

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

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

**INTERVENOR DEFENDANT OHIO ATTORNEY GENERAL RICHARD CORDRAY’S  
MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION (R. 2)**

**I. Introduction**

Citing to the Sixth Circuit’s recent decision in *Carey v. Wolnitzek*, 2010 U.S. App. Lexis 14367 (6th Cir. July 13, 2010), plaintiffs seek a declaration that Ohio Revised Code § 3505.04 violates the First Amendment to the United States Constitution. The State’s refusal to designate a judicial candidate’s political party affiliation on the general election ballot, plaintiffs say, violates their right to free speech and association.

But *Carey* addressed State restrictions on campaign speech by judicial candidates, not State regulations on the design of its ballots. The Sixth Circuit decision had nothing to do with ballots, because no Kentucky ballot provision was being challenged. Other precedents do, though, and those decisions—including *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)—confirm that such ballot regulations do not impair a candidate or political party’s

expressive and associational rights. Because plaintiffs' First Amendment attack on § 3505.04 fails as a matter of law, it necessarily follows that they are not entitled to injunctive relief.

## **II. Standard of Review**

Before granting a 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 (3) 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).

Because none of the above factors support plaintiffs' request, plaintiffs are not entitled to a court order enjoining enforcement of Ohio Revised Code § 3505.04. The Attorney General begins his analysis with the complete lack of any likelihood of success on the merits, since that factor resolves this case.

## **III. The State's Prohibition of Party Identifiers on the Ballot Is Constitutional.**

In enacting Ohio Revised Code § 3505.04, the State reasonably concluded that the omission of a judicial candidate's political affiliation would advance its interest in diminishing

voters' reliance on political parties in the general election. And that decision does not offend the First Amendment. Neither the speech nor the associational rights of the candidate or the political party are impaired. Candidate and party are free to associate with one another and declare their support for each other.

**A. Judicial candidates have no First Amendment right of expression in the content of a ballot.**

First, as to the Free Speech Clause, Plaintiffs' complaint rests critically on a mistaken premise—that a ballot designation “is part of the *speech* the candidate presents to the public.” (R.2, p.20) (emphasis added). But a candidate has no expressive rights in the ballot. For this reason, the State does not violate the First Amendment when it fails to “allow the ballot also to be used as a means of pure advocacy” of one's political ideologies. *Georges v. Carney*, 691 F.2d 297, 300 (7th Cir. 1982).

Without equivocation, the Supreme Court has stated that “[b]allots serve primarily to elect candidates, not as fora for political expression.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Whereas political parties, their members, and their candidates have the right to “campaign . . . , endorse, and vote” in an election, they do not have “a right to use the ballot itself to send a particularized message.” *Id.*

The Supreme Court confirmed this principle in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). The Court summarily dispensed with any claim that a political party has a First Amendment right to have its candidates identified by party on the ballot: “It is true that parties may no longer indicate their nominees on the ballot, but that is unexceptionable: The First Amendment does not give political parties a right to have their nominees designated as such on the ballot.” *Id.* at 453 n.7 (citing *Timmons*).

The lower federal courts have likewise denied claims by candidates and political parties asserting a First Amendment right to expression in the ballot. For instance, in *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1011 (9th Cir. 2002), the Ninth Circuit rejected a challenge by a candidate running for city council who proposed to use “peace activist” as his ballot designation. The disputed ballot regulation allowed only three specific designations: the candidate’s current elective office, her status as an incumbent, and her current vocation or occupation. *Id.* The court found that this restriction “d[id] not infringe on ‘core political speech,’ or favor one type of political speech over another.” *Id.* at 1015. As the court explained, “[a] ballot is a ballot not a bumper sticker.” *Id.* at 1016.

Other cases are to the same effect. In *Golden v. Cook County Officers Electoral Board*, No. 96-C-1283, 1996 U.S. Dist. Lexis 3264 (N.D. Ill. March 11, 1996), a congressional candidate sought to place his name and nickname—“Les ‘Cut the Taxes’ Golden”—on a primary election ballot, but the county election board refused. The district court rejected the candidate’s claimed First Amendment infringement, finding that he had “no constitutional right to use the ballot as a forum for advocating a policy or communicating a message.” *Id.* at \*21-22.

These holdings follow from plaintiffs’ own logic. Plaintiffs rely heavily on Sixth Circuit precedent confirming that ballot designations are not candidate speech, but “simply *government provided information* designed to inform voters of the political party affiliation of each candidate.” *Rosen v. Brown*, 970 F.2d 169, 177 (6th Cir. 1992) (emphasis added). Or, stated differently, a ballot designation is speech *by the State*, not the candidate. And a long line of Supreme Court precedent establishes that “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Sumnum*, 125 S. Ct. 1125, 1131 (2009); e.g., *Johanns v. Livestock Marketing Assn.*, 544 U.S.

