

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

<b>OHIO COUNCIL 8 American</b>	:	<b>Case No. 1:10-CV-504</b>
<b>Federation of State, County and</b>	:	
<b>Municipal Employees, AFL-CIO, et al.</b>	:	<b>Judge Susan J. Dlott</b>
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
<b>JENNIFER BRUNNER, et al.</b>	:	
	:	
Defendants.	:	
	:	

**PLAINTIFFS' TRIAL BRIEF AND REPLY TO DEFENDANTS'**  
**MEMORANDUM IN OPPOSITION TO MOTION FOR INJUNCTION**

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## **I. INTRODUCTION**

This case challenges as unconstitutional, two sections of code of judicial conduct and one state statute, O.R.C. § 3505.04. On August 11, 2010 at 5:00, the Ohio Supreme Court amended the challenged provisions of the judicial code. Counsel is presently reviewing the amended rules with the Plaintiff judges and judicial candidate and will advise the Court of the status of that argument by 2:00 p.m. today.

This trial and reply memo will be limited to the challenge to the O.R.C. § 3505.04. Plaintiff Allen, Corrigan, and Good, each won the Democratic primary for a specific judicial office, but pursuant to the O.R.C. § 3505.04, none of the Plaintiffs will have his or her party affiliation listed on the general election ballot. As fully explained below, the statute severely burdens the interest of the Plaintiff judges, judicial candidate, voters, and Democratic Party, without serving any compelling or substantial state interest. Enforcement of the statute should be enjoined. Defendants should be ordered to list party affiliations for the judicial offices on the general election Office Type ballot.

## **II. ARGUMENT**

### **A. Preliminary Injunction Standard of Review**

Plaintiffs incorporate the standard of review articulated in their Motion for TRO and Preliminary Injunction (Doc. 2, pp. 11-13).

**B. Plaintiffs' Have Demonstrated a Likelihood of Success - O.R.C. § 3505.04 is Unconstitutional**

**1. The State's interest must be Compelling and Narrowly Tailored to outweigh severe burdens on Plaintiffs' First Amendment Rights.**

The concept of "liberty" assured by the Due Process Clause of the Fourteenth Amendment embraces those rights and freedoms that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). Among these most fundamental rights and freedoms are those that flow from the First Amendment, including the freedom of speech, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the freedom "to engage in association for the advancement of beliefs and ideas," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (Harlan, J.), "the right of citizens to create and develop new political parties," *Norman v. Reed*, 502 U.S. 279, 288 (1992), and the right of political parties to select their own nominees, *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).

Ordinarily, state laws which impinge upon such fundamental liberties are automatically subject to strict judicial scrutiny. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969). The Supreme Court has recognized, however, that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For this reason, the Court has adopted a special balancing test for evaluating due process claims against state election laws, all of which inevitably affect the fundamental rights of political parties, candidates, and voters:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In

passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

*Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of that scale, the law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788-89 n.9). But when the law places “severe” burdens on the rights of political parties, candidates or voters, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. at 289). ORC § 3505.04 fails this test and must be enjoined.

## **2. The statute places a heavy burden on each of Plaintiffs’ interests**

The *Anderson* balancing test requires that this Court first identify the interests of each of the plaintiffs and then determine what burden is imposed on the plaintiffs by the Ohio statute. The Ohio statute heavily burdens the rights of each plaintiff in this case: the voters’ rights to associate, receive information and cast meaningful votes at the ballot box, the Democratic Party’s rights to select and champion its nominee and educate the voters, and even the judicial candidates’ freedom of speech to express their qualifications and primary victory.

**a. The Interests of the Ohio Democratic Party is Heavily Burdened by Ohio's Prohibition on Judicial Candidates Appearing on the Partisan General Election Ballot**

Freedom of association guaranteed by the First Amendment protects the right of individuals to organize into political parties. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). The associational rights of political parties include the right to select their nominees, *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the right to access the ballot, *Norman v. Reed*, 502 U.S. 279 (1992), *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the right to define their own membership qualifications, *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Nader v. Schaffer*, 417 F.Supp. 837 (Conn.), *summarily aff'd*, 429 U.S. 989 (1976), the right to endorse or oppose political candidates, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) and the right to refuse to seat delegates to their conventions who were not chosen by party rules, *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides *whether and how to communicate* those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects.

*California Democratic Party v. Jones*, 530 U.S. 567, 592 (2000), (emphasis added) citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354-355, n. 4, 359 (1997).

Ballot access goes beyond the right to place a candidate on the ballot. Freedom of speech encompasses a political party's right to broaden the base of public participation in and support for their activities. See *Tashjian* U.S. 479 at 214. Party labels play a

significant role in announcing a candidate's views by proxy. "Party affiliation has the same, *if not more*, importance than the identity of the candidate." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6<sup>th</sup> Cir. 2008) (emphasis added) (rejecting Ohio's argument that third-party ballot rules were not burdensome because the candidate could still appear on the general ballot without party identification).

