks the Court to deny the motion for temporary restraining order and preliminary injunction.¹

II. Standard of Review

Before issuing a motion for preliminary injunction, the Court must examine four separate factors:

- (1) Whether the movant has a “strong” likelihood of success on the merits;
- (2) Whether the movant would otherwise suffer irreparable injury;
- (3) Whether issuance of a preliminary injunction would cause harm to others; and
- (4) Whether the public interest would be served by the issuance of a preliminary injunction.

McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *Cabot Corp. v. King*, 790 F. Supp 153, 155 (N.D. Ohio 1992). The standard for granting a preliminary injunction is more “stringent” than that required for summary judgment. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). This is because “the preliminary injunction is an ‘extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied ‘only in [the] limited circumstances’ which clearly demand it.” *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)) (internal quotations omitted).

Plaintiffs cannot meet their burden with respect to the first prong: they cannot show a strong likelihood of success on the merits. And the reason this is so, despite some similarities to

¹ Defendants the Board of Commissioners on Grievances and Discipline and the Ohio Disciplinary Counsel are arms of the Supreme Court and serve as the “arbiters” and “prosecutors” of violations of the Code of Judicial Conduct, pursuant to the Supreme Court Rules for the Government of the Bar of Ohio, Rule V, Section 1(A), Section 2, and Section 3(B). As such, they take no separate position. The seven members of the Supreme Court, who have been named as defendants, join in this brief.

Carey, is because Plaintiffs have brought a *facial* challenge to the Judicial Canons, and cannot meet the very high legal burden that such a challenge entails.

III. The Law of Facial Challenges

A facial challenge to a law is “no small matter.” *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (en banc). A facial challenge seeks “to leave nothing standing,” *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc), to invalidate the law in each of its applications—to take the law off the books completely. *Connection Distrib.*, 557 F.3d at 335. Before a court may take such a dramatic step, the claimant must show one of two things: (1) that *no* circumstances (or at least *very few*) exist in which the statute would be constitutional; or (2) that the court cannot sever the unconstitutional portions or enjoin only the unconstitutional applications. *Id.* at 335 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The burden is slightly lighter in the context of free-speech challenges to the facial validity of a law. Because a law might be constitutional in one setting but chill protected speech in another, overbreadth analysis applies. On that approach, the courts will strike a law on its face “if it prohibits a *substantial* amount of protected speech” both “in an absolute sense” and “relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis added).

Even in First Amendment cases, facial challenges are “disfavored,” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and considered “strong medicine that is not to be casually employed.” *Williams*, 553 U.S. at 293. This reluctance to strike down laws on their face stems from two concerns: First, a facial challenge requires a court to engage in hypotheticals and decide applications not presented by the case before it; and second, the act

of invalidating a statute is inherently anti-democratic, and therefore not to be undertaken lightly. *Wash. State Grange*, 552 U.S. at 450-451. For these reasons, the Supreme Court has demanded that the claimant prove the overbreadth is “substantial.” *Virginia v. Hicks*, 539 U.S. 113, 122, (2003); see also *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (To succeed in a facial-overbreadth challenge, the plaintiff must demonstrate from the text of the statute and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally).

Plaintiffs cannot meet this daunting burden with respect to at least one of Ohio’s Judicial Canons. Indeed, the Sixth Circuit’s decision in *Carey* suggests just the opposite.

IV. Legal Argument

A. Ohio’s Ban on In-Person Solicitations is Constitutional

Plaintiffs object to Rule 4.4(A) of the Code of Judicial Conduct, which bars judicial candidates from “personally soliciting or receiving campaign contributions.” Plaintiffs inform the Court that Ohio’s rule is identical to the Kentucky provision at issue in *Carey*, and therefore the Sixth Circuit has already effectively declared Ohio’s Judicial Canon unconstitutional. Both assertions are incorrect.

The Supreme Court of Kentucky had adopted a rule, Canon 5(B)(2), which said that judicial candidates could not “solicit campaign funds.” Such a blanket proscription, the Sixth Circuit explained in *Carey*, was unconstitutionally overbroad because it not only applied to in-person solicitations, but it also barred judicial candidates from making *any* kind of solicitation, including mass-mailings and speeches to large groups where the danger of coercion and quid pro quo is minimal.

The *Carey* opinion was careful not to adopt the absolutist position that *any* restriction on a candidate's ability to ask for money is automatically unconstitutional. The Sixth Circuit explained that the First Amendment might permit bans on "face-to-face solicitations, particularly by sitting judges." *Carey v. Wolnitzek*, 2010 FED App. 0199P, at * 36-37.

