

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

OHIO COUNCIL 8 AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, et al.,	:	Case No. 1:10-cv-504
	:	
	:	Judge Susan J. Dlott
	:	
Plaintiffs,	:	MOTION FOR TEMPORARY
	:	RESTRAINING ORDER AND
vs.	:	PRELIMINARY INJUNCTION
	:	
JENNIFER BRUNNER, et al.,	:	
	:	
Defendants.	:	

Pursuant to Fed. R. Civ. Pro. 65, Plaintiffs hereby move for a temporary restraining order prohibiting the Defendants from enforcing O.R.C. § 3505.04 and Ohio Code of Judicial Conduct Rules 4.2(B) (4) and 4.4 (A). An order enjoining the statute will permit judicial candidates to be listed by political party on the general election ballot in 2010. An order enjoining the two sections of the Judicial Code will permit a judicial candidate to “identify himself or herself in advertising as a member of or affiliated with a political party.” Such an order would also permit a judicial candidate to “personally solicit and receive campaign contributions.”

Plaintiffs request a TRO and/or a preliminary injunction well before August 24, 2010 in order for the Defendant Secretary of State and Boards of Election to have sufficient time to comply with any injunction before setting the final text of the ballot for the 2010 general election. Plaintiffs request that no bond be required.

MEMORANDUM OF LAW

I. INTRODUCTION

This case simply seeks to apply recent Supreme Court and Sixth Circuit precedent to judicial elections in Ohio. The Ohio Constitution requires that judges be elected. The Ohio Legislature has created a unique system – the only one like it in the country – in which judicial primaries are partisan but in the general election judicial candidates are placed on a “nonpartisan ballot.” Thus the general election candidate is not identified as the winner of the partisan political primary election.

Plaintiffs also challenge two provisions of the Ohio Code of Judicial Conduct: Rule 4.2 (B) (4), stating that a judicial candidate shall not, “After the day of the primary election, identify himself or herself in advertising as a member of or affiliated with a political party;” and Rule 4.4 (A), stating that “A judicial candidate shall not personally solicit or receive campaign contributions.” Similar Kentucky rules were recently held unconstitutional by the United States Court of Appeals for the Sixth Circuit in *Carey v. Wolnitzek*, ___ F.3d ___, 2010 WL 2771866 (6th Cir 2010). Plaintiffs seek to expand the public dialogue with and about judicial candidates by enjoining enforcement of these two Ohio Rules.

Plaintiffs include judicial candidates presently running for election or reelection in Ohio. Plaintiffs also include voters acting through their union and others acting through their political party. Through this lawsuit Plaintiffs hope to end the content based suppression of election speech by judges without compromising judicial impartiality. Great public good will flow from permitting this core political speech in the context of judicial elections.

II. STATEMENT OF FACTS

A. Parties

Plaintiffs in this case include one judge seeking reelection (Peter J. Corrigan); one judge seeking election following appointment (Nadine Allen) and a judicial candidate who is not an incumbent judge (Martha Good). They have all prevailed in a partisan judicial primary election and they seek access to a general election ballot that reflects their party affiliation. Noting their party affiliation will show that they won the first round (the partisan primary) in the judicial election. Plaintiffs also include two organizations, Ohio Council 8 AFSCME and the Ohio Democratic Party. They represent the interests of their voting members. Ohio Council 8 AFSCME members include Democrats, Republicans, and Independents. These members value party identification as an important factor when they choose their preferred candidates.

Defendants include all of the state and local officials that enforce the laws and rules that are challenged in this case. They are sued only in their official capacities.

B. Restrictions on Ballot Language for Judicial Candidates in Ohio

1. Description of Ballot restrictions in Ohio Judicial Elections

All candidates for Common Pleas, Court of Appeals, and Supreme Court are elected by the People of the State of Ohio. This requirement that judges be elected is set out in the Ohio Constitution, O Const Art IV, §6. The Ohio Constitution does not require that judicial elections be nonpartisan. *Id.* The first opportunity judges have to present themselves for election by the people is in the primary election. The primary election ballots in Ohio list judges by their political party. These ballots are referred to as “office type” ballots. O.R.C. § 3505.03.

The next opportunity for judicial candidates in Ohio to present themselves for election by the voters is the general election. Ohio law prohibits judicial candidates in the general election from appearing on an “office type ballot,” which lists party affiliation.

O.R.C. § 3505.03. The prohibition is clear in O.R.C. § 3505.04:

No name or designation of any political party nor any words, designations, or emblems descriptive of a candidate or his political affiliation, or indicative of the method by which such candidate was nominated or certified, shall be printed under or after any nonpartisan candidate’s name which is printed on the ballot.

All judicial candidates competing in a general election in Ohio are considered nonpartisan candidates. O.R.C. § 3501.01(J). All nonpartisan judicial candidates must appear only a nonpartisan ballot. O.R.C. § 3505.04. See Ex. A (sample Nov. 2008 general election ballot).¹ Thus, no judicial candidate in Ohio may appear on any general election ballot with a party designation. Ohio is the only state in the union in which judges participate in a partisan primary but are then restricted to nonpartisan status in the general election. Judicial candidates are the only candidates in Ohio who appear on an office type ballot in the primary election but on a nonpartisan ballot in the general election. Legislative and executive branch candidates who appear on an office type ballot in the primary also appear on an office type ballot in the general election.

2. Enforcement of the Ballot Prohibition

The Ohio Secretary of State is responsible for certifying the forms of ballots and names of statewide judicial candidates. O.R.C. § 3501.05 (I).

The secretary of state shall certify to the board of elections of each county the forms of the official ballots to be used at the general election, together with the names of the candidates to be printed on those ballots whose candidacy is to be submitted to the electors of the entire state.

¹ See Branch Declaration for authentication of all exhibits referenced herein.

O.R.C. § 3505.01 ¶ 1. The Secretary of State is also required to issue instructions by directives and advisories in accordance with O.R.C. § 3501.53 to members of the boards as to the proper methods of conducting elections. O.R.C. § 3501.05 (B).² The Secretary of State is further obligated to “compel the observance by election officers in the several counties of the requirements of the election laws.” O.R.C. § 3501.05(M). Conversely, the county boards of election must perform all duties as prescribed by the Secretary of State. O.R.C. § 3501.11(P).

Consistent with her duties, the Secretary of State each election issues a directive to all county boards of elections members, directors, and deputy directors which includes ballot forms for Office Type Ballots and Nonpartisan Ballots. See Ex. B SOS Directive 2008-83. For example, in the 2008 general election, the Secretary of State directed county boards of elections to place Justices of the Supreme Court, Judges of the Court of Appeals, Judges of the Court of Common Pleas, and Judge of the County Court all on the Nonpartisan Ballot. Ex. B SOS Directive 2008-83 p. 6. Furthermore, when courts interpret election laws, they routinely order the Secretary of State to issue directives and advisories informing boards of elections of the ruling. SOS Advisory 2010-01;³ SOS Directive 2010-48,⁴ 2008-37, 2008-93, 2008-97, 2008-103, 2008-116, 2008-118, 2006-88, 2006-87, 2006-84, 2006-79. The Secretary of State follows court orders until the order is modified by the court or a higher court. SOS Directive 2008-60. Courts have also ordered the Secretary of State to rescind directives. SOS Directive 2009-09.

² While only temporary directives can be issued and only have effect during the 90 days before an election, temporary directives can be made permanent if the procedures in O.R.C. § 3501.053 are followed.

³ Advisories are available at:
<http://www.sos.state.oh.us/SOS/elections/Directives/2008%20Advisories.aspx>

⁴ Directives are available at:
<http://www.sos.state.oh.us/SOS/elections/Directives.aspx>

3. Enforcement of the Ballot Restrictions on Local Judicial Candidates

The Secretary of State is not responsible for certifying local ballots. Common Pleas Court, Court of Appeals, Municipal Court judicial balloting are certified by the applicable county board of elections. For example, judicial candidates who run in districts that span multiple counties, the board of elections of the most populous county are responsible for certifying to the board of each county in the district the names of the candidates to be printed on the ballots. O.R.C. § 3505.01.