In *California Democratic Party v. Jones*, the Supreme Court struck down a voter initiative, Proposition 198, which changed California's primary from a closed primary, in which only a party's members can vote on its nominees, to a blanket primary, where each voter's ballot lists every candidate regardless of party affiliation and allows the voter to choose freely among them. The candidate of each party who won the most votes became that party's nominee for the general election. California's major political parties challenged the law as an unconstitutional burden on their right of free association because it allowed nonparty members to select the parties' nominees. The Supreme Court agreed. The Court emphasized that the process of selecting the nominee "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 574. The Court held that the open primary changed the party's message by selecting its nominee. The Court could think of no heavier burden on a political party than forcing it to change its message. *Id.* at 582. Thus, absent a narrowly tailored compelling state interest, the law was unconstitutional.

The State of Ohio allows the party to select its judicial nominee but through ORC 3505.04 does not allow the party to communicate that on the general election ballot.

Ohio's general election ballot thus eliminates the party's message in the general election by keeping from the voter the identity of the party's nominee. Therefore, the Ohio statute severely burdens the Ohio Democratic Party's right to choose its own candidate and have the nominee listed on the ballot. When a regulation heavily burden's a party's right to select its own nominees, it must be narrowly tailored to serve a compelling state interest. *See Jones*, 530 U.S. at 575 (reaffirming "the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences") (internal quotation marks omitted); *New York State Bd. of Elections v. Lopez-Torres*, 522 U.S. 196, 202 (2008) ("A political party has a First Amendment right to . . . choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986).

Cordray argues that the statute creates no significant burden on the party's associational rights because the political party is not prevented from endorsing and nominating candidates and placing them on the general election ballot. Cordray states that candidates and voters are similarly unburdened because they are free to associate in this manner. Doc. 17, p. 6. But the Supreme Court will not "overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. *Jones*, 530 U.S. at 580.

**b. Voter Interest is Heavily Burdened by Ohio’s Prohibition on Judicial Candidates Appearing on the Partisan General Election Ballot**

Ohio voters step into the voting booth on Election Day knowing the party affiliation of all candidates on the office type ballot. Farther down the ballot the voters are presented with the nonpartisan judicial candidates. Even lower are issues to be voted on. Voters typically drop-off, or skip voting, for the judicial nonpartisan races but then continue to vote for issues. This phenomenon can be directly attributable to the lack of information the voter has about the judicial races and the absence of information about the judicial candidate’s party identification. The absence of party identification for judicial candidates is a heavy burden on those voters who skip judicial races for lack of information.

Restrictions on political parties by their nature burden the associational rights of their members, i.e., voters. *Tashjian*, 479 U.S. at 215-216. The right of political parties to spread their message is closely tied to the voters’ right to receive it. “As we have said, “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.” *Id.* The Supreme Court struck down California’s ban on political party primary endorsements not only because it burdened the political party, but also because it “hampers the ability of a party to spread its message and hamstring voters seeking to inform themselves about the candidates and the campaign issues.” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). “A ‘highly paternalistic approach’ limiting what people may hear is generally suspect.” *Id.*,

*citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S., 748, 779 (1976).

“[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively ... rank among our most precious freedoms.” *Williams v. Rhodes*, 393 U. S. 23, 30 (1968). In *Williams*, Ohio’s election laws were challenged that made it virtually impossible for a new political party with hundreds of thousands of members to be placed on the ballot. The Socialist party and the Independent Party challenged the laws on equal protection grounds. The Court held the laws violated the equal protection clause by favoring established political parties over new ones. The Court also held that Ohio laws heavily burdened the right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Williams*, 303 U.S. at 30. The Court reiterated that freedom of association is protected by the First Amendment. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Williams*, 303 U.S. at 31. The Court held the voters right to vote was heavily burdened when some parties were kept off the ballot, thus the State had to assert a compelling state interest. *Id.* Likewise, in this case, the voters’ right to vote is heavily burdened when all party affiliations are kept off the ballot. Thus, the State must assert a compelling state interest. The State has not addressed the burden on voters or what compelling interest the state could have in burdening voters in their memorandum in opposition.

**c. The Interests of the Judicial Candidates is Heavily Burdened by Ohio's Prohibition on Their Appearing on the Partisan General Election Ballot**

The State argues the judicial candidates have no First Amendment right of expression in the content of a ballot. Doc. 17, p. 3. But a candidate's status as a party nominee does reflect the candidates' qualifications for office. Speech about a candidate's qualifications is a core First Amendment right. *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765 (2002). Restricting the right of candidates to express their qualifications strikes at the very heart of representative democracy:

'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges. *Eu*, 489 U. S., at 222-223. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. *Wood v. Georgia*, 370 U. S. 375, 395 (1962). "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Brown*, 456 U. S., at 60 (internal quotation marks omitted). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

*Id.* at 781-782. One crystal clear qualification is the candidate's nomination by her party. A judicial candidate can only run if a sufficient number of the members of her party nominate her by declaring that they certify that she "is in our opinion, well qualified to perform the duties of the office" she seeks. See, PX-10. Depriving the judicial candidate of conveying such an important qualification is a heavy burden.

