

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

<b>OHIO COUNCIL 8 American Federation of State, County and Municipal Employees, AFL-CIO, et al.</b>	:	<b>Case No. 1:10-CV-504</b>
	:	
	:	<b>Judge Susan J. Dlott</b>
	:	
Plaintiffs,	:	<b><u>PLAINTIFFS'</u></b>
	:	<b><u>SUPPLEMENTAL RESPONSE</u></b>
vs.	:	<b><u>TO ISSUES RAISED BY THE</u></b>
	:	<b><u>COURT</u></b>
	:	
<b>JENNIFER BRUNNER, et al.</b>	:	
	:	
Defendants.	:	

This Court held a hearing on the Plaintiffs’ Motion for TRO/Preliminary Injunction on August 13, 2010. At the conclusion of testimony the Court posed four questions to counsel for the parties. Given the late hour on Friday and the long day of testimony the oral presentation at that time did not include all of the points that should be made with respect to the excellent questions posed by the Court. This memo simply supplements the response of Plaintiffs’ to these questions. Plaintiffs obviously have no objection if defendants choose to file a similar memo.

**ISSUES RAISED BY THE COURT**

- **The State's asserted interest in enacting 3505.04 is to diminish voters' reliance on political parties in the general election. Why does the State distinguish the general and primary elections this way, and how does the State reconcile the need for nonpartisan general elections with the fact that judicial candidates run in partisan primaries and are now permitted to identify themselves as a member of or endorsed by a political party?**

A nonpartisan election is a competitive election in which neither candidate’s partisan affiliation is placed on the ballot. A partisan election is one where the candidates are listed on the ballot along with a label designating which political party they are

affiliated with. An election cannot be partisan and nonpartisan at the same time. The existence of a partisan primary and nonpartisan general election is not a “grand compromise.” It is a legal fiction.

Ohio insists that its system of electing judicial candidates, which purports to be half partisan and half nonpartisan, balances the right of political parties to participate in judicial elections while at the same time diminishing the voters’ reliance on political parties. However, the range of partisan activities that a candidate is allowed to engage in throughout the campaign undermines the State’s claim that party labels must not appear on the general election ballot. The State hides the candidate’s party affiliation only during the election’s final act – when the voter marks his ballot. Nonpartisan judicial elections do not exist in Ohio.

#### **Discouraging reliance on political parties**

Ohio’s main justification for the half-and-half system is that it discourages judicial candidates from appearing beholden to political parties. The claim that the ballot restriction limits the influence of political parties on judicial elections is a myth. In reality, the State invites judicial candidates to rely on political parties to wage a successful campaign. Plaintiffs’ witnesses testified that judicial candidates depend on party apparatus in order to obtain enough signatures to get on the primary ballot (Allen, Corrigan), raise enough money to win contested primaries (Corrigan), raise funds to win the general election (even if uncontested), participate in party-sponsored advertising to promote their candidacy (Corrigan, Allen, Brown, Twigg) and recruit volunteers to work at the polls on election day (Corrigan, Allen, Brown, Twigg). After this lawsuit was brought, the State expanded the range of partisan activities that are permitted during the

general election. Judicial candidates can now advertise as members of political parties and directly solicit funds during gatherings of more than twenty people. The large gatherings are highly likely to be party-sponsored events. The State encourages all of this partisan activity.

During the hearing, the State agreed with Plaintiffs that voters are entitled to know the extent of partisan participation in judicial elections. The State listed other acceptable ways that voters could be informed about the party affiliation of judicial candidates. Ohio said that voters can learn about the party affiliation on the primary ballot, review slate cards produced by political parties identifying the candidates as party nominees and even enter the voting booth with a sample ballot showing the candidate's party affiliation. These facts do not bolster Ohio's claim that it has a strong interest in keeping the general election nonpartisan.

The State argued that it simply does not want voters to see a partisan cue on the general election ballot because voters should not be burdened with partisan information inside the voting booth. The state interest in keeping the party label off the general election ballot fails to satisfy any constitutional standard for restricting speech. Plaintiffs' witnesses established that the State's restriction burdens the broadest range of individuals, the people who vote in the general election. Censoring information about party affiliation leads to significant drop off once voters reach the nonpartisan section of the ballot (Allen, Good, Twigg, Margolis). The only place Ohio gives political parties a limited role in judicial elections is on the ballot where voters select the winner.

### **Appearance of Impropriety**

The State argues that it must hide the candidate's party affiliation on the last day of the election in order to avoid the appearance of impropriety. However, as *Carey* observed, "[i]f concern over judicial partisanship and the influence of political parties on judging truly underlies the [party affiliation] clause, the authorization to belong (secretly) to a political party amounts to a gaping omission. A party's *undisclosed potential influence on candidates is far worse than its disclosed influence*, as the one allows a full airing of the issue for the voters while the other helps to shield it from public view." Emphasis added. *Carey v. Wolnitzek*, 2010 WL 2771866 at \*10 (6<sup>th</sup> Cir. 2010).