C. Restrictions on Judicial Candidate Campaigning in Ohio

1. Prohibition Against Identifying Oneself In Advertising As A Member Of Or Affiliating With A Political Party After The Primary Election

Before the end of the day of the primary election date all judicial candidates are permitted to identify him or herself in person or in advertising as *a member of or affiliated with* a political party. Ohio Code of Judicial Conduct Rule 4.2 (C)(7).

However, after the day of the primary election, no judicial candidate may identify him or herself in advertising as a member of or affiliated with a political party. Ohio Code of Judicial Conduct Rule 4.2 (C)(4).

After the day of the primary, a judicial candidate must carefully word advertising so as not to identify himself or herself as a member of or affiliate with a political party. For example, in a case interpreting Canon 7(B)(3)(c), a predecessor rule to Rule 4.2(B)(4), a judicial candidate's use of the phrase "Endorsed Democrat" on billboards violated the campaign conduct rule by identifying the candidate in advertising after the date of the primary as a member of a political party. *In re Judicial Campaign Complaint Against Grunda*, 100 Ohio St.3d 1465, 2003-Ohio-5896.

Ex. C Board of Commissioners on Grievances and Discipline Advisory Opinion 2009-8 (October 10, 2009). However, during the primary and general elections all judicial candidates are permitted to state in person or in advertising that he or she is a *nominee of*

or *endorsed* by a political party. Ohio Code of Judicial Conduct Rule 4.2 (C)(6)

(emphasis added).

Throughout a judicial campaign, a judicial candidate may truthfully state in person or in advertising that he or she is “Endorsed by (or a nominee of) the Democratic Party” or “Democratic Party Endorsed (or nominee)” or “Endorsed by (or a nominee of) the Republican Party” or “Republican Party Endorsed (or nominee)”; provided that the phrase identifies which political party entity endorsed the candidate, for example, the county, state, or national Democratic or Republican Party.

Ex. C Board of Commissioners on Grievances and Discipline Advisory Opinion 2009-8 (October 10, 2009).

This system results in an array of rules designed not to keep politics out of the general election, but to confuse the electorate about the party affiliation of the judicial candidates. For example, during the primary Judge Allen may advertise she is a democrat, but the day after the primary must stop advertising she is a democrat. However, throughout the entire campaign she can say out loud she is a democrat to any voter in earshot, which can then be advertised on the internet, in the media, or by third party advocates. While Judge Allen may not advertise she is a democrat, she is permitted to advertise at any time that she is “endorsed by the Ohio Democratic Party.” Such a distinction can only lead to voter confusion.

2. Prohibition Against Judicial Candidates Personally Soliciting or Receiving Campaign Contributions

A judicial candidate faces several fundraising restrictions. There is an outright ban on his asking for contributions. “A judicial candidate shall not personally solicit or receive campaign contributions.” Ohio Code of Judicial Conduct Rule 4.4 (A). He must establish a committee, which is restricted in time as to when it may begin soliciting and receiving contributions (approximately 120 days before the primary) and when it must

end doing so (120 days after the general election or a primary defeat). Ohio Code of Judicial Conduct Rule 4.4 (F) & (G).

A judicial candidate is prohibited from receiving contributions as well. For example, Judge Corrigan cannot accept unsolicited contributions. If offered, he must refuse and cannot even tell a prospective donor where to mail the contribution. He cannot properly thank donors either, for fear he would be accused of asking for their continued support. Plaintiff Corrigan Declaration ¶ 13.

3. Enforcement of violations of the Ohio Code of Judicial Conduct

The Ohio Supreme Court adopted the Ohio Code of Judicial Conduct. If a judge or judicial candidate is suspected of violating the Judicial Code, Defendant Disciplinary Counsel has the authority to investigate, file a complaint, and prosecute a complaint. Supreme Court Rules for the Government of the Judiciary of Ohio (“Gov. Jud. Rule”) Rule II § 2(A).

During a judicial campaign, Defendant Jonathan Marshall, Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Board”), is responsible for initially reviewing complaints of judicial misconduct for validity. He is also responsible for appointing the probable cause panel and prepares the formal complaint. Ohio Gov. Jud. Rule II § 5 (A)(1) and (B). He acts, in essence, as a prosecutor. In his absence, the Chair or Vice-Chair of the Board review judicial misconduct complaints for validity. *Id.*

Findings of misconduct and enforcement are in the hands of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Gov. Jud. Rule II § 5. The members of this Board are appointed by the Ohio Supreme Court.

