

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

OHIO COUNCIL 8 American	:	Case No. 1:10-CV-504
Federation of State, County and	:	
Municipal Employees, AFL-CIO, et al.	:	Judge Susan J. Dlott
	:	
Plaintiffs,	:	<u>PLAINTIFFS SUPPLEMENTAL</u>
	:	<u>BRIEF SUPPORTING</u>
vs.	:	<u>CHALLENGES TO</u>
	:	<u>RESTRICTIONS ON</u>
JENNIFER BRUNNER, et al.	:	<u>SOLICITATION</u>
	:	
Defendants.	:	
	:	

INTRODUCTION

After plaintiffs filed this case the defendant Ohio Supreme Court modified the rules. Effective August 12, 2010, the Defendant Ohio Supreme Court amended the Code of Judicial Conduct. The Code now permits judicial candidates to advertise and publicly state their political affiliation through the day of the general election. The Code continues to restrict candidates from personally soliciting or receiving financial contributions. After the hearing on August 13, 2010 this court invited the parties to make a closing argument but the ensuing discussion was limited to the questions posed by the Court related to the challenge to ORC §3505.04. Plaintiffs now respectfully submit this short memo as their closing argument regarding their challenge to the Code restrictions on solicitation. Plaintiffs have no objection should defendants seek to file a similar memo.

I. Rule 4.4(A) Severely Burdens Speech of Judicial Candidates in a Substantial Number of Applications; is Not Narrowly Tailored and is Facially Overbroad

Judicial Conduct Rule 4.4(A) previously prohibited a judicial candidate from any direct solicitation of campaign contributions. Rule 4.4, as amended, now permits

candidates to directly solicit contributions when speaking before groups of twenty or more. Candidates may also sign fund raising letters from their campaign committee that go to large numbers of persons. Candidates may only accept contributions through a campaign committee. Additionally, candidates may not accept contributions from their political party unless such funds were specifically established by the party solely for judicial candidates. Rule 4.4. All judicial candidates must comply with the Ohio Code of Judicial Conduct when engaging in campaigns for elections to office. Consequently, these rules all apply to Plaintiffs Corrigan, Allen, and Good.

The Ohio Supreme Court enacted the Code, and Defendant Disciplinary Counsel has authority to investigate, file a complaint and prosecute a complaint of violation of the Code's provisions. Supreme Court Rules for the Government of the Judiciary of Ohio ("Gov. Jud. Rule") Rule II § 2(A). The Code provisions related to judicial campaigns may also be enforced by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ("Board"). Gov. Jud. Rule II § 5. However, The Supreme Court of Ohio is the ultimate arbiter of any sanction for violation of the Code's provisions. Gov. Jud. Rule II § 5(E). Sanctions include fines, public reprimand, suspension, removal from office, and disbarment. Gov. Jud. Rule II § 5(D)(1)(a)-(e) and Gov. Bar R. V § 6.

At the hearing, the State argued that the Plaintiffs' challenge to Rule 4.4 must fail because the Plaintiffs cannot show that it is facially overbroad. Traditionally a piece of legislation will only be declared facially unconstitutional where "there truly are 'no' or at least few 'circumstances' in 'which the Act would be valid.'" *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, where the allegation is that the enforcement of the legislation may "deter people from engaging in constitutionally protected speech," the

law should be facially invalidated if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010) citing *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 449 (2008). Because Plaintiffs have successfully shown that applicable provisions will apply in a number of circumstances to deprive many differently situated individuals of their constitutionally protected right to speech, the provisions are unconstitutional on their face.

Judicial candidates are required to attend a seminar explaining the legal and ethical rules they must follow during judicial elections. The evidence showed that the rule, the comments, and the seminar materials (Def. Ex. 3) – when applied to common campaign activity – prevent constitutionally protected solicitation from taking place in a substantial number of situations that the judges face during their campaigns:

- When people approach Plaintiff Allen and ask if they can give money to her campaign, she is prohibited from accepting the donation because of the anti-solicitation rule. The rule also prevents her from giving the donor a remittance envelope with the address of the campaign committee. Plaintiff Allen can only give the donor the address of the treasurer of her campaign committee.