550, 553 (2005) (“[T]he Government's own speech . . . is exempt from First Amendment scrutiny”).

The State’s decision not to speak in this case—that is, not to include a judicial candidate’s partisan affiliation on the general election ballot—is the government’s choice to make. It does not infringe on the expressive rights of candidates or political parties.

**B. Any impairment of plaintiffs’ associational rights is minimal and justified by the State’s important regulatory interests.**

To the extent that plaintiffs also allege a violation of the First Amendment right to association, they fare no better. Ohio Revised Code § 3505.04 passes muster under the *Timmons* balancing test.

To review First Amendment challenges to an election regulation, a court must first fix the appropriate level of scrutiny. “Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest”—that is, they must satisfy strict scrutiny. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). “Lesser burdens, however, trigger less exacting review”—“a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, nondiscriminatory restrictions.’” *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

In *Timmons*, the Supreme Court rejected a political party’s First Amendment challenge to a Minnesota law that prohibited multiple party (or “fusion”) designations on the ballot. The “New Party” had endorsed a candidate for state office, but the State refused to acknowledge the designation on the ballot because the candidate had already received an endorsement from the Democratic-Farmer-Labor Party. *Id.* at 354. Claiming an infringement on its associational rights, the New Party sued.

The Supreme Court rejected the claim, concluding that State restrictions on ballot designations do not impose “severe burdens” on First Amendment rights: “That a particular individual may not appear on the ballot as a particular party’s candidate does not severely burden that party’s association rights.” *Id.* at 359. The Court then applied the “less exacting” standard and upheld the Minnesota law. *Id.* 364-70; accord *Rubin*, 308 F.3d at 1017 (applying “less exacting” standard of review to state law limiting designations candidates can place on the ballot).

The *Timmons* “less exacting” framework applies equally to the ballot restriction in Ohio Revised Code § 3505.04. The statute does not touch on activities that form the core of plaintiffs’ associational rights—the right of political parties to organize and participate in the election process, and the right of candidates to associate with a particular party. Each plaintiff “remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.” 520 U.S. at 361.

Therefore, § 3505.04 satisfies constitutional scrutiny if (1) it advances an important regulatory interest; and (2) its restrictions are “reasonable” and “nondiscriminatory.”

**1. Ohio Revised Code § 3505.04 advances important regulatory interests.**

As the Sixth Circuit acknowledged in *Carey*, “[j]udicial elections differ from legislative elections.” 2010 U.S. App. Lexis 14367, at \*5. In a departure from legislative and executive branch offices, the State has a compelling interest in “having a judiciary that is neither biased in fact nor in appearance.” *Id.* at \*26. Therefore, the State has a compelling interest in “diminishing reliance on political parties in judicial selection.” *Id.* This interest is particularly acute in Ohio, which has a history of “political imbroglios” in its judiciary. *In re Squire*, 2010 U.S. App. Lexis 16024, at \*2 n.1 (6th Cir. Aug. 3, 2010).

Ohio Revised Code § 3505.04 furthers this interest by removing political designations from the general election ballot in judicial races. The absence of such designations unquestionably discourages voting based on a candidate's political party affiliation. See *Rubin*, 308 F.3d at 1016 (“[S]tates have a legitimate interest in assuring that the purpose of a ballot is not transformed from a means of choosing candidates to a billboard for political advertising.”) (internal quotations and citation omitted); accord *Schrader v. Blackwell*, 241 F.3d 783, 790 (6th Cir. 2001) (“States have significant authority to regulate . . . the identification of candidates on the ballot.”).

Plaintiffs contend that Ohio forfeited this interest by adopting a “blended” system. (Under Ohio law, judicial candidates must first prevail in a partisan primary election to secure the nomination of the Republican or Democratic parties, but they then appear as non-partisan candidates on the general election ballot.<sup>1</sup>) But plaintiffs offer no authority to advance that theory, nor can they. Nothing in *Timmons* requires the State to choose between two competing interests—the State's desire to diminish voters' reliance on political parties in judicial selection, see *Carey*, 2010 U.S. App. Lexis 14367, at \*5; and the State's decision to preserve a stabilizing role for political parties in nomination process, see *Timmons*, 520 U.S. at 367. Rather, it can accommodate both.