Additionally, other elected officials on the Office Ballot are permitted to communicate their party affiliation to the voters. Judicial candidates should be no different. See, *Suster v. Marshall*, (*Suster II*) 149 F.3d 523, 529 (6th Cir. 1998) cert. denied 525 U.S. 1114 (1999), where the Sixth Circuit agreed that judicial candidates are

not distinct from other candidates. The Court struck down a rule in the Ohio Code of Judicial Conduct that prohibited a judge from spending more than a set dollar amount on a campaign. The Court held that “an election candidate does not forgo his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one.” *Id.* at 529. The Sixth Circuit explicitly held that the prevention of corruption is the only interest to which it would give credence as compelling enough to infringe upon the First Amendment rights of a candidate seeking an electoral office. *Id.* at 532. On remand, the district court held that the judicial canon limiting campaign expenditures was unconstitutional because it was not narrowly tailored to the state’s interest in preventing corruption. *Suster v. Marshall (Suster III)*, 121 F.Supp.2d 1141 (N.D. Ohio 2000). See also, *Carey*, holding that speech about the qualifications of candidates for public office is a fundamental First Amendment right and that judicial candidates have a right to announce the party platform with which they affiliate because the party platform is “a shorthand way of announcing one's views on *many* topics of the day.” p. 16.

Finally, in *Rosen v. Brown*, 970 F.2d 169 (6<sup>th</sup> Cir. 1992) an independent candidate sought to place “Independent” designation below his name on the Ohio general election ballot. The Court did not apply strict scrutiny but nevertheless held that the State impermissibly burdened the candidate’s First Amendment Rights. The Court held that 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. “An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic

moment of choice.” *Id.* at 175. “General election ballot designations are simply government provided information designed to inform voters of the political party affiliation of each candidate....” *Id.* at 177. In *Rosen*, the Court noted evidence showing that “party identification is the single most important influence on political opinions and voting.” *Id.* at 172. The Court held that once the State places a subject on the ballot and legislates what should appear on the ballot, “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.* at 175.

Just as Ohio burdened the candidate in *Rosen*’s rights, Ohio has burdened Plaintiff judicial candidates’ rights to freedom to associate with the voters.

### **3. The State’s interests are not compelling or narrowly tailored**

The State of Ohio identifies several state interests that it claims justify the Ohio law. None of them are strong enough to override the Plaintiffs’ First Amendment speech and association rights.

#### **a. Interest in nonpartisan general elections**

The State claims a compelling interest in “having a judiciary that is neither biased in fact nor in appearance.” Doc. 17, Cordray Memo p. 6, citing *Carey* at \*26. The State argues it has a compelling interest in “diminishing reliance on political parties in judicial selection.”<sup>1</sup> Doc. 17, p. 6, citing *Carey* at \*26. The State claims that removing party

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<sup>1</sup> Cordray argues that this interest is particularly acute in Ohio, which has a history of “political imbroglions” (Memo p. 6) yet cites only to case where the Sixth Circuit affirmed a suspension of a judge for misconduct while in office (inappropriate behavior while on the bench). The case had nothing to do with misconduct involving judicial elections or politics. *See, In re Squire*, 2010 WL 3001861 (6th Cir. 2010).

designations from the general election ballot furthers these two interests. Cordray Memo, p. 7. Neither of these interests justifies the severe burden on the plaintiffs' speech.

**i. Impartiality**

The State asserts that it has an interest in nonpartisan general elections. The core of this argument is that judges should remain impartial rather than beholden to the views of political parties or voters. In *White I*, the Supreme Court deduced that there were three possible meanings of impartiality. One possible meaning is a "lack of preconception in favor of or against a particular legal view." *White I*, 536 U.S. at 777. The Court said it could not be a compelling interest for a judge to "lack . . . predisposition regarding the relevant legal issues in a case" because such a requirement "has never been thought a necessary component of equal justice." *Id.*, *See also, Carey at* \*5. The Court reasoned that it is "virtually impossible" to find a judge who lacks any "preconceptions about the law," and that lack of preconceptions was not desirable in a judge. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *White I* at 778.