Supreme Court Rules for the Government of the Bar of Ohio (“Gov. Bar. Rule”) Rule V § 1 and Gov. Jud. Rule II § 1. Under certain circumstances, the Board may refer the judicial grievance to the Disciplinary Counsel. Gov. Jud. Rule II § 5 (A) (3). Ultimately the Supreme Court is the final arbiter of any sanction. *Id.* Rule II § 5(E). If the grievance is against a Justice of the Supreme Court or a candidate for Justice, a different procedure is used where the final arbiter is a panel of thirteen appellate judges. *Id.* Rule II § 6.

If a violation is found, a judicial candidate is to be sanctioned commensurate with the seriousness of the violation. The sanction should be sufficient to punish the violator and serve as a deterrent to similar violations by judicial candidates in future elections. *In re Judicial Campaign Complaint Against Brigner* (2000), 89 Ohio St.3d 1460, 1461, citing *In re Judicial Campaign Complaint Against Morris* (1997), 81 Ohio Misc.2d 64, 65. A judicial candidate faces sanctions of fines, suspension, removal from office, and even disbarment for violation of the Code. Gov. Jud. Rule II, § 5 (D)(1)(a)-(e) and Gov. Bar R. V § 6. *See, In re Judicial Campaign Complaint against Carr* (1995), 74 Ohio Misc.2d 81; *aff’d* (1996), 76 Ohio St.3d 320 (judicial candidate fined \$500 for soliciting funds by including handwritten notes in envelopes with solicitation letters saying “we need your help now!”).

D. Impact of the Restrictions

The requirement of a non-partisan general election judicial ballot causes a significant drop off among voters. That is, participation is greater in those races where party identification appears on the ballot than in those races where no party identification appears. Moreover, voters often consider the party of a candidate, including a judicial candidate, as a helpful factor in determining which candidates to support. Chris Redfern

Declaration (Plaintiff Ohio Democratic Party); John Lyall Declaration (Plaintiff Ohio Council 8 AFSCME).

Plaintiff Martha Good has run for countywide office several times, some partisan races, some nonpartisan. Plaintiff Good has studied the Hamilton County election results and has noticed that voters are less likely to vote in the nonpartisan judicial races than in other “down ticket” local races which list the candidate’s partisan affiliation. While candidates at the “bottom of the ballot” traditionally receive fewer votes than those at the top of the ticket, nonpartisan judges receive the fewest votes. This attributable to the lack of party affiliation on the ballot. Good Declaration ¶ 8.

Without party identification voters are often confused regarding candidates that have the same name. For example, there are two Peter J. Corrigan’s on the general election ballot in Cuyahoga County. One is a Republican running for Congress. The other Peter J. Corrigan is the Plaintiff, a Democrat, running for Common Pleas Court after prevailing in the partisan Democratic primary for the judicial seat. Without the party identification voters will be confused and may well assume that the Republican Corrigan is running for two offices.

Prohibiting party identification on the ballot and in advertising is inconsistent with the promotion of party affiliation at other times in the election process. For example, nominating petitions require judicial candidates to declare under the penalty of perjury that they are a candidate for nomination to judicial office “as a member of the _____ Party.” Ex. D (Nominating petition for Nadine Allen), Ex. E (Nominating Petition for Peter J. Corrigan), Ex. F (Nominating Petition for Martha Good). Primary Ballots require judicial candidates to run on a party ballot. Ex. G (Sample Democratic

May 4, 2010 Primary Ballot). Designation of Treasurer forms also require judicial candidates to declare their party affiliation. Ex. H (Peter J. Corrigan designation of treasurer form).

Moreover, the Defendant local Boards of Elections make available to the public a list of candidates for each general election. This list includes the party affiliations of all judicial candidates even though the general election ballot does not include the party affiliations. Ex. I (Cuyahoga County list of candidates; Ex. J (Hamilton County list of candidates). Thus, the current system for restricting party identification on the ballot and in the Code is inconsistent and confusing and serves no legitimate governmental interest.

