

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

OHIO COUNCIL 8 AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, et al	:	
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	:	
	:	
Plaintiffs,	:	Case No. 1:10-cv-00504-SJD
	:	
v.	:	Judge Susan J. Dlott
	:	
SECRETARY OF STATE JENNIFER BRUNNER, et al	:	
	:	
	:	
Defendant.	:	

**INTERVENOR-DEFENDANT OHIO ATTORNEY GENERAL RICHARD CORDRAY’S
SUPPLEMENTAL RESPONSE TO ISSUES RAISED BY THE COURT**

Intervenor-Defendant Attorney General Richard Cordray respectfully submits the following supplemental responses to the four questions posed by this Court at the August 13, 2010, hearing.

ISSUES RAISED BY THE COURT

I. 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?

Contrary to plaintiffs’ claims, Judge Kinneary’s analysis of the First Amendment issues in *Haffey v. Taft*, 803 F. Supp. 121 (S.D. Ohio 1992), was exactly right. He correctly recognized that a judicial candidate has no First Amendment interest in having his political affiliation displayed on the election ballot. That holding was reinforced by the Supreme Court’s decision in

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), and *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

When reviewing the constitutionality of a state election law, the Court must first assess “the extent to which [the] challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In *Haffey*, the plaintiff argued that Ohio Revised Code § 3505.04 violated his First Amendment rights because it “denie[d] him the ability to inform the electorate of his nonaffiliation.” 803 F. Supp. at 125. The judicial candidates in this case make an identical claim about the inability to inform the electorate of their affiliation: “Depriving the judicial candidate of conveying such an important qualification is a heavy burden” on her “First Amendment right of expression.” (R.35, p.9).

Judge Kinneary correctly held that § 3505.04 did not burden the judicial candidate’s First Amendment rights because “the ballot is not a vehicle for communicating messages; it is a vehicle only for putting candidates and laws to the electorate.” *Haffey*, 803 F. Supp. at 125 (internal quotation and citation omitted). The Supreme Court held the same in *Timmons*: “Ballots serve primarily to elect candidates, not as fora for political expression.”

Undeterred, plaintiffs cite to the presence of the Ohio Democratic Party and voters—two plaintiffs who were not present in the *Haffey* litigation. Although Judge Kinneary did not consider the interests of these two groups, the Supreme Court has. With respect to political parties, the Supreme Court has stated that “[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot.” *Washington State Grange*, 552 U.S. at 453 n.7.

The Supreme Court has also held that voters, candidates, and parties have the *same First Amendment interests* in ballot access. See *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983)

("[V]oters can assert their preferences only through candidates or parties or both."); accord *Cook v. Gralike*, 531 U.S. 510, 531 (2001) (Rehnquist, C.J., and O'Connor, J., concurring) ("Our ballot access cases based on First Amendment grounds have rarely distinguished between the rights of candidates and the rights of voters."). Because candidates and the Ohio Democratic Party have no First Amendment right in having partisan designations on the ballot, the voters also have none.

For these reasons, Judge Kinneary's holding in *Haffey*—that a candidate's desire to have his political affiliation displayed on the ballot did not burden any First Amendment interest—is as valid today as it was in 1992. Therefore, because plaintiffs have identified *no expressive or associational impairment* in this litigation, they cannot prevail under the *Burdick* balancing test.

II. 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?

Plaintiffs' response does not answer the question posed by this Court—is the ballot the State's speech, or the candidate's speech? Their silence is telling.

In *Timmons*, the Supreme Court stated unequivocally that "[b]allots serve primarily to elect candidates, not as fora for political expression." In other words, the ballot is *State* speech. The Sixth Circuit too has confirmed that ballot designations are "simply *government provided information* designed to inform voters of the political party affiliation of each candidate." *Rosen v. Brown*, 970 F.2d 169, 177 (6th Cir. 1992) (emphasis added). That characterization destroys plaintiffs' First Amendment speech claim because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 125 S. Ct. 1125, 1131 (2009).

Plaintiffs instead fall back on their Free Association claim, asserting that § 3505.04 imposes a “very severe” burden on their right to associate with the political party of their choice. (R.41, p.8). *Timmons* undercuts that argument as well.

The Supreme Court identified the following “severe” burdens on the right to associate: (1) when a State “directly preclude[s] . . . political parties from developing or organizing”; (2) when a State “exclude[s] a particular group of citizens, or a political party, from participation in the electoral process”; (3) when a State “restrict[s] the ability of [a political party] and its members to endorse, support, or vote for anyone they like”; and (4) when the State “directly limit[s] the Party’s access to the ballot.” *Timmons*, 520 U.S. at 361, 363. The State of Ohio has done nothing of this sort here. The Ohio Democratic Party is participating fully in Ohio elections. It has placed a number of judicial candidates on the ballot (including the three plaintiff-candidates here); and it is free to endorse publicly and support financially those candidates in the upcoming campaign. For their part, candidates and voters are free to associate with and proclaim their fidelity to the Party.

By contrast, the Supreme Court said the following about restrictions on ballot designations: “That a particular individual may not appear on the ballot as a particular party’s candidate *does not severely burden that party’s associational rights.*” *Id.* at 359 (emphasis added). Because § 3505.04 simply precludes candidates from “appear[ing] on the ballot as a particular party’s candidate,” it does not “severely burden” anyone’s association rights.

Simply put, *Timmons* is fatal to plaintiffs’ repeated claim that § 3505.04 constitutes a “heavy burden” on their First Amendment rights to free speech and free association.