A second possible meaning of impartiality is a "lack of bias for or against either party to [a] proceeding." *Id.* at 775. Lack of bias toward a party is a compelling state interest. An impartial decision-maker is required by the Due Process clause of the Fourteenth Amendment. It is universally accepted in both criminal and civil contexts. *Tumey v. Ohio*, 273 U.S. 510 (1927) (invalidating Ohio Mayor's Court where judges and prosecutors were paid from fines they levied); *In re Murchison*, 349 U. S. 133 (judge had prior relationship with party); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)

(Mayor had broad executive powers that presented a temptation to forget the burden of proof required in order to convict the defendant); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (impartial decision-maker in administrative hearings); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997), (reiterating that "the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.")

Due process plainly means that a tribunal must avoid bias *for or against a party*. Although the State's interest in unbiased judges is compelling, the Ohio statute is not narrowly tailored to address that interest, nor is it the least restrictive means of protecting a party's right to an unbiased tribunal. The Ohio statute banning party identifiers on the ballot does not address the conflict of interest that arises when a judge has a financial or personal stake in the outcome of a trial. In *White I*, the Supreme Court held that the clause preventing judicial candidates from announcing their views on issues "is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *White I*, 536 U.S. at 776.

In *White II*, the 8<sup>th</sup> Circuit used party-affiliation ballot cues to illustrate the fallacy of using such bans to promote the state's general interest in impartiality. "In the case of a political party involved in a re-districting dispute, for example, the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an "R" or "D," or "DFL" (denoting

Minnesota's Democratic-Farmer-Labor Party) after his or her name.” *White II*, 416 F.3d 738, 755 (8th Cir. 2005). The court held that broad restrictions on the associational rights of judicial candidates do not serve the due process rights of party litigants to have an unbiased judge. *Id.* at 754.

Likewise in Ohio, removing the Republic or Democrat designation from the judicial candidate’s name on the ballot does nothing to promote the state’s interest in electing unbiased judges. Party labels are shorthand for expressing *views* that a judicial candidate holds and views a voter can associate with. Censoring a candidate’s views does nothing to ensure impartiality toward litigants who will later appear before the court should the candidate win the election.

The Seventh Circuit’s decision in *Siefert* furthers this point. *Siefert* addressed a state’s interest in maintaining nonpartisan elections. Wisconsin’s judicial elections are nonpartisan, therefore Wisconsin law prohibited a judicial candidate from joining a political party or participating in partisan activities. But the Court held the candidate had a right to express his party affiliation even during an officially nonpartisan election:

The crux of the state’s concern here seems to be that a judge who publicly affiliates with a political party has indicated that he is more inclined toward that party’s stance on the variety of legal issues on which that party has a position. But that is the purported compelling state interest that *White I* squarely rejected. 536 U.S. at 777-78. The state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy. **Nor can casting the argument in terms of the “appearance of bias” save it—because “avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest either.”** [*White I*] *Id.* at 778.

Emphasis added. *Siefert* at p. 13. Like Wisconsin, Ohio cannot pretend that partisan primaries and nonpartisan general elections eliminate the appearance of bias. Nor can Ohio maintain this is a compelling interest.

Moreover, there are other mechanisms that directly address impartiality. In an instance where actual bias is strongly indicated, due process requires that a judge recuse himself. See *e.g. Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009). (West Virginia Supreme court judge was required to recuse himself from a case involving the financial interests of a major donor to the judge's election campaign, where there was a close temporal link between the donation, the pendency of the coal company's case and the election). In Ohio, the State has established mechanisms for judges to be recused from cases where bias, interest, prejudice or disqualification are alleged. See O.R.C. § 2701.03 (Chief Justice of the Ohio Supreme Court rules on recusal petitions for common pleas, court of appeals, and probate judges) and O.R.C. § 2791.031 (presiding judge of municipal and county courts rule on recusal petitions). Therefore, the State can show no compelling interest of impartiality in removing party identification from the judicial ballot.

**ii. Protecting the Integrity of the Judiciary by Diminishing Partisan Influence**

The State's second articulated interest is to diminish reliance on political parties in judicial selection. Doc. 17, p. 6. This can hardly be a compelling state interest when the State encourages partisan primary elections for judicial candidates. This requirement undermines any alleged interest in nonpartisan general elections, thus this interest cannot be compelling. In order to appear on the primary ballot the judicial candidate must declare he is running for office "as a member of the Democratic Party." PX-8. And, he

must obtain enough signatures of qualified voters who are members of the Democratic Party and who “certify that Peter J. Corrigan, whose declaration of candidacy is filed herewith, is in our opinion well qualified to perform the duties of the office” he seeks. PX-8. Whatever influence the State is trying to prevent still exists because of the candidates’ political party affiliation is cemented during the primary.

Ohio chose to have its judges elected through a partisan primary and a nonpartisan general election. The State claims that this system strikes a balance between two competing State interests: to keep politics out of the judiciary and to preserve the party system. Doc. 17, p. 7-8. But in fact through the general election the State continues to disclose the party affiliation of judges on the local board of election websites. Moreover, on August 10, 2010 the Ohio Supreme Court announced new rules for judicial candidates that permit them to disclose and advertise their party affiliation. Thus a candidate can say to people that he won the Democratic or Republican primary and a diligent voter can look up on a government website the affiliation of the candidate before he casts a ballot but the State inconsistently masks party affiliation on the one place the voters will surely look – the general election ballot. This inconsistent disclosure of party affiliation by the state achieves no “balance” and instead simply blocks information that should be available to the voters when they need it the most.

