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.	:	**Case No. 1:10-CV-504**
	:	**Judge Susan J. Dlott**
Plaintiffs,	:	**PLAINTIFFS' REPLY TO INTERVENOR DEFENDANT POST HEARING MEMO (DOC. 44)**
vs.	:	
JENNIFER BRUNNER, et al.	:	
Defendants.	:	

Plaintiffs respectfully submit the following comments in reply to the Intervenor Defendant Cordray's memorandum, Doc. 44.

***Haffey v. Taft*, 803 F.Supp. 121 (S.D. Ohio 1992)**. In *Haffey*, the Court did not hold that "a judicial candidate has no First Amendment interest in having his political affiliation on the election ballot." Doc. 44, p. 1. Rather the Court held that,

> Fatal to Haffey's claim is the fact that no competent evidence was presented at the hearing to establish his contention that independent candidates in judicial elections suffer any injury, especially an irreparable one.

803 F.Supp. at 125. Moreover, the entire discussion by the Court focused on the unique position of the plaintiff – an independent candidate who did not have the alleged advantage of participating in the partisan primaries. The Court noted that in *Rosen* the failure to have a party label on the ballot itself violated the First Amendment – exactly what plaintiff alleges here. In *Haffey*, on the other hand, "the alleged 'voting cue'… is of a very different caliber since it appears five months before the general election, *rather than on the general election ballot itself*." *Id.* at 126 (emphasis added). Thus *Haffey* focused on an asserted advantage given to Democrats and Republicans by virtue of the

partisan primary, a claim unique to the *Haffey* plaintiff that is simply not present in this case. Moreover, if the Court had truly held that no first amendment interest was at stake the motion to dismiss would have been granted. Instead it was denied and the plaintiff was free to further develop his proof.

Nor do *Timmons* and *Washington State Grange* hold that a judicial candidate has no First Amendment interest in having his political affiliation displayed on the election ballot. Under these and other cases ballot language does indeed invoke First Amendment rights of voters, candidates and parties. *Timmons* was thoroughly reviewed in previous briefing. *Washington State Grange* was a challenge to a Washington state primary system that allowed the candidates to state their party preference on the ballot, allowed voters to vote for any candidate and advanced the top two vote getters for each office to the general election ballot, regardless of party preference. The Court held that there was no evidence that the new primary system (which had not yet been implemented) actually served to select the party candidates. That is, the parties remained free to select their own candidates through other means and advise the voters as to the identity of the endorsed party candidates. By contrast, in this case the State itself does indeed establish and run the primary system that picks the party's candidates – and then presents the winners to the voters without identifying the candidates in the general election as the winners of their respective primaries.

But *Washington State Grange* is nonetheless instructive. Chief Justice Roberts concurred in the result because he believed the case was brought prematurely- before the ballots were printed (a point with which the majority agreed). He noted that the ballots could be designed to alleviate any confusion as to whether the winners of the primary

were the party nominees. Of note for our purposes is his agreement with dissenting Justice Scalia of, "the special role that a state-printed ballot plays in elections. And what makes the ballot special is precisely the effect it has on voter impressions…The ballot is the last thing the voter sees before he makes his choice." 552 U.S. at 460 (citations omitted). Justice Roberts states that when printed, if the ballot "fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment Challenge." *Id*. at 461. Thus, so long as the ballot makes clear that the election is not for the purpose of selecting a party standard bearer, there is no First Amendment burden on the party. But in the instant case the Ohio primary was precisely established by the State for the purpose of selecting the Republican and Democratic Party standard bearers. Thus, under the analysis of Chief Justice Roberts, a general election ballot that suggests no party affiliation when indeed the system for achieving a spot on the ballot was an official party selection system violates the First Amendment associational rights of the party.

Practical Effect of Order. There is no Pandora's Box. This case is limited to judicial candidates who are unique among nonpartisan general election races because they achieve a spot on the ballot through a partisan state sponsored primary. No other nonpartisan candidates are in this situation. This case does not involve races that are nonpartisan throughout. The relief requested in this case is no different than the relief granted in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) when ORC §3505.04 was held unconstitutional because it failed to authorize placement of the label "independent" after the plaintiff's name.

***New York State Board of Elections v. Torres*, 552 U.S. 196 (2008)**. The intervenor Defendant Cordray dismisses the claim for party affiliation on the general election ballot by falsely claiming that the Supreme Court, in *Torres,* has "resolved that argument." Doc. 44, p. 7. *Torres* does no such thing. In that case the Court reviewed a New York system for nominating judges in a partisan process and electing them based on a general election ballot that set out the party affiliation on the ballot. The plaintiffs sought to attack the system as uncompetitive since a single party dominated the elections. The Court rejected the argument noting that the First Amendment did not guarantee any particular level of competitiveness. *Id.* at 800-801. The Court did state in dicta, "The States can 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." *Id* at 801. Thus the full quote acknowledges that eliminating the party affiliation from the ballot is limited by the freedom of parties to associate. There is no exploration of those "limits," the associational rights of the parties, or whether the endorsement referred to is the status of the candidate as the party nominee or the status of the candidate as an "endorsed" party candidate among others in the same party. Nor does this dictum apply to a system where primary voters have selected the party nominee. What is clear is that New York has but one opportunity to present judicial candidates to voters under that state's system. It is also clear that a nonpartisan ballot in that single public election system such as that suggested in *Torres* presents very different interests. Ohio has no such system and no request for such a system is present in this case. Rather, Ohio directs voters to select each party's nominee in a public election in May and then fails to identify that party nominee in the fall in the general election. The party's right to

associate is severely burdened. This restriction also severely burdens the rights of the voters and candidates and is not supported by any substantial state interest and thus violates the First Amendment right of association.

Respectfully Submitted,

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein