

**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>	:	

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**TRIAL BRIEF OF DEFENDANTS SUPREME COURT OF OHIO, OHIO  
DISCIPLINARY COUNSEL, AND BOARD OF COMMISSIONERS ON  
GRIEVANCES AND DISCIPLINE**

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**Introduction**

On August 10, 2010, the Ohio Supreme Court revised the Ohio Code of Judicial Conduct, effective August 12, 2010, in response to the Sixth Circuit’s recent decision in *Carey v. Wolnitzek*, Nos. 08-6468/6538, 2010 U.S. App. Lexis 14367 (6th Cir. July 13, 2010). The court repealed Rule 4.2(B)(4) (“the Partisan Affiliation Clause”), thereby allowing judicial candidates to advertise their political affiliations during the general election campaign. The court also revised Rule 4.4(A) (“the Solicitation Clause”) to allow judicial candidates greater leeway in their solicitation of campaign funds; they may now request contributions from large gatherings and sign letters to potential donors.

These revisions drastically alter the landscape of this litigation. Plaintiffs' attack on the now-repealed Partisan Affiliation Clause is moot. And the Ohio Supreme Court's narrowing of the Solicitation Clause dooms plaintiffs' overbreadth challenge to that provision. They cannot demonstrate that the Clause prohibits "a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 304 (2008). For these reasons, plaintiffs' request for a temporary restraining order or preliminary injunction should be denied.

### **Background**

The Sixth Circuit issued *Carey* on July 13, 2010, striking down Kentucky's Partisan Affiliation Clause and its Solicitation Clause.

The Ohio Supreme Court's review process of the Code of Judicial Canons has been both expeditious and deliberate. Plaintiffs filed suit on July 28, 2010. The following day, undersigned counsel informed the Court and opposing counsel that the Ohio Supreme Court was scheduled to meet on August 10 to consider the *Carey* decision, this lawsuit and recommendations from the Court's administrative staff regarding possible Code revisions.

On August 5, 2010, the court scheduled the matter for its August 10, 2010, conference—the earliest date on which the justices could deliberate on these matters.

On August 11, 2010, the Ohio Supreme Court amended the Code of Judicial Conduct. See Administrative Actions, 2010-Ohio-3708 (Aug. 11, 2010) (attached as Ex. A). The amendments are effective August 12, 2010.<sup>1</sup>

First, the Ohio Supreme Court repealed the Partisan Affiliation Clause, which had prohibited a judicial candidate from "identify[ing] himself or herself in advertising as a member of or affiliated with a political party" "[a]fter the day of the primary election." Former Ohio Jud.

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<sup>1</sup> The Court voted unanimously to amend Ohio Jud. Cond. R. 4.2 and by a 4-1 vote approved revisions to Comment [2] of R. 4.2 and the revisions to Rule 4.4. Chief Justice Eric Brown and Justice Judith A. Lanzinger not participating. See Exhibit A.

Cond. R. 4.2(B)(4). The rule now permits judicial candidates to announce their political affiliations in any medium: “A judicial candidate may . . . [s]tate in person or in advertising that he or she is a member of, affiliated with, nominee of, or endorsed by a political party.” Ohio Jud. Cond. R. 4.2(C)(6). The court also revised the comment section to urge restraint in a judicial candidate’s announcement and advertisement of her partisan affiliation: “Although these [political party] affiliations and others may be communicated to the electorate, a judicial candidate should consider the effect that partisanship has on the principles of judicial independence, integrity, and impartiality.” *Id.* R. 4.2, cmt. 2.

Second, the Ohio Supreme Court amended the scope of the Solicitation Clause. Judicial candidates may now “make a general request for campaign contributions when speaking to an audience of twenty or more individuals.” Ohio Jud. Cond. R. 4.4(A)(1). They may also “sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate’s campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate.” *Id.* R. 4.4(A)(2). But in all other circumstances, judicial candidates “shall not personally solicit campaign contributions.” *Id.* R. 4.4(A). Furthermore, judicial candidates “shall not personally receive campaign contributions” under any circumstance. *Id.*

The Ohio Supreme Court ordered these revisions to take effect on August 12, 2010.