The prohibition on soliciting and receiving funds directly impacts a candidates access to what is needed most in modern elections – money. See, e.g. Plaintiff Corrigan Declaration in which he states that unsolicited financial contributions are occasionally offered but he cannot accept them and he cannot even effectively route that contributor to a committee or other fundraising vehicle. He cannot even properly thank the donors to his campaign. Plaintiff Corrigan Declaration ¶ 13. Instead the restrictions simply cause such contributions to be lost.

III. ARGUMENT

A. Standard for Granting Preliminary Relief

The standard for evaluating a request for preliminary injunctive relief under Rule 65 is well established in this Circuit. Though, there is no “rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief, *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984) (citations omitted), the court should consider the following four factors:

1. Whether the party seeking the injunction has shown a substantial likelihood of success on the merits;
2. Whether the party seeking the injunction will suffer irreparable harm absent the injunction;
3. Whether the injunction will cause others to suffer substantial harm;
4. Whether the public interest would be served by the preliminary injunction.

Leary v. Daeschner, 228 F. 3d 729, 276 (6th Cir. 2000); *Memphis Planned Parenthood, Inc. v. Sunquist*, 175 F.3d 456, 460 (6th Cir. 1999). These factors are “to be balanced and [are] not prerequisites that must be satisfied . . . they are not meant to be rigid and unbending requirements.” *McPherson v. Michigan High School Athletic Association*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). A finding of irreparable injury “is the single most important prerequisite that the Court must examine when ruling upon a motion for preliminary injunction.” *Metrobank v. Federal Home Loan Bank Bd.*, 666 F. Supp. 981, 984 (E.D. Mich. 1987). “The probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction.” *State of Ohio Ex Rel Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987); accord *Shell v. R.W. Sturge Ltd.*, 850 F. Supp. 620, 632 (S.D. Ohio 1993).

Even if the Court is not certain that a plaintiff is likely to succeed on the merits, a preliminary injunction is still appropriate where the plaintiff shows “serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant,” *DeLorean*, 755 F.2d at 1229 (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)), or if “the merits present a sufficiently serious question to justify further investigation,” *DeLorean*, 755 F.2d at

1230. A district court is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are determinative of the issue. *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2002).

In this case, as thoroughly set out below and in the accompanying declarations, the Plaintiffs meet the test for preliminary relief. Their likelihood of success on the merits, their irreparable harm, the balance of hardships and the public interest all strongly favor the issuance of an injunction.

B. Plaintiffs Have a Likelihood of Success on the Merits: Defendants' Restrictions on Ballot Language and Judicial Campaign Speech Violates the Right to Free Speech, to Freedom of Association and to Equal Protection

1. The *Carey v. Wolnitzek* Decision

In many respects this case is simply an effort to apply the ruling addressing the Kentucky Code of Judicial Conduct, *Carey v. Wolnitzek*, ___ F.3d ___, 2010 WL 2771866 (6th Cir 2010), to similar restrictions in Ohio. Therefore a careful look at *Carey* is appropriate. In *Carey*, the Court applied strict scrutiny to three sections of the Kentucky judicial code. Two sections (party affiliation clause and solicitation clause) were declared unconstitutional on their face and enforcement was enjoined. One section (commits clause) was remanded for further fact finding.

The Kentucky Code of Judicial Conduct Canon 5(A)(2) (party affiliation clause) states that "A judge or candidate shall not identify himself or herself as a member or a political party in any form of advertising, or when speaking at a gathering." The Kentucky Code of Judicial Conduct Canon 5(B)(2) (solicitation clause) states that "A judge or a candidate for judicial office shall not solicit campaign funds, but may establish

committees for responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statement of support for the candidacy.” The Kentucky Code of Judicial Conduct Canon 5(B)(1)(c) (commits clause) states that a judge or candidate “shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge to rule a certain way on a case, controversy or issue that is likely to come before the court.” The Court applied strict scrutiny noting that the Kentucky Code sections contain “content-based restrictions” that “implicate a core area of free speech protection: elections.” *Id* at *6. Speech restrictions subject to strict scrutiny are “presumptively invalid unless the restriction discriminates on the basis of categorically ‘proscribable’ speech” which it held was not true in this case. *Id* at *6-7.