Furthermore, the State bases its balancing of two interests on *Haffey v. Taft*, 803 F. Supp. 121 (S.D.OH 1992). In *Haffey*, an independent judicial candidate wanted the Secretary of State to indicate on the ballot the political party affiliation or non-affiliation of the three candidates (the others were a democrat and a republican). The Court found the state had a “sincere” interest, not a compelling interest, in compromising between its

desire to keep politics out of the judiciary and its desire to preserve the party system. *Haffey*, 803 F. Supp. at 125-126. The Court failed to find a significant interest for Haffey since he offered no evidence of injury. *Id.* 125. Moreover, voters and political parties were not plaintiffs in *Haffey*. Thus, applying the *Anderson* balancing test, the State's interest outweighed the candidate's interest. *Id.* 125-126. In this case, where the three types of Plaintiffs each have a significant interest that will be heavily burdened by the State, the State's compromise interests cannot rise to the level of a compelling interest that would outweigh the Plaintiffs' interests. Certainly after *Carey*, the Sixth Circuit has recognized that *White I* requires a strict scrutiny analysis when content based speech is implicated. However, even if strict scrutiny is not applied, the State's interest in eliminating partisan politics from the general election cannot be even an important regulatory interest given the State's articulated competing interests in partisan primaries.

The State relies on *New York State Board of Elections v. Torres*, 552 U.S. 196 (2008), to support it having compromised between two competing state interests of keeping politics out of the judiciary and to preserving the party system. In *Torres*, the parties advanced a novel First Amendment argument: that because there was in essence one-party rule in New York's judicial districts, the Court should impose competitiveness in the nominee selection process. New York's process required parties to first elect delegates who later came together at a party convention to select its judicial nominees. Plaintiffs challenged the election of the delegates to the convention because the party controlled the delegate election. Plaintiffs sought a more competitive nominating process. The Court declined to declare the system unconstitutional holding that the candidate did not have a constitutional right to a "fair shot" at winning the party's

nomination. The Court acknowledged that a state could, “within limits (that is, short of violating the parties' freedom of association), discourage party monopoly—for example, by refusing to show party endorsement on the election ballot.” *Torress*, 522 U.S. at 801. However the Court also acknowledged that voters usually approve the positions and candidates that the party regularly puts forward. “It is no function of the First Amendment to require revision of those positions or candidates.” *Id.* Contrary to the State’s assertion that *Torress* supports the Ohio’s competing interests, the Court emphasized that voters have a First Amendment right to support party candidates and the State should not violate political parties freedom of association. *Id.*

The State apparently also wants to discourage voting based on a candidate’s political party affiliation. Doc. 17, p. 7. But this alleged interest runs contrary to the compelling interests stated by the general assembly and omitted from the State’s brief. The legislature has established a deadline for independent candidates to file nominating petitions that is prior to the partisan primary election. In support of having independent nominating petitions filed before the primary, the legislature articulated several compelling interests:

The purpose of establishing a filing deadline for independent candidates prior to the primary election immediately preceding the general election at which the candidacy is to be voted on by the voters is to recognize that the state has a substantial and **compelling interest in protecting its electoral process by encouraging political stability, ensuring that the winner of the election will represent a majority of the community, providing the electorate with an understandable ballot, and enhancing voter education, thus fostering informed and educated expressions of the popular will in a general election.** The filing deadline for independent candidates required in this section prevents splintered parties and unrestrained factionalism, avoids political fragmentation, and maintains the integrity of the ballot. The deadline, one day prior to the primary election, is the least drastic or restrictive means of protecting these state interests. The general assembly finds that the filing deadline for independent candidates in primary elections required in this section is reasonably related to the

state's **purpose of ensuring fair and honest elections while leaving unimpaired the political, voting, and associational rights secured by the first and fourteenth amendments to the United States Constitution.**

O.R.C. § 3513.257. Thus, the State's interest in discouraging voting based on party affiliation, articulated in its memo in opposition, cannot be sincere, let alone compelling. A carefully articulated compelling state interest in encouraging political stability, ensuring the winner of an election will represent a majority of the community, providing the voter with an understandable ballot, enhancing voter education in fostering informed and educated expressions of the popular will in a general election, all undermine the alleged interest to discourage voting by party affiliation.