Ohio's Rule 4.4(A) is more narrowly tailored than was Kentucky's because it applies only when the judge "personally" solicits the funds. Ohio's law is therefore directed at least in part at the very conduct Judge Sutton indicated the might be constitutionally proscribable: face-to-face solicitations, where the potential for impropriety is at its greatest. In other words, a core range of judicial conduct that is covered by the solicitation clause is proscribable under *Carey*.

That is enough to save the statute from facial invalidation. The "strong medicine" of overbreadth invalidation is warranted only where the overbreadth that exists (if any) is *substantial*. *Virginia v. Hicks*, 539 U.S. at 122. Even if plaintiffs can show that the solicitation clause reaches constitutionally protected conduct—and their vague assertions thus far do not suffice on that score—that reach is not so substantial as to invalidate the entire provision. Put another way, because at least some aspects of the solicitation clause remain constitutional in the wake of *Carey*, this Court should not invalidate the provision as a whole.

Case law confirms this point. Recently the Seventh Circuit upheld a Wisconsin judicial solicitation ban identical to Ohio's. *Siefert v. Alexander*, Case No. 09-1713, 2010 U.S. App. LEXIS 12057 (7th Cir. June 14, 2010). To be sure, the Seventh Circuit applied a more lenient standard of review to what it considered a campaign finance regulation—a rationale the Sixth Circuit rejected in *Carey*. But the Seventh Circuit went on to analyze the restriction under a "strict scrutiny" standard and found that it was still constitutional. "We conclude that the solicitation ban is drawn closely enough to the state's interest in preserving impartiality and

preventing corruption to be constitutional.” *Id.* at * 42. The Seventh Circuit found that the personal solicitation ban serves two compelling state interests: promoting anti-corruption and preserving judicial impartiality. “A direct solicitation closely links the quid – avoiding the judge’s disfavor – to the quo – the contribution.” *Id.* at * 40.

The Eighth Circuit’s recent decision in *Wersal v. Sexton*, No. 09-1578 (8th Cir. July 29, 2010), does not change the analysis here. *Wersal* is distinguishable because it involved an “as-applied” challenge (which is lacking here). What is more, one of the dispositive facts in the opinion was *Wersal*’s promise that, in soliciting door-to-door, he skipped the homes of attorneys. We have no such assurances about in-person solicitations in this case.

Because Plaintiffs cannot prevail on their facial challenge, they have no likelihood of success on the merits (let alone a “strong” likelihood), and therefore the request for injunctive relief should be denied.

B. Ohio’s Ban on Partisan Advertising Presents a Closer Question

Ohio employs a hybrid system for electing its judges: the candidates vie in partisan primaries for their parties’ nominations to appear on the ballot; the nominees then compete in a “nonpartisan” contest in the general election. This is not a unique arrangement: Michigan employs a similar system to elect its Supreme Court Justices. As one federal court has recognized, Ohio’s hybrid system reflects a reasonable compromise “between the desire to keep politics out of the judiciary and the desire to preserve the party system.” *Haffey v. Taft*, 803 F.Supp. 121, 125 (S.D. Oh. 1992) (Kinneary, J.). Canon §4.2(B)(4)’s limited ban on party identifiers in campaign ads during the “nonpartisan” phase serves the state’s interest in preserving that compromise.

Of course this does not necessarily mean that the rule is constitutional. Defendant acknowledges that *Carey* speaks more directly to this issue than it does to Ohio's solicitation ban. The members of the Ohio Supreme Court will be meeting on Tuesday, August 10, 2010, to consider whether *Carey* necessitates a change to, or repeal of, Canon §4.2(B)(4), and that determination will necessarily affect Defendant's litigating posture in this case. Defendant will apprise the Court of that determination in their Trial Brief (due August 12, 2010).

V. Plaintiffs Cannot Prove the Remaining Elements Necessary for Injunctive Relief

The remaining elements for injunctive relief -- irreparable injury, harm to third parties, and the public interest -- are more fact specific inquiries which Defendants will address in its Trial Brief. At this point, Defendant will simply note that the public interest weighs heavily against granting relief, given the fact that judicial campaigns are already in full swing. This suit would change the rules of judicial fund-raising and advertising right in the middle of the election cycle, and if some candidates might benefit from the changes, others would plausibly be disadvantaged by the fact that they have played by the old rules to date. Plaintiffs waited too long to bring their challenge, and resolution of these complex issues should not occur on an expedited basis.

VI. Conclusion

For the reasons set forth above, and based on the evidence anticipated at the hearing, the Ohio Supreme Court and related defendants respectfully submit that Plaintiffs cannot meet their burden of proof as specified, and ask the Court to deny the motion for injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the foregoing *Memorandum in Opposition* was filed electronically on August 6, 2010. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Richard Coglianesse

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