Kentucky Affiliation Clause. The party affiliation clause of the Kentucky Code of Judicial Conduct served two legitimate interests: “the Commonwealth’s goal of having a judiciary that is neither biased in fact nor in appearance....[and] the Commonwealth’s interest in diminishing reliance on political parties in judicial selection, a policy grounded in the Kentucky Constitution’s requirement that judicial elections be nonpartisan in nature.” *Id* at *8. The party affiliation clause failed, however, as it was both over and under inclusive and therefore not narrowly tailored to serve either of the government interests.

The party affiliation clause was overinclusive because it “suppresses too much speech to advance the government’s interest.” *Id.* at *8. The Court found the clause to be more defective than the Minnesota Canon struck down in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)(Canon prohibiting a judicial candidate from announcing his or her views on disputed legal or political issues failed under strict

scrutiny). Specifically, the Minnesota canon in *White* prohibited a statement on a single issue such as same-sex marriage. But the Kentucky party affiliation rule “prohibits candidates from announcing their position on one issue of potential importance to voters: the party they support.” *Carey, supra* at *8. By blocking candidates from identifying party affiliation, Kentucky was effectively denying statements on many issues since political parties often have platforms. The rule was overinclusive as it prohibited more speech than that necessary to serve any legitimate purpose. *Carey* at *9 citing *White*, 536 U.S. at 782 (“We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”)

The Kentucky party affiliation clause was also held to be underinclusive in *Carey* as it did “too little to advance the state interest in impartiality and the avoidance of partisan influence.” *Id.* at *9. The Rule set up a double standard. It permitted party affiliation to be stated when a voter asked the candidate in a one on one setting but party affiliation could not be advertised. “That reality undermines the suggestion that a candidate deals a fatal blow to judicial impartiality by revealing her party affiliation.” *Id.* The Court also noted that the Kentucky affiliation clause did not prohibit party membership, only disclosure of party membership. “A party’s undisclosed potential influence on candidates is far worse than its disclosed influence, as one allows a full airing of the issue before the voters while the other helps shield it from public view.” *Id.* In response to Kentucky’s over-arching effort to separate party affiliation from judicial elections, the Court in *Carey* stated:

Voters often resort to a variety of proxies in selecting judges and other office holders, some good, some bad. And while political identification may be an unhelpful way to pick judges, it assuredly beats other grounds, such as the all-too-familiar formula of running candidates with familiar or popular last names. In

that respect this informational ban increases the likelihood that one of the least relevant grounds for judicial selection – the fortuity of one’s surname – is all that the voters will have to go on.

Id. at *10.

Kentucky Solicitation Clause. In *Carey*, the Court acknowledged a legitimate state interest behind the solicitation clause in that it was consistent with the goal of securing an impartial judiciary. But this restriction must be assessed in light of the decision to select judges through elections because as the Court stated, Judicial elections, like most elections, require money-often a lot of it.” *Id.* at 10. The impact on the First Amendment was obvious:

Prohibiting candidates from asking for money suppresses speech in the most conspicuous of ways and, in the process, favors some candidates over others (incumbent judges who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders.

Id. at *11. The resulting rule fails to be narrowly drawn to the state’s interest:

That leaves a rule preventing a candidate from sending a signed mass mailing to every voter in the district but permitting the candidate’s best friend to ask for a donation directly from an attorney who frequently practices before the court. Are not the risks of coercion and undue appearance far less with the first (prohibited) solicitation than the second (permitted) one?

Id. The Kentucky solicitation clause was therefore enjoined as overbroad.

2. Application of *Carey* to Ohio Judicial Code Rules

The Ohio Judicial Code Rules are identical in all material respects to the Kentucky rules invalidated in *Cary*. Ohio Rule 4.2 (B) (4) states that a judicial candidate shall not, “After the day of the primary election, identify himself or herself in advertising as a member of or affiliated with a political party.” Ohio Rule 4.4 (A) states

that “A judicial candidate shall not personally solicit or receive campaign contributions.” *Carey* requires that these rules be enjoined.