In fact, the evidence will show at trial that the most important information a voter can have in the voting booth is party affiliation. Voters routinely skip judicial elections in Ohio because there is no party affiliation to educate the voter. The evidence will show that voters cast votes in contested partisan races and on issues at a much higher rate than they vote on contested nonpartisan judicial elections. For example, in Hamilton County, Ohio in 2008, 425,086 votes were cast in the presidential race. There were 372,023 votes cast in the contested partisan county treasurer race (which was low on the partisan ballot), indicating a drop-off in voting of 10.71%. In the Supreme Court contested non-partisan race (which was high on the nonpartisan ballot) only 315,520 votes were cast, which indicates a drop-off in voting of 26.45%. Seven different issues appeared even lower on the ballot than the judicial races, but in all seven issues, the votes cast were significantly higher than in the judicial elections (drop-offs ranged from 4.23% on a casino amendment to 16.19 % on a Cincinnati charter amendment changing the electoral process for members of council). See PX-22 and PX-15.

Therefore, given the importance of voters needing to be educated in the voting booth, and the State's interest in voter education and ensuring the winner of an election will represent a majority of the community, the State cannot have any interest, let alone a compelling interest, in discouraging votes based on party affiliation.

In *Washington State Grange v. Washington State Republican Party*, the Supreme Court emphasized the important role ballots play at the voting booth. 552 U.S. 442 (2008). In *Washington State Grange* political parties challenged a new voting system that allowed candidates to self-designate their party preference on the primary ballot. The political parties challenged the law as a usurpation of the party's right to nominate its own candidates and forced them to associate with candidates they did not endorse. The Supreme Court upheld the law finding that the law was not a party nominating law and thus did not infringe on the parties' rights. Plaintiffs argued their associational rights were nevertheless burdened because voters would assume the candidates were the parties' nominees. Again, the Supreme Court rejected this argument, finding that it was speculative since no ballot had yet been printed showing candidate preference. *Id.* 552 U.S. at 454. In his concurrence in *Washington State Grange*, Justice Roberts noted that the ballot plays a special role in elections. He stated that voter perceptions matter. *Id.* at 460. The candidates are making their party preference known on the ballot. And the ballot plays a special role in elections because of its effect on voter impressions. The ballot is "the last thing the voter sees before he makes his choice." *Id.* Thus, the Supreme Court recognizes that the State has an interest in making sure that the ballot not mislead voters. The Court also recognizes that the candidate has an interest in making their party preference known on the ballot and the voter has an interest in the ballot since

the ballot will make an impression on him right before he chooses who to vote for. All of these interests support the States' interest in voter education. Such a compelling state interest directly contradicts and undermines Ohio's asserted interest in discouraging voting based on a candidate's party affiliation.

Defendants claim that *Timmons v. Twin Cities Area New Party* 520 U.S. 351, 358 (1997) stands for the proposition that restrictions on ballot designations are valid because they do not impose "severe burdens" on First Amendment rights. But this broadly overstates the holding of *Timmons* and misconstrues the facts that were at issue. One of the central holdings of *Timmons* is that where state election laws impact First and Fourteenth associational rights, courts must weigh "the character and magnitude" of the burden that the state law imposes on those interests versus the state's purported interests used to justify the burden and the extent to which the burden is necessary. *Id* at \_\_\_\_\_. The Court also found it wise in *Timmons* to warn that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Id.* at 358-359; *see also Storer v. Brown*, 415 U.S. 724,730 (1974) ("[N]o litmus-paper test ... separat[es] those restrictions that are valid from those that are invidious.... The rule is not self-executing and is no substitute for the hard judgments that must be made"). Defendant's broad assertions as to the validity of any restriction on ballot designations ignore this simple warning that this is a fact-specific inquiry that requires analysis of the particular election law.

When the actual facts are examined, it also becomes evident that the ORC 3505.04 places a much more severe restriction on associational rights than did the laws in *Timmons*. At issue in *Timmons* was Minnesota's law on fusion ballots, which prevented

candidates from appearing on the ballot as a candidate of more than one party. *Timmons*, 520 U.S. at 353-354. The Court characterized the law only as a slight limitation on a party's ability to send a message to the voters and its preferred candidate because any party was "*able to use the ballot to communicate information about itself and its candidate to the voters*, so long as that candidate is not already someone else's candidate." *Id.* at 363 (emphasis added). This minor restriction was then weighed against a number of state interests, including the interest in avoiding voter confusion, promoting candidate competition, preventing electoral distortions and ballot manipulations, and discouraging party splintering and unrestrained factionalism. *See id.* at 364. In coming to its conclusion that the particular Minnesota law at issue was valid, the Court noted that it has "repeatedly upheld reasonable, politically neutral regulations *that have the effect of channeling expressive activit[ies] at the polls.*" *Id.* at 369 (emphasis added), quoting *Burdick v. Takushi*, 504 U.S. 428, 437-438 (1992).