### **Analysis**

#### **I. Plaintiffs’ Challenge to the Partisan Affiliation Clause is Moot.**

The Ohio Supreme Court’s repeal of the Partisan Affiliation Clause moots plaintiffs’ challenge to that provision.

A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969). This usually occurs after “the passage of a new law or an amendment to the original law.” *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 460 (6th Cir. 2007); accord *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004) (“We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect.”).

The Ohio Supreme Court’s decision to repeal the Partisan Affiliation Clause and promulgate language authorizing candidates to announce and advertise their political affiliation in judicial campaigns “provides sufficient assurance that the [old rule] will not be re-enacted.” *Brandywine*, 359 F.3d at 836. Plaintiffs’ request for declaratory and injunctive relief on this Clause should therefore be dismissed as moot.

## **II. The Newly Revised Solicitation Clause is Not Facially Overbroad.**

The Ohio Supreme Court’s revisions also undercut plaintiffs’ overbreadth challenge to the Solicitation Clause. The Sixth Circuit held that States must permit “indirect methods of solicitation [that] present little or no risk of undue pressure or the appearance of a quid pro quo”—“signed mass mailings” and “speech[es] requesting donations from . . . large gathering[s].” *Carey*, 2010 U.S. App. Lexis 14367, at \*37. But “one-on-one solicitations” might be prohibited, *id.* at \*42, as these interactions “afford . . . significant opportunity for overreaching or coercion,” *id.* at \*37-38 (quoting *In re Primus*, 436 U.S. 412, 435-36 (1978)). Because the newly revised Solicitation Clause hews precisely to the demarcation line established by *Carey*, it is not facially overbroad.

**A. Facial Invalidation is an Exceptional Remedy.**

Plaintiffs argue that Ohio's Solicitation Clause is "fatally overbroad" and, therefore, invalid on its face. (R. 2, p.17). They disregard, however, the strict limitations on the federal courts' authority to declare a law facially invalid on overbreadth grounds.

Invalidation for overbreadth is "strong medicine that is not to be casually employed." *Williams*, 553 U.S. at 293 (internal quotations and citations omitted). To prevail, a plaintiff must demonstrate that "a statute's overbreadth [is] *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.*; accord *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) ("[A] law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep.") (internal quotations and citations omitted). The federal courts rigorously hold litigants to this burden in order to limit the "substantial social costs *created* by the overbreadth doctrine," which inevitably obstructs valid applications of a law to "unprotected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

**B. The Solicitation Clause's Coverage is Clear.**

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. And there can be no dispute about the proper construction of Ohio's Solicitation Clause. The Clause uses clear and precise language, giving judicial candidates "of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The Solicitation Clause prohibits judicial candidates from "personally solicit[ing] campaign contributions" in most instances, and from "personally receiv[ing] campaign

contributions” in all instances. Ohio Jud. Cond. R. 4.4(A). Such activities must be performed by the candidate’s campaign committee. Two exceptions to that general rule exist: (1) candidates may “make a general request for campaign contributions when speaking to an audience of twenty or more individuals”; and (2) candidates may “sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate’s campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate.” *Id.* R. 4.4(A)(1)-(2). The Ohio Supreme Court crafted these exceptions in direct response to *Carey*. See 2010 U.S. App. Lexis 14367, at \*37 (finding “[s]uch indirect methods of solicitation” to be protected speech).