Ohio Affiliation Clause. Ohio’s interest in a nonpartisan judicial election is muddled. Unlike Kentucky, nonpartisan elections are not required by the Ohio Constitution. Ohio has a unique system whereby the judicial primary election is partisan and the general election is not. Thus a candidate is free to identify her party affiliation during the primary but must stop doing so “After the day of the primary election.” As stated in *Carey*, “[t]hat reality undermines the suggestion that a candidate deals a fatal blow to judicial impartiality by revealing her party affiliation.” *Id.* at *9. Moreover, to stop identifying a candidate’s party affiliation undermines any state interest: “A party’s undisclosed potential influence on candidates is far worse than its disclosed influence, as one allows a full airing of the issue before the voters while the other helps shield it from public view.” *Id.* Ohio’s party affiliation clause must necessarily fail under *Carey*.

Ohio Solicitation Clause. As in Kentucky, the Ohio solicitation rule denies to plaintiffs access to funds which are critical to success in elections. Moreover, the rule does not permit an appeal by mass mailing or in person at a large rally but does permit a friend of the judge to solicit donors one on one. The rule also prevents candidates from receiving unsolicited contributions. See Plaintiff Corrigan Declaration. The rule is thus fatally overbroad sweeping within its ambit much speech that is protected by the First Amendment. Rule 4.4(A) is unconstitutional under *Carey*.

3. O.R.C. §3505.04 violates the First Amendment and Equal Protection Clause of the Fourteenth Amendment

The Kentucky system for judicial elections at issue in *Carey* was internally consistent as it required a nonpartisan primary as well as a nonpartisan general election.

Id. at *9. Ohio is quite different. The Ohio Constitution does not require nonpartisan judicial elections. Moreover, the Ohio statutes regulating judicial elections establish a partisan primary election for judicial candidates but then establish a nonpartisan general election. Ohio is the only state in the union to follow such an internally inconsistent system. Under the principles set out in *Carey*, the Ohio statute requiring that judicial candidates suddenly drop their party label and appear on the ballot in a nonpartisan general election – devoid of party identification – violates the First Amendment.

The State of Ohio has conceded in another ballot case, that “General election ballot designations are 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). In that same case the Court noted evidence showing that “party identification is the single most important influence on political opinions and voting.” *Id.* at 172. Ohio has chosen to deny this valuable information to voters for judicial candidates in the general election even though voters learn this information and use it in the primary.

Plaintiff Judges Nadine Allen and Peter J. Corrigan filed nominating petitions, which required them each to declare that they were seeking nomination “as a member of the _____ party.” Each Plaintiff filled in the word “Democrat” as their party membership. Each won their primary election and will appear on the 2010 general election ballot as candidates for the Court of Common Pleas. See Plaintiffs Allen, Corrigan and Good Declarations. Their presentation to the public in the May, 2010 primary election as Democrats was a factor considered by some voters – including members of Plaintiff Ohio Council 8 AFSCME and members of Plaintiff Ohio Democratic Party – as important to the selection of these individuals as nominees in the

general election. See Chris Redfern Declaration (Plaintiff Ohio Democratic Party); John Lyall Declaration (Plaintiff Ohio Council 8 AFSCME). In many respects the very fact that a judge in Ohio is routed to the general election through a partisan primary election makes his or her party affiliation a qualification of that judicial candidate. After establishing party affiliation as so important that an entire primary election is based upon it, O.R.C. §3505.04 then denies to the general election candidates the right to have their status as Democratic and Republican primary winners noted on the general election ballot, effectively now hiding this qualification or trait of party affiliation that voters have come to identify with the candidate. In fact such actions will cause voter confusion. Given the general election ballot's silence as to a judicial candidate's party, a voter may improperly assume that the judge broke ranks with her party sometime after the primary; or the party broke ranks with her. Silence can be as misleading as false speech.

Once the state undertakes to regulate what can be said about a candidate on a ballot, it must comply with the First Amendment and Fourteenth Amendment protections of freedom of speech, freedom of association, and equal protection. *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992). Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 898 (2010). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Id.*, citing *Buckley v. Valeo*, 424 U.S. 1, 14-16, 96 S.Ct. 612, 612 (1976). The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 130 S.Ct. 898.