The ballot restriction does not address impropriety or its appearance. The presence of the party label "R" or "D" has no bearing on the judges' ability to rule fairly and impartially. The State has not claimed that judicial candidates are forbidden from membership and participation in political parties. The State also failed to present evidence showing that the presence of party labels creates a strong appearance of judicial bias toward political parties. If the State's interest is in preventing potential judges from commingling with party politics, then the ballot restriction is woefully underinclusive, since the candidates are otherwise permitted to fully participate in party politics. The State suggests that voters find the judicial system mysterious and that there is something unseemly about judges running for election. (See repeated questions about judges being uncomfortable campaigning and raising money). But Ohio law provides for election of judges. The voters clearly agree, having voted twice to reject replacing judicial election with a merit system. The censored general election ballot severely burdens the voters' interest in casting meaningful votes.

- **What would be the practical effect of an order by this Court finding the statute unconstitutional? Would it throw into disarray the election of the nonpartisan administrative and legislative positions that are not directly at issue here, and how do you distinguish judicial candidates from other nonpartisan candidates for office?**

**The injunction only applies to judicial candidates**

This lawsuit seeks to enjoin the State from placing judicial candidates on nonpartisan general election ballots after having won a partisan primary. Judicial candidates are unique in that they run in a partisan primary followed by a nonpartisan general. No other Ohio candidates who appear on the nonpartisan general election ballot run in a partisan primary. State law currently allows all candidates who were nominated during a primary election to have their party affiliation listed under their name:

Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy under section 3513.31 of the Revised Code shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified.

R.C. 3505.03.

The Plaintiffs are requesting an injunction compelling the State to comply with R.C. 3505.03 by listing the party affiliation of judicial candidates who were nominated through a partisan primary. Under Ohio law, candidates who won partisan primaries must appear on the partisan office-type ballot. The State is concerned that this lawsuit will turn the general election ballot into a billboard for political expression. But Ohio law expressly prohibits designations or slogans that are not party labels:

Except as provided in this section, no words, designations, or emblems descriptive of a candidate or the candidate's political affiliation, or indicative of the method by which the candidate was nominated or certified, shall be printed under or after a candidate's name that is printed on the ballot.

R.C. 3505.03.

Ohio claims that if the party labels of the primary winners are placed on the ballot, candidates will be able to start new political parties that contain slogans in their name in order to communicate their message on the ballot. The State cites cases where candidates tried to get on the ballot as a third party called “Not the White Man’s Bitch,” or with the occupation “Peace Activist” under the candidate’s name. The hypothetical Ohio gubernatorial candidate who wants to appear on the general election ballot with the party label “No New Taxes” will still be restricted by all of the State’s procedures for qualifying for the ballot. Unlike the third party ballot access cases, Plaintiffs are not seeking to change the procedures for qualifying for the ballot. Plaintiffs complied with all of the State’s requirements and won the political primary for their seats. They simply want the State to place their party label on the ballot the same as their legislative and executive counterparts. As to other allegations of chaos, the labels “Republican” and “Democrat” already appear on the general ballot. The presence, on the general election ballot, of those same labels next to the judicial primary winners will not create confusion by the voter or chaos in the system.

**Other nonpartisan races are unaffected**

If the Court issues a preliminary injunction requiring judicial candidates to be correctly listed on the general election ballot, the other nonpartisan races will be unaffected. Unlike judicial candidates, candidates for the boards of education, municipal and township offices are not nominated through partisan primaries:

On the nonpartisan ballot shall be printed the names of all nonpartisan candidates for election to judicial office, office of member of the state board of education, office of member of a board of education, municipal or township offices for municipal corporations and townships in which primary elections are not held for nomination of candidates by political parties, and municipal offices of municipal

corporations having charters which provide for separate ballots for elections for such municipal offices.

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.

R.C. 3505.04. The injunction would order the State to place the judicial candidates in the proper section of the ballot – with the partisan races. The other nonpartisan races belong on nonpartisan ballots.

- **The Supreme Court has stated that ballots serve primarily to elect candidates, not as a fora for political expression. That's the *Timmons* case from the Supreme Court in 1997. How do you respond to the argument that the ballot is the State's speech, not the candidate's?**

*Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), is not applicable to the present case. *Timmons* says only that a state may limit candidates to only one political party label on the ballot. The candidate, Andy Dawkins, won a partisan primary and appeared on the ballot as the nominee of the Democratic Farmer Labor Party (DFL), which is classified as a major political party in Minnesota. However, the New Party also nominated Dawkins and wanted him listed as a New Party candidate on the ballot in addition to his listing as the candidate of the major DFL party.

The Court was strongly influenced by the fact that the plaintiff was a minor third party. Minnesota's anti-fusion law was upheld because the state had a legitimate interest in preventing third parties from "bootstrap[ing] their way to major party status in the next election and circumvent[ing] the State's nominating petition requirement for minor parties." *Id.* at 366. The New Party did not nominate Dawkins through a political primary.