In their declarations, plaintiffs misstate the breadth of the Solicitation Clause. For instance, Judge Corrigan indicates that “a potential donor may approach [him] to make a contribution, but [he] [is] forbidden from accepting it or even telling her where to send it.” Corrigan Decl. ¶ 13. He is mistaken. It is true that Judge Corrigan may not personally accept the contribution, but nothing in Rule 4.4 prevents him from instructing the inquiring donor to contact his campaign committee. Likewise, Judge Corrigan complains that he is not “permitted to sign thank you notes to donors that imply they will continue to support me.” Corrigan Decl. ¶ 13. That fear is unfounded. Under the plain terms of the Solicitation Clause, Judge Corrigan may personally send thank-you notes to donors expressing his appreciation for their financial support, so long as the notes do not solicit *additional contributions* from the donors. (Of course, Judge Corrigan is free to solicit additional contributions from these donors if he routes his thank-you letters through his campaign committee. See Ohio Jud. Cond. R. 4.4(A)(2).)

In sum, there is little to debate on the Solicitation Clause’s operation and scope.

**C. The Solicitation Clause is Not Overbroad.**

The only question before the Court is whether Ohio’s Solicitation Clause “prohibits a substantial amount of protected speech” in relation to its legitimate sweep. *Williams*, 553 U.S. at 292. It does not. The Ohio Supreme Court tethered its revisions to *Carey*, allowing judicial candidates to employ “indirect methods of solicitation,” but prohibiting more problematic “one-on-one solicitations.” 2010 U.S. App. Lexis 14367, at \*37, \*42. For that reason, the newly revised Solicitation Clause is not facially overbroad.

**1. The Ohio Supreme Court’s Revisions Allay *Carey*’s Overbreadth Concerns With Respect to Indirect Methods of Solicitation.**

In *Carey*, the Sixth Circuit did not hold that *any* restriction on a judicial candidate’s ability to ask for money is automatically unconstitutional. To the contrary, the court observed that States may prohibit solicitations that carry the “risk of undue pressure or the appearance of a quid pro quo.” *Id.* at \*37. It further identified “at least” two types of solicitations that might be proscribed—“face-to-face solicitations” and “solicitations of individuals with cases pending in front of the court.” *Id.* at \*36-37.

Kentucky’s Solicitation Clause, however, extended far beyond those categories. The Sixth Circuit invalidated the Clause due to its “considerable overbreadth”—namely, because “it[] appli[ed] to mass-mailing solicitations [and] speeches to a large audience.” *Id.* at \*41. These “indirect methods of solicitation,” the court found, were relatively innocuous. *Id.* at \*37. The Eighth Circuit identified similar infirmities in Minnesota’s Solicitation Clause. See *Republican Party of Minn. v. White*, 416 F.3d 738, 765-66 (8th Cir. 2005) (“*White II*”) (“[T]he solicitation clause’s proscriptions against a candidate personally signing a solicitation letter or making a blanket solicitation to a large group[] does not advance any interest in impartiality.”).

*Carey*'s result does not hold in this case because Ohio's newly revised Solicitation Clause authorizes the two "indirect methods of solicitation" discussed in that opinion. Judicial candidates may now request campaign contributions "when speaking to an audience of twenty or more individuals," and they may "sign letters soliciting campaign contributions" for "distribution by the judicial candidate's campaign committee." Ohio Jud. Cond. R. 4.4(A)(1)-(2). These revisions demonstrate that the Ohio Solicitation Clause does not suffer the same "considerable overbreadth" as the Kentucky Rule. *Carey*, 2010 U.S. App. Lexis 14367, at \*41.

**2. The State May Continue to Proscribe "One-On-One Solicitations."**

The Sixth Circuit in *Carey* further indicated that a proscription "focused on one-on-one solicitations" might pass constitutional muster. *Id.* at \*42. Ohio's rule adopts that very focus. It prohibits the direct, personal solicitation of potential donors. The State has at least four compelling interests in limiting such interactions.