Two sources confirm the State's ability to strike this balance. First, in *Haffey v. Taft*, 803 F. Supp. 121 (S.D. Ohio 1992), the district court rejected an identical First Amendment challenge to § 3505.04. In so doing, it recognized the State's interest in harmonizing its interests: “While the Plaintiff has attempted to discredit the state's asserted interest by pointing

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<sup>1</sup> Contrary to plaintiffs' claim, other States have adopted similar “blended” systems. For instance, Michigan nominates judicial candidates through partisan primary conventions, and then conducts non-partisan general elections.

out that the election is extremely partisan in many respects, the Court does not believe this serves to lessen the importance or the sincerity of the state's interest" "to keep politics out of the general judicial election." *Id.* at 125. As the court acknowledged, the State's position is "that of a compromise between the desire to keep politics out of the judiciary and the desire to preserve the party system." *Id.*

Second, the Supreme Court effectively endorsed Ohio's compromise in *New York State Board of Elections v. Torres*, 552 U.S. 196 (2008). There the Court rejected a First Amendment challenge to New York's system of nominating candidates for judicial office. Candidates for trial judge were nominated at partisan political conventions and then ran in contested general elections. (Given that most judicial districts in New York are politically homogenous, the political conventions effectively determined the election's winner.) A group of voters and unsuccessful candidates challenged the nomination process, arguing that it deprived candidates of their right to obtain access to the ballot. After rejecting the First Amendment claim, a unanimous Court observed that New York had other tools to "discourage party monopoly" in judicial elections if it chose to use them—"for example, by refusing to show party endorsement on the election ballot." *Id.* at 208.

Simply put, Ohio Revised Code § 3505.04 advances the State's compelling interest in lessening the role of political affiliations in the general election. As *Torres* indicates, the fact that the judicial nomination process is partisan does not mean the general election must be as well.

**2. Ohio Revised Code § 3505.04 is reasonable and nondiscriminatory.**

Ohio Revised Code § 3505.04's ban on party designation is also reasonable. It does not in any way "limit . . . access to the ballot." *Timmons*, 520 U.S. at 636. The law simply regulates

how candidates appear on the ballot. See *Schrader*, 241 F.3d at 791 (state law restricting ballot designations for minor political parties was reasonable because, “[w]ith or without the cue ‘Libertarian,’ [the candidate] had gained access to appear on the general-election ballot”).

Further, § 3505.04 does not touch on any traditional areas of expression or association. Candidates are free to associate with the political party of their choosing and advertise the fact of any party endorsement to the voting public. Political parties and their members are likewise free “to endorse, support, or vote for anyone they like.” *Timmons*, 520 U.S. at 636.

Finally, the law is nondiscriminatory both on its face and in its application. Plaintiffs’ reliance on *Rosen* to claim otherwise is misplaced. In that case, the Sixth Circuit invalidated an Ohio law that authorized ballot designations for select political parties, but denied designations for “independent” candidates who gained access to the ballot through the independent-petition procedure. 970 F.2d at 171. That unequal treatment, the court said, “violate[d] the Equal Protection Clause of the Fourteenth Amendment because it place[d] unequal burdens on Independent and third-party candidates and is designed to give Democrats and Republicans a decided advantage at the polls in a general election.” *Id.* at 177-78. In this case, by contrast, there is no unequal treatment. Section 3505.04 applies equally to all judicial candidates—Democrats, Republicans, minor-party candidates, and independents. Regardless of affiliation, no candidate appears on the general ballot with a party designation.

The Sixth Circuit has made clear that litigants challenging election laws “bear[] a heavy constitutional burden” under the *Timmons* balancing test, *Schrader*, 241 F.3d at 791-92, and plaintiffs have not satisfied that burden here. Ohio’s decision to omit a judicial candidate’s party affiliation from the general ballot places minimal, if any, impairments on the candidate or party’s associational rights. And that burden is more than outweighed by the State’s compelling interest

in minimizing the role of partisan identification in the final stage of judicial selection. As such, plaintiffs' request for emergency injunctive relief should be denied.

### **III. Plaintiffs Have Not Demonstrated Irreparable Injury.**

Plaintiffs have not articulated any irreparable injury from the continued application of Ohio Revised Code § 3505.04. First, they say that “[d]enying a candidate fair access to the ballot constitutes irreparable harm,” (R.2, p. 21), but the statute does not actually keep any candidate off the ballot. It simply regulates how qualified candidates appear on the ballot. See *Schrader*, 241 F.3d at 791 (“With our without the cue, [the candidate] gained access to appear on the general-election ballot.”).

Second, plaintiffs assert that “[d]enying a voter information needed to follow her candidate from the primary through the general election constitutes irreparable harm.” (R.2, p.21). Again, § 3505.04 does not deprive voters of access to this information; it merely denies use of the ballot to communicate that information. See *Timmons*, 520 U.S. at 636 (“[B]allots serve primarily to elect candidates, not as fora for political expression.”); *Rubin*, 308 F.3d at 1016 (same). Plaintiffs have numerous other tools to “inform the majority of the electorate of [their] [a]ffiliation”—“radio and television advertising, direct mailings, billboards, placards, etc.” *Haffey*, 803 F. Supp. at 125.

Third, plaintiffs contend that “[d]enying a citizen his right to free speech constitutes irreparable injury.” (R.2, p.21). As the Sixth Circuit has recognized, however, ballot designations are not candidate speech, but “government provided information.” *Rosen*, 970 F.2d at 177. Thus, § 3505.04’s prohibition on partisan designations in judicial races implicates only government speech, does not inflict any harm on plaintiffs’ speech.

Not one of plaintiffs' claimed injuries is actually an injury. See *Winter v. NRDC*, 129 S. Ct. 365, 375 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."). As such, their plea to enjoin § 3505.04 is fatal on this prong as well.

#### **IV. A Balancing of the Equities Counsels against the Issuance of an Injunction.**

Had plaintiffs filed their complaint in a timely fashion, this court could have entertained the merits of their First Amendment claims without the press of an impending deadline. Put simply, plaintiffs' request for emergency injunctive relief is one of their own making. When such dilatoriness occurs in election cases, the Supreme Court has instructed the lower courts to stay their hand in issuing injunctive relief. This Court should do so here.

In no uncertain terms, this Supreme Court has discouraged judicial orders that enjoin electoral processes on the eve of an election deadline. In *Purcell v. Gonzalez*, 127 S. Ct. 5, (2006) (per curiam), the Court summarily reversed a Ninth Circuit order that enjoined enforcement of an Arizona voter-identification requirement several weeks before the election. The Court explained that the circuit court, "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election . . . was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." 127 S. Ct. at 7. The Court added: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* Thus, in light of "the imminence of the election and the inadequate time to resolve factual disputes," the Court vacated the Ninth Circuit's order and "allow[ed] the election to proceed without an injunction suspending the voter identification rules." *Id.* at 8.

Any issuance of an injunction in this case would contravene the teachings of *Purcell*. It would endorse the filing of litigation on the eve of an election deadline, thereby forcing the hasty adjudication of constitutional claims. It would also ignore the real and tangible dangers that such last-minute meddling can have on the election process.

In this case, the Secretary of State and local election boards must finalize the 2010 general election ballot on August 24. This statutory deadline is imposed to allow for adequate printing and distribution of absentee and election-day ballots. Plaintiffs now urge this Court to resolve the constitutionality of Ohio Revised Code § 3505.04 before that date.

Plaintiffs could have—and should have—filed their complaint much earlier. The Ohio General Assembly enacted § 3505.04 in 1981, and plaintiffs were unquestionably aware of its operation well before their July 28, 2010 complaint. Their reliance on the Sixth Circuit’s *Carey* decision to explain this last-minute filing is misplaced, as *Carey* had nothing to do with ballot designations. In fact, the lead Sixth Circuit decision addressing the constitutionality of ballot designations—*Schrader v. Blackwell*—was issued nine years ago.

Moreover, the looming August 24, 2010, deadline imposes unwarranted stress on the State and the courts. The State has had precious little time to consult with and coordinate all the relative parties that may have an interest in the constitutionality of § 3505.04 (notably, the Secretary of State’s Office, the eighty-eight county elections boards, and the Supreme Court of Ohio). This, not surprisingly, has hindered the State’s ability to mount a vigorous factual and legal defense of the statute. The compressed timeline will also impair the ability of the federal courts to decide these weighty constitutional issues in a deliberate and careful fashion. See *Purcell*, 127 S. Ct. at 8 (Stevens, J., concurring) (“[T]he Court wisely takes action that will

enhance the likelihood that [constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation.”).

Finally, whatever this Court decides, the Secretary of State and the county election board will be forced to implement the decision on the eve of the statutory deadline. Such last-minute directives insert confusion and the risk of error into the election process, which, in turn, triggers further litigation. Of particular note, § 3505.04 mandates non-partisan ballots not just for judicial offices, but for boards of education, municipal offices, and township offices. If this Court declares that candidates for judicial office are entitled to have their partisan affiliations appear on the 2010 general election ballot, then county election boards will face a flood of eleventh-hour candidate requests for various partisan designations (Democrat, Republican, Libertarian, Independent, and the like) in these other races as well. The Secretary of State's Office and the county election boards would be forced to resolve the bona fides of each request in the few short days and hours before the August 24th deadline, and disappointed candidates would run to the courthouse claiming First Amendment and Equal Protection errors.

For these reasons, all the equities in this case weigh heavily against plaintiffs' request for injunctive relief.

**CONCLUSION**

For the reasons set forth above, and based on the evidence anticipated at the hearing, the Court should deny plaintiffs' request to enjoin Ohio Revised Code § 3505.04.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This will certify that the foregoing *Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction* 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 N. Coglianesse

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