When third party ballot access cases involve a challenge to two-party dominance of the political system, states have other legitimate interests, including promoting the stability of the two-party system. That is simply not a factor here. The Plaintiffs include the Democratic Party and the candidate plaintiffs are members of that party. They are part of the political establishment and have complied with all of the State's requirements for appearing on the partisan ballot. Unlike the candidate in *Timmons*, the candidate Plaintiffs won their Democratic political primaries. The Court did say that "Ballots serve primarily to elect candidates, not as forums for political expression." *Id* at 363. But that was not the constitutional test applied by the Court. Rather the Court assessed the burden on the associational rights of the New Party, "[the fusion restrictions] limit, slightly, the party's ability to send a message to the voters and to its preferred candidates." *Id*. This burden was described as "not severe." *Id*. Without a severe burden the state needed to only to present interests that were "sufficiently weighty to justify the limitation imposed on the party's rights." *Id*. at 364. Unlike the facts in *Timmons*, here the burden is very severe. And that burden is suffered by the major parties, including the Plaintiff Democratic Party. The evidence shows that substantial drop off occurs when the major party partisan primary winners are not identified by their partisan party label on the general election ballot. The State of Ohio organized, sponsored, regulated and certified the results of the partisan primary system for selecting the major party judicial candidates. Unlike *Timmons*, Ohio can assert no interest to justify the burden on the Plaintiff Democratic Party, its member voters and candidates that equals in any respect the interest of Minnesota in regulating minor parties who seek to add their label to a candidate already identified on the ballot as the candidate of a major party.

Indeed, absent the concern for regulating ballot access for minor parties the only valid state interest actually supports adding the party label to the general election ballot. “To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986).

- **The Ohio Revised Code statute that has been referred to all day, that was challenged in 1992 in the *Haffey* case and found constitutional. That was Judge Kinneary's decision. Why should this Court now find it unconstitutional? What has changed?**

*Haffey v. Taft*, 803 F.Supp. 121 (S.D. OH 1992) did not uphold Ohio’s half-and-half partisan system for electing judges. It was framed as a challenge by an unaffiliated candidate who wanted to be listed on the general election ballot as an “independent.” He had not participated in the state sponsored partisan judicial primary. He had not won a primary for the seat. He did not request that the major party candidates have their party labels added to the general election ballot. Indeed, he did not challenge the system of holding a partisan primary and then a non partisan general election. He simply wanted the label “independent” in the general election since he had not been involved in a primary.

Unlike the instant case, there were no voters or political parties as plaintiffs, there was no analysis of the interests of voters and political parties, there was no analysis of the interests of a partisan primary winner, and there was no expert testimony. Nor was there an extended analysis of the state’s interest. Moreover, the decision came very early in the case (only seventeen days after the case was filed) and Judge Kinneary ruled both that a preliminary injunction should not be issued *and* that the State’s motion to dismiss would

be denied. The judge noted that the process of printing the November election ballots “was nearly complete” and that reprinting “would lead to chaos.” *Id.* at 126. In short, there was not enough before him to disrupt the status quo but he left the door open for the plaintiff to develop facts to pursue his claim. It appears that the plaintiff did not pursue the case further. This half hearted effort by a single independent candidate is not controlling in this case.

Haffey was one of three candidates running for election to the Ohio Supreme Court. The Republican and Democratic candidates had appeared on the primary ballots along with their party labels. Haffey entered the race as an Independent. Shortly before the general election he asked the Secretary of State to place on the general election ballot Haffey’s non-party affiliation, as a way to distinguish himself from the Democrat and Republican primary winners. The Secretary of State refused, citing O.R.C. § 3505.04 as prohibiting any party labels on the general election ballot for nonpartisan candidates. Haffey alleged that he was irreparably harmed by Ohio’s refusal to put his non-affiliation on the general election ballot. But Haffey offered no evidence of injury. *Id.* at 125. The Court held that 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. Applying the *Anderson* balancing test, the State’s interest were held to outweigh the candidate’s interest. *Id.* 125-126.

In this case, three types of Plaintiffs (major political party, voters, and candidates) each have a significant interest that is heavily burdened by the State . Burdens of this magnitude require a compelling state interest and none is present on this record. (Doc.

35). Moreover, as set out in response to the first question addressed above, the alleged state interest in keeping “politics out of the general election” *Haffey* at 125, no longer has much (if any) weight, “If concern over judicial partisanship and the influence of political parties on judging truly underlies the [party affiliation] clause, the authorization to belong (secretly) to a political party amounts to a gaping omission. A party’s *undisclosed potential influence on candidates is far worse than its disclosed influence*, as the one allows a full airing of the issue for the voters while the other helps to shield it from public view.” Emphasis added. *Carey v. Wolnitzek*, 2010 WL 2771866 at \*10 (6<sup>th</sup> Cir. 2010). In light of this strong statement from the Sixth Circuit, hiding the candidate’s party affiliation on the only document every voter sees, the general election ballot, fails to serve a substantial government interest and is certainly neither compelling or narrowly tailored.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 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.

/s/ Alphonse A. Gerhardstein  
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