First, the State has a vital interest in "avoiding the appearance of coercion or *quid pro quo*, especially when a judicial candidate engages in a one-on-one solicitation of a lawyer or party who appears before the court." Ohio Jud. Cond. R. 4.4, cmt. 1. As the Second Circuit recognized, a State has a "compelling . . . interest in rooting out the coercion of political contributions" and in protecting the contributor's "First Amendment right to contribute to the groups of [her] choice." *Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n*, 667 F.2d 267, 272 (2d Cir. 1981). This concern is heightened in judicial elections. Attorneys and potential litigants who receive one-on-one solicitations from a judicial candidate know full well that they might later appear before that candidate in a courtroom, and the prospect of turning down the candidate's request will unnerve at least some of them. Rightly or wrongly, they will fear that declining the request will trigger disfavor, and they will either donate to allay

those fears, or decline to donate and bear the risk (and the anxiety) that the candidate, if elected, will view them unfavorably. See *Siefert v. Alexander*, No. 09-1713, 2010 U.S. App. Lexis 12057, at \*40 (7th Cir. June 14, 2010) (“A direct solicitation closely links the quid—avoiding the judge’s future disfavor—to the quo—the contribution.”).

Ohio’s ban on one-on-one solicitations advances the State’s anti-coercion interest by separating the courtroom from the campaign trail. A direct fundraising request from a judge may be quite intimidating for some. See *Bauer v. Shepard*, 634 F. Supp. 2d 912, 955 (N.D. Ind. 2009) (observing that the judicial candidate “himself admitted that personal solicitations have additional leverage”). See generally *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978) (“[I]n-person solicitation may exert pressure and often demands an immediate response.”). Preventing one-on-one solicitations in judicial campaigns safeguards the right of attorneys and potential litigants to make a free and informed choice about whether to contribute to a particular candidate.

Second, a prohibition on one-on-one solicitations helps to “preserv[e] both the appearance and reality of an impartial, independent, and noncorrupt judiciary.” Ohio Jud. Cond. R. 4.4, cmt. 1. Not only must “[j]udges . . . be impartial toward the parties and lawyers who appear before them,” *Siefert*, 2010 U.S. App. Lexis 12057, at \*40 n.6, but the parties must believe that to be so. See *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The power and the prerogative of a court to [resolve disputes under law] rest, in the end, upon the respect accorded to its judgments.”). A litigant who discovers that the judge assigned to her case personally solicited donations from the opposing counsel or party has reason to question whether she will get a fair shake. By precluding such personal interactions while allowing less direct forms of solicitations, the State advances its interest in

keeping its tribunals free of actual or perceived bias with respect to individual parties, and does so narrowly. See *White II*, 416 F.3d at 765 (“Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case.”).

Third, the State has a vital interest in “furthering the public trust and confidence in the impartiality of the judicial decision-maker.” Ohio Jud. Cond. R. 4.4, cmt. 1. To be sure, the realities of an elected judiciary—and the need for campaigns and fundraising—uniquely challenge that interest: “[T]he mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.” *White*, 536 U.S. at 790 (O’Connor, J., concurring). But *Carey* makes clear that, even with an elected judiciary, the State retains its “compelling interest . . . in furthering the public’s trust in the integrity of its judges.” 2010 U.S. App. Lexis 14367, at \*34-35. And a ban on one-on-one solicitations advances that interest. Allowing judicial candidates personally to solicit donors in private meetings and telephone calls would seriously erode the public’s confidence in Ohio’s judiciary. After all, “the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means.” *Siefert*, 2010 U.S. App. Lexis 12057, at \*40. And even if these plaintiffs promise to avoid such unseemliness in their fundraising efforts, there is no guarantee that every judicial candidate in Ohio will be as solicitous. See, e.g., *Disciplinary Counsel v. O’Neill*, 103 Ohio St. 3d 204, 214 (2004) (“[The judge] approached the staff attorney and demanded that both her future law firm and her husband’s law firm ‘needed to step up to the plate and contribute to her campaign.’”).