The Ohio statute in this case, on the other hand, is a stark contrast from the law that was at issue in *Timmons*. Ohio holds a partisan primary for judicial candidates and then bars from the general election ballot any information regarding the results of that primary. That is, a voter cannot tell who won the Democratic primary or who won the Republican primary because party labels are forbidden by statute in the general election. The statute is an absolute bar to a party's ability to communicate information about itself to the candidates and voters through ballots, it harms the associational rights of voters by removing this critical piece of association-related information from the ballots, and it undermines the state's interest in ensuring that voters are fully informed. This goes well beyond channeling expressive activity in the polls, and essentially amounts to a desire to

ban or severely impair expression by both political parties and voters in the polls. Furthermore, Defendants cannot assert a multitude of state interests to support the Code, as Minnesota was able to do in *Timmons*; Defendants sole contention is that the state of Ohio has an interest in getting partisanship out of state elections. However, the important associational rights the Plaintiffs assert and the fact that any claim by a state that “it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism”<sup>2</sup> make clear that the purported interest asserted by Defendant is clearly outweighed and this law should be invalidated as an improper abridgement of Plaintiffs’ First Amendment rights.

Finally, the State argues that Ohio is not the only state in the union that has a partisan judicial primary and a non-partisan judicial general election. Doc. 14, p. 7 fn 1. However the State is wrong. Ohio is unique. The one state Ohio points to is Michigan, but Michigan does not hold partisan primary elections. Michigan holds primary party conventions. Mich. Comp. Laws § 168.392. Furthermore, the State of Michigan and Defendant Cordray, on behalf of the State of Ohio, filed an amicus brief in *Carey*, in with the two States asserted that “Ohio draws a distinction between the primary and general election seasons because it is currently the only State that selects its judges by partisan primaries and nonpartisan general elections.” *Carey v. Wolnitzek*, COA No. 08-6468, Brief of Ohio and Michigan as Amici Curiae, p. 30.

**b. The State may assert additional interests of avoiding voter confusion, overcrowded ballots, and clearly identifying an election winner, not of which are compelling interests in this case**

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<sup>2</sup> *Timmons*, 520 U.S. at 376 (J. Stevens, dissenting), quoting *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 228 (1989).

States have interests in manipulating the ballots to minimize voter confusion, prevent sloganeering on the ballot and eliminating problems in tabulating votes. However, none of those interests are served by the Ohio law. In this case Ohio's judicial elections scheme creates confusion, undermines its interest in voter education, and discourages participation in the general election, which undercuts Ohio's interest in majority support of winners.

In *Rosen* the Sixth Circuit held that an Ohio law prohibiting the placement of the party label "Independent" below the name of the candidate on a general election ballot violated the constitutional rights of the candidates and their supporters. *Rosen*, 970 F.2d at 176. The State asserted in *Rosen* that it had interests in preventing voter confusion, protecting integrity of the major political parties and producing a more manageable ballot. Although the Court did not apply a strict scrutiny test, it still found Ohio's interests were both "questionable" and "somewhat specious." *Id.* at 176-177. Denying the Independent label did not produce a shorter, smaller or more manageable ballot, and in any event those state interests did not outweigh the associational rights of the voter to cast a meaningful and effective vote. *Id.* at 177-178.

A state's interests in ballot layout were also rejected by the district court in *Devine v. State of Rhode Island*, 827 F Supp. 852 (D. R.I. 1993). In *Devine* three independent candidates were mistakenly listed under "Independents for LaRouche" on sample ballots. The state claimed that its process, which relied on alphabetization by political party or organization, supported impartiality. *Id.* at 862. It also asserted that the physical limitations of the ballot machines necessitated a certain style ballot, and that there was a need to avoid voter confusion. The district court followed the logic of *Rosen*,

The Sixth Circuit's finding that the failure to provide a “voting cue” to independent candidates burdens the First Amendment rights of independent candidates and their supporters, applies with equal force to the case at hand. If such a disparity between the labeling of recognized party candidates and independents amounts to a deprivation of constitutional dimension, then the potential *mislabeled* of candidate affiliations raises even more serious constitutional concerns.

*Id.* at 861.

### **C. Judicial Code of Conduct is Unconstitutional**

On August 11, 2010, the Ohio Supreme Court amended Code of Judicial Conduct Rule 4.4 to allow candidates to make a general request for contributions when speaking to an audience of twenty or more individuals and to sign letters soliciting contributions if the letters direct the contributions to be sent to the candidates’ campaign committee. *Rule 4.4(A)(1) and (2)*. The amended comment to the changes states that the limitations protect four interests:

(1) 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; (2) preserving both the appearance and reality of an impartial, independent, and noncorrupt judiciary; (3) ensuring the public’s right to due process and fairness; and (4) furthering the public trust and confidence in the impartiality of the judicial decision-maker.