An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. See *Bachrach*

v. Secretary of Commonwealth, 382 Mass. 268, 415 N.E.2d 832, 834 (1981) (citing *Anderson v. Martin*, 375 U.S. 399, 402, 84 S.Ct. 454, 455, 11 L.Ed.2d 430 (1964)). The ballot is necessarily short; it does not allow for narrative statements by candidates and requires responses by the electors simple enough to be counted. *Bachrach*, 415 N.E.2d at 834-35. Within these limitations, a State has discretion in prescribing the particular makeup of the ballot for its various elections; however, this discretion must be exercised in subordination to relevant constitutional guaranties. *Id.* (citing *Bullock v. Carter*, 405 U.S. 134, 140-41, 92 S.Ct. 849, 854-55, 31 L.Ed.2d 92 (1972)).

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. *Bachrach*, 415 N.E.2d at 835. Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws. *Id.* (citing *Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 775-779 (5th Cir.1975)).

Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992) (holding O.R.C. § 3505.03 burdens the First Amendment right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of political affiliation, to cast their votes effectively).

Once the statute links party status to a candidate as a central fact in his judicial candidacy through the primary election the government has no legitimate interest in denying to that candidate the right to carry that qualification or trait with him or her to the general election ballot. The partisan credential established by winning the state sponsored primary election is part of the speech the candidate presents to the public as he or she emerges from the primary. It is as much a part of the candidate as the candidate's name. Both the candidate's name and the party affiliation as winner of the partisan primary should follow the candidate to the general election ballot. That speech – name and party - should not be suppressed on the general election ballot. “[D]ebate on the

qualifications of candidates is at the core of our election process and of the First Amendment freedoms, not at the edges.” *White*, 536 U.S. at 781 (internal quotations and citations omitted). *See also, Rosen v. Brown, supra*.

There is no permissible rational basis for a law prohibiting judicial candidates nominated in a partisan primary from having that nomination reflected on the general election ballot. This is particularly true when non-judicial candidates nominated in the partisan political primary do have their success reflected on the general election ballot since they are listed with their party affiliation noted. Treating similarly situated candidates differently with respect to a party affiliation notation on the ballot was held to violate the equal protection rights of a candidate seeking a party label on the general election ballot in *Rosen v. Brown, supra*. This lends further support to the judicial Plaintiffs in this case. O.R.C. § 3505.04 therefore violates the First Amendment and the Equal Protection clause of the Fourteenth Amendment.

C. Plaintiffs Are Experiencing Irreparable Harm

Denying a candidate fair access to the ballot constitutes irreparable harm. Denying a voter information needed to follow her candidate from the primary through the general election constitutes irreparable harm. Denying a citizen his right to free speech constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). Chilling a person in the exercise of fundamental rights constitutes irreparable harm. Each Plaintiff judicial candidate is chilled in the exercise of his or her rights. See Plaintiffs Allen, Corrigan, and Good Declarations.

D. The Balance of Hardships and the Public Interest Favor Issuance of an Injunction

The Defendants will not be harmed by the issuance of an injunction. Indeed they will be aided in their duty to foster and establish a fair election. The Plaintiffs, on the other hand, will be severely harmed by the continued restrictions imposed on them by the statute and the Code of Judicial Conduct. The public interest is surely benefited by a ruling that will make the judicial election comport with the Constitution.

IV. CONCLUSION

This Court should declare O.R.C. §3505.04, Judicial Code 4.2(B) (4) and 4.4(A) to be unconstitutional and enjoin their enforcement. Relief should include an order requiring that judicial candidates be listed on the fall ballot with their party affiliation. A draft order is attached. This Court should act as soon as possible but well before August 24, 2010 in order for the Defendants Secretary of State and Boards of Election to have time to implement any order before voting begins in the general election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify all Defendants were served with a copy of this Motion and Declarations by personal service on July 28, 2010 and putative counsel for Defendants were served by email on July 28, 2010.

/s/ Alphonse A. Gerhardstein
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