- Plaintiff Corrigan testified that he many not tell people how to make contributions. He also testified that he cannot send thank you notes to donors that ask for the donor’s continued support because they could be interpreted as another appeal for money.

- Plaintiff Corrigan attends ward meetings, church festivals, and parades, conducts door to door canvassing, and attends other functions at which he seeks to approach potential voters, shake hands, discuss his qualifications, ask for their support as campaign

volunteers and ask for their financial support. He meets hundreds of people in this fashion. The Code prevents him from asking any of these potential donors for financial support.

- Plaintiff Corrigan stated that he is prohibited from handing out a flyer that contains the URL of his campaign website because the website asks visitors to make a campaign contribution. He would like to place the URL on all of his handouts.

- Plaintiff Good testified that she would like to solicit and receive donations from her family members. She cannot ask her children or her mother to donate to her campaign. (Plaintiffs Corrigan and Allen also want to solicit and receive donations from friends and family)

- Plaintiff Allen said she is very concerned when someone approaches her unsolicited and offers a campaign contribution. She is concerned that in such instances it could be a setup for an ethics complaint. Allen fears that even responding to an unsolicited offer of money could expose her to an ethics investigation and eventual suspension, removal or public reprimand.

- Plaintiff Good testified she would want to hand out contribution envelopes to people attempting to donate money but believes to do so would be an ethics violation. Defendants submitted the affidavit of Richard Dove (Def. Ex. 1) which actually supports Prof. Good's interpretation of the rule. Mr. Dove testified he has told seminar participants, in answer to a private question, asked after the conclusion of the seminar, that envelopes may be handed to a potential donor. However, no such permission is given in the seminar materials (Def. Ex. 3) or in writing. As Prof. Good testified, unless it is in writing, she would not do it for fear of an ethics charge being filed.

The facts demonstrate that the Plaintiffs’ speech is chilled by the anti-solicitation rules and that there are hundreds of situations – clearly a substantial number – where the code prevents candidates from engaging in constitutionally protected conduct. A rule that has a laudable purpose but sweeps many constitutionally protected applications into a ban is overbroad. That has been the fate of many solicitation bans in other states. *Wersal v. Sexton*, No. 09-1578 (8th Cir. July 29, 2010) (MN rule facially unconstitutional to that prohibited direct soliciting even though judicial candidates could appear before groups of 20 or more donors and sign fundraising letters); *Weaver v. Bonner*, 309 F. 3d 1312, 1322-23 (11th Cir. 2002) (GA ban on personal solicitation by judicial candidates violates First Amendment); **but see contra** re Wisconsin rule, *Siefert v. Alexander*, No. 09-1713 (7th Cir. 6/14/10).

II. Amended Rule 4.4 is not Constitutional under *Carey*

In *Carey v. Wolnitzek*, 2010 WL 2771866 (6th Cir. 2010) the Sixth Circuit held that the Kentucky ban on personal solicitations by judicial candidates was overbroad. The State claims that the Ohio Supreme Court’s revised Rule 4.4 tracks the Sixth Circuit’s opinion in *Carey* because the revised rule allows candidates to solicit funds during large gatherings and personally sign mass mailing campaign letters requesting donations. While it is true that *Carey* suggested that those two restrictions posed little risk of coercion or opportunity for quid pro quo between the candidate and donor, those examples did not exhaust the range of constitutional applications improperly barred by the Kentucky rule. The Court did not hold that a hypothetical ban on direct, one-on-one fundraising was constitutionally permissible.¹ “[W]e do not decide today whether a State could enact a narrowly tailored solicitation

¹ “But even if we grant the Commonwealth’s premise—that in-person solicitations always lead to more immediate information about donations or rejections—that suggests only that the solicitation clause *may* be constitutional in some settings.” *Carey* at *23

clause—say, one focused on one-on-one solicitations or solicitations from individuals with cases pending before the court—only that this clause does not do so narrowly.” *Id.* at *23. Similarly, here, shaking hands and asking for support, one on one, from voters during door to door canvassing, at festivals, parades, picnics and public events or asking family, friends, colleagues, former classmates, and neighbors for support present additional, common campaign activities that are improperly banned under the Ohio rule. Judge Sutton did not say that the prohibition on personal appeals for money was narrowly tailored to satisfy the state’s interest in preventing corruption. If anything, Judge Sutton was implying that in order for a solicitation ban to be narrowly tailored to address the state’s interests in preventing *actual* corruption, it should to apply to litigants who had cases pending in court.