*Comment 1.*

In order to protect the four interests, the Ohio Supreme Court limited the solicitation activities to appeals for contributions that appear to be “less personal and directed at a wider audience” than lawyers and parties. *Comment 1*. However, in *Wersal v. Sexton*, Case (July 29, 2010) the Eighth Circuit struck down solicitation rules that are identical to the amended rules adopted by the Ohio Supreme Court. Following the Court’s decisions in *White I* and *White II*, Minnesota amended its rules to allow judicial

candidates slightly more freedom to solicit. Minnesota Canon 4.2(B)(3) permitted a candidate to

(a) make a general request for campaign contributions when speaking to an audience of 20 or more people;

(b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.

*Id.* at Canon 4.2(B)(3).

Judicial candidate Wersal wanted to solicit money from non-attorneys by going door-to-door. The Court held that Minnesota's recusal rules were the least restrictive means of preventing the erosion of the public's trust in the judiciary. "[R]ecusal serves both to protect a litigant's due process rights and a candidate's right of speech through receipt of campaign contributions. Since "it is our law and our tradition that more speech, not less, is the governing rule," *Citizens United*, 130 S. Ct. at 911, we think the Constitution favors stricter recusal standards and fewer speech restrictions. Moreover, just as in *Citizens United*, the personal solicitation clause is a "categorical ban[]" on speech that [is] asymmetrical to preventing quid pro quo corruption." ' *Id.* at p. 29.

The Court rejected the claim that a candidate who did door-to-door canvassing would be able to intuit whether a person would contribute to his campaign, and even if the person contributed, it would be extremely unlikely that the candidate would remember such a "fleeting encounter" and improperly favor the donor in a hypothetical future case. *Id.* at p. 29. Wersal is consistent with the Sixth Circuit's decision in *Carey*.

The Supreme Court has determined that the only interest compelling enough to infringe upon the First Amendment rights of a candidate seeking an electoral office is the prevention of corruption or the appearance of corruption. *Federal Election Comm'n v.*

*National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). In *Suster v. Marshall*, (*Suster II*), *supra*, the Sixth Circuit struck down an Ohio judicial canon setting spending limits on judicial elections. The Court agreed that the prevention of corruption is the only interest that the Ohio Supreme Court had that was compelling enough to infringe upon the First Amendment rights of a candidate seeking an electoral office. *Id.* 532. But the state had no empirical evidence suggesting a link between campaign expenditures and actual corruption, instead relying heavily on polls showing that voters thought campaign spending limits would improve the fairness and integrity of the judiciary. The poll results were meant to address the state's interest in the *appearance* of an unbiased and fair judiciary. But the Court said that the study results indicated "voters wanted more information, not less." *Id.* at 532. The judicial canon was not narrowly tailored to address the state's interest in preventing corruption or its appearance.

Assuming that unlimited campaign expenditures are tied to corruption and some form of quid pro quo, a least restrictive means of redressing that problem, as stated by the district court, would be restricting campaign contributions, and/or mandating disqualification if violated. Simply put, there are other avenues available to Defendants to prevent corruption or the appearance of corruption, but, a limitation on campaign expenditures is not one of them.  
*Id.* at 535.

Although the Ohio Supreme Court amended Rule 4.4. in an effort to more narrowly tailor it to the state's interests in preventing corruption and ensuring judicial impartiality, the clause still serves as a content-based restriction which burdens core political speech. The solicitation rule cannot survive strict scrutiny because the revised rule does not further the state's compelling interest in preventing corruption. Judicial candidates are subject to Ohio campaign finance laws that promote transparency in

campaign contributions and address the corruption concerns raised by the Ohio Supreme Court in its comment. See *R.C. 2921.02*, making bribery and improper influence crimes; *R.C. 3517.091*, requiring persons soliciting campaign donations door to door to give person being solicited written notices; *R.C.3517.11*, *3513.259* requiring financial disclosure statements to be filed with the Secretary of State; *R.C. 3517.10 (C)(2)*, prohibiting campaign contributions by anonymous donors; *R.C. 3517.13(O)*; *OAC 111-1-03*, requiring itemizations of loans or contributions by the candidate to his own campaign ; *R.C. 3599.03*, prohibiting corporate funds from being given to a candidate or his committee; *R.C. 3517.092*, prohibiting statewide candidates from soliciting or accepting a contribution from employees whose appointing authority is or would be that public official or who are or would be employed by the same public agency, department, division or office as the official; *R.C. 3517.105(D)*, requiring any expenditure by a political party for the purpose of financing communications advocating the election or defeat of a candidate for judicial office to be reported by the political party as an independent expenditure on form 31-U and not as an in-kind contribution.

Amended Rule 4.4(A)(1) and (2) are unconstitutional.

### **III. CONCLUSION**

Plaintiff seeks an order declaring O.R.C. § 3505.04 and O.R.C. § 3501.01(J) unconstitutional and directing SOS Brunner to place all judicial elections on the Office Type Ballot in the proper position and to issue a directive to all county boards of elections to do the same.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2010, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

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