Fourth, a ban on one-on-one solicitations “ensur[es] the public’s right to due process and fairness.” Ohio Jud. Cond. R. 4.4, cmt. 1. Judicial canons have long prohibited *ex parte*

communications between judges and litigants, see Ohio Jud. Cond. R. 2.9, because such contact impairs the other party's due process rights, see *Swank v. Smart*, 898 F.2d 1247, 1253 (6th Cir. 1990); accord Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. Pa. L. Rev. 181, 227-28 (2004) (“[T]he nature of the judicial function ordinarily precludes private or ex parte contacts between a judge and a party who has an interest before the judge.”). Those due process interests are squarely implicated in one-on-one solicitations, which require the would-be judge to engage in *private communication* with the would-be donor *over money*. And that would-be donor likely has a keen interest in the court's docket as a lawyer, an institutional litigant (a financial institution, insurance company, health care lobby, or labor union), or an advocacy organization (the Chamber of Commerce, the National Rifle Association, or the Academy of Trial Lawyers). See Ohio Citizen Action, Contributions to Candidates for Justice of the Ohio Supreme Court (Jan. 1–Oct. 4, 2006) at <http://www.ohiocitizen.org/moneypolitics/2006/judicial.html> (last visited Aug. 12, 2010). By precluding such personal contact, the Solicitation Clause helps to shield the judge from improper extrajudicial influences, thereby protecting the due process rights of all litigants.

In light of these compelling interests, the State may ban one-on-one solicitations in judicial campaigns without offending the First Amendment.

### **3. The Newly Revised Rule Does Not Reach a “Substantial” Amount of Protected Speech.**

The State has established that the Solicitation Clause's focus on one-on-one solicitations in judicial campaigns is a constitutional endeavor. To prevail on their facial overbreadth challenge, plaintiffs must “demonstrate from the text of [the Clause] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.” *N.Y.*

*State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988). Plaintiffs have yet to identify any such instances of overbreadth in this litigation.

First, plaintiffs contend that Ohio's Solicitation Clause "denies [them] access to funds which are critical to success in elections." (R.2, p.17). But the Clause does not prohibit the dissemination of any viewpoint, nor does it reduce the overall quantity of speech in a judicial campaign. Rather, the Clause narrowly regulates the manner of delivery for one category of speech—the solicitation of campaign contributions. The candidate is free to request money from any individual, provided that the solicitation occurs through her campaign committee, in a letter, or at an event with at least twenty individuals. The candidate is also free to appear at fundraisers and campaign rallies, speak individually with potential supporters, and send notes of appreciation to contributors. The Clause bars only the one-on-one *solicitation* of funds by the candidate. Because this narrow prohibition does not prevent plaintiffs "from amassing the resources necessary for effective advocacy" in a judicial campaign, *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), any resulting impairment on their fundraising has no First Amendment implications.

Second, plaintiffs originally complained that Ohio's Solicitation Clause "does not permit an appeal by mass mailing or in person at a large rally." (R.2, p.17). As discussed above, the Ohio Supreme Court revised the Clause to allow such activities in response to *Carey*. See Ohio Jud. Cond. R. 4.2(C)(6). Plaintiffs' objection is now moot.

Third, plaintiffs erroneously object that the Clause "prevents candidates from receiving unsolicited contributions." (R.2, p.17). To the contrary, a judicial candidate may receive unsolicited contributions. And although the candidate cannot physically collect the check, she may instruct the individual to send the contribution to her campaign committee, and may even provide the individual with a plain stamped envelope addressed to the candidate's campaign

committee. Plaintiffs have not cited, nor is the State aware of, any authority supporting the premise that a candidate's *physical act* of accepting money qualifies as protected expression under the First Amendment. Directing a candidate to route all monetary donations through her campaign representatives accommodates any marginal speech interest she might have in the act of collection, and it ensures that all campaign funds are properly accounted for as required by state campaign finance reporting requirements.

All told, plaintiffs cannot identify the "substantial number" of unconstitutional applications of the Solicitation Clause required to demonstrate facial overbreadth. As such, the Clause is constitutional in the main. If plaintiffs have specific objections to its application, those objections belong in an as-applied challenge. See *Wash. State Grange*, 552 U.S. at 457-58.

**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 Trial Brief of the Supreme Court of Ohio, Ohio Disciplinary Counsel, and Board of Commissions on Grievances and Discipline was filed electronically on August 12, 2010. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*/s/ Aaron D. Epstein*

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