III. 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?

Plaintiffs respond that they “simply want the State to place their party label on the ballot the same as their legislative and executive counterparts.” (R.41, p.6). They say that “the other nonpartisan races will be unaffected” by the Court’s injunction. True enough; the Court can limit the scope of its injunction to judicial races. But plaintiffs’ response ignored the Court’s question—what is the “*practical effect*” of a ruling for the plaintiffs?

That practical effect would be considerable. Plaintiffs have argued that their “partisan credential . . . is part of the speech the candidate presents to the public as he or she emerges from the primary.” (R.2, p.20). And plaintiffs reasserted this position at Friday’s hearing. Judge Allen testified that “voters want to know what party judges are in,” and “they ought to know.” Judge Corrigan indicated that he wants his “Democrat” affiliation displayed on the ballot to “identify [himself] with other voters who share the general tenets of the Democratic Party.” Ms. Goode testified that her “identification as a Democrat helps voters understand what [she] stand[s] for.” Simply put, plaintiffs claim a First Amendment right to display their partisan affiliations on the general election ballot.

But plaintiffs fail to explain how such a constitutional right could be confined to judicial candidates. After all, if a judicial candidate has a First Amendment right to display his “Democrat” affiliation on the ballot, then presumably candidates for mayor, township trustee, and school board have a similar right. These candidates would likewise want to convey this information to the electorate, and many voters would want to know it. Therefore, if “hiding the [judicial] candidate’s party affiliation on . . . the general election ballot[] fails to serve a

substantial government interest,”(R.41, p.12), then hiding a school board candidate’s party affiliation would presumably fail the same test.

Because plaintiffs have identified no limiting principle to their argument, a ruling in their favor would cast a constitutional cloud over the State’s ability to hold nonpartisan election for any elected office. If this Court holds that the First Amendment affords judicial candidates a right to have their party affiliation appear on the ballot, then countless other candidates for nonpartisan offices may well file suit in the coming days and months claiming a similar right of expression and association. That is the “Pandora’s Box” over which the Court expressed concern.

IV. 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?

Because plaintiffs have not identified any burden on their First Amendment expressive and associational interests, their claim necessarily fails under *Burdick*. But even if they had articulated some burden, those burdens are not “severe.” Therefore, the State need only demonstrate that Ohio Revised Code § 3505.04 advances “important regulatory interests” under the *Burdick* balancing test. 504 U.S. at 434. And there is no requirement that the statute be narrowly drawn to advance those regulatory interests. *Id.*; accord *Anderson*, 460 U.S. at 788 (“[T]he State’s important regulatory interests are generally sufficient to justify reasonable nondiscriminatory restrictions.”).

Section 3505.04 unquestionably discourages voting based on a candidate’s political party affiliation. Plaintiffs’ own witnesses confirmed this fact. Ms. Twigg testified that even though a judicial candidate’s partisan affiliation is easily discoverable, most general election voters are not

aware of it when they walk into the voting booth. Therefore, this group of voters will not cast ballots for judicial office based on these partisan cues. The Sixth Circuit recognized this interest—“diminishing reliance on political parties in judicial selection”—as compelling. See *Carey v. Wolnitzek*, 2010 U.S. App. Lexis 14367, at *26 (6th Cir. July 13, 2010).

Plaintiffs claim that Ohio forfeited this interest by adopting a “blended” system—partisan primaries followed by non-partisan general elections. Because the State “depend[s] on the party apparatus” in primary elections, plaintiffs say, it is stuck with that apparatus in the general election. (R.41, p.2).

The Supreme Court’s decision in *New York State Board of Elections v. Torres*, 552 U.S. 196 (2008), resolves that argument. The State of New York uses the “party apparatus” to nominate judicial candidates for its trial courts. The political parties convene a “judicial convention” in each of New York’s twelve judicial districts. *Id.* at 200. Party members appear at the convention and “nominate the party’s Supreme Court candidate or candidates who will run at large in that district in the general election.” *Id.* at 201. The winning nominees then appear on the fall general election ballot with independent candidates and other minor party candidates. *Id.* The entire system is authorized by state statute.

A group of voters and unsuccessful candidates attacked the constitutionality of the system, claiming that it skewed judicial elections to the preferences of the two parties. The Supreme Court upheld its constitutionality. Furthermore, the Court suggested other legitimate ways in which New York could “discourage party monopoly” in judicial selection—“for example, *by refusing to show party endorsement on the general election ballot.*” *Id.* at 208 (emphasis added).

Torress therefore endorsed the hybrid system that Ohio uses. A State can have an overtly partisan process for selecting its judicial nominees. (In New York, the partisan overtones in the nomination process are especially strong. Prospective judicial candidates must garner the support of the party faithful at a political pep rally. See N.Y. Elec. Law § 6-124.) Notwithstanding that overly partisan process, the Supreme Court confirmed that the State could “refus[e] to show party endorsement on the general election ballot” without violating the First Amendment. Accord *Haffey*, 803 F. Supp. at 125 (“[T]he state’s position appears to be that of a compromise between the desire to keep politics out of the judiciary and the desire to preserve the party system.”).

As a final matter, plaintiffs repeatedly invoke *Carey*, but that decision is irrelevant to plaintiffs’ attack on § 3505.04. *Carey* invalidated a Kentucky Judicial Canon that prevented judicial candidates from announcing their political affiliations, declaring it to be an unconstitutional restriction on the speech of *the candidate*. But § 3505.04 does not suppress the speech of the candidate; it regulates the speech of *the government*. *Carey* therefore has no relevance to determining the constitutionality of the statute.

Respectfully submitted,

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Certificate of Service

This will certify that the foregoing Supplemental Response to Issues Raised by the Court was filed electronically on August 16, 2010. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

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