As to one-on-one solicitations, there are many different scenarios where fundraising occurs. The Amendments to Rule 4.4 lifted some restrictions on judicial candidates’ speech, but the rules still unconstitutionally restrict Plaintiffs’ speech in many instances:

- Plaintiff Good testified that she has held three fundraisers during her current campaign. Each was attended by fewer than twenty people. Under the amended Rule 4.4, Good is not allowed to ask for contributions from anyone attending the fundraiser, even though they are ostensibly there for the purpose of raising money.

- Plaintiff Corrigan testified that he would like to ask for donations directly from individuals. Under the amended Rule 4.4(A) Corrigan cannot ask for financial support from people he meets at church festivals, voter forums and fundraisers. Corrigan testified that people are more likely to donate money when a candidate makes a personal appeal. But Rule 4.4 does not allow judges to make personal connections with voters.

- Plaintiff Good also testified she could not make phone calls, ask people face to face, hand out flyers, hand out donation/volunteer envelopes or send emails to potential

donors such as former classmates, colleagues, or neighbors. She is prohibited from doing all of this.

Rule 4.4 may legitimately prohibit fundraising in some scenarios but unconstitutionally burden candidates' free speech in others. Plaintiffs Corrigan and Good described very common situations where the risk of quid pro quo or coercion was minimal or nonexistent. Should the State be able to prohibit Good from asking for a contribution from her mother? Or from the members of her own campaign committee? Plaintiff Corrigan wants to hand people a flyer about his campaign and ask for their support. Is there really a risk that Corrigan's brief encounter with that citizen creates a risk of quid pro quo or the perception of corruption?

The reach of Rule 4.4 simply sweeps too broadly to achieve the State's goal of preventing corruption and its appearance. Ohio claims that requiring candidates to raise money from a surrogate, i.e. a campaign committee, alleviates the risk that the candidate will favor or penalize future litigants based on whether they make campaign contributions. But as the Sixth Circuit observed in *Carey*, the candidate will still learn who made donations and how much they gave. The candidate's committee can directly solicit individuals. Plaintiff Corrigan testified that one-on-one solicitation minimized the potential for corruption because then the candidate would be personally responsible and could not hide behind his committee. In that sense direct solicitations promote greater accountability and transparency in elections.

III. There is no Risk that the Judges will Abandon their Ethical Duties

The State alleged that if the code provisions are struck down, judges would be free to solicit contributions from the bench, while court is in session. All three Plaintiff judicial candidates testified that they would never do such a thing. A rule limiting such solicitations would clearly be constitutional. Moreover, as Plaintiff Allen testified, other

provisions of the Judicial Code of Conduct prohibit that type of activity.² Although raising money for elections can be uncomfortable, judges need money to fund their campaigns. Corrigan noted that judicial candidates are bound by strict canons ensuring integrity and impartiality. They are prevented from soliciting from staff. Their staff are prohibited from soliciting or receiving campaign contributions. They are subject to contribution limits. Donations are limited to \$3,400 per person in Supreme Court races, \$1,100 per person in court of appeal races and \$575 per person in all other.³ Rule 4.4(J). They are subject to mandatory disclosure of all contributions. These rules limit the public perception that there is a quid pro quo between candidates and donors. All of the candidate plaintiffs stated that they would recuse themselves if there was ever a perception of impropriety because of a donation. Moreover, all said they would not solicit or let their staff solicit campaign funds at the courthouse. In short, there are narrower means to available to regulate solicitations and the revised rule continues to sweep too broadly.

For these reasons, the Amended Rule 4.4 unconstitutionally restricts judicial candidates' speech and should be held to be unconstitutional.

Respectfully Submitted,

/s/ Alphonse A. Gerhardstein

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² Laws against bribery might also be implicated on those facts.

³ Family, as defined by Rule 4.6 (C) may give unlimited donations.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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
Attorney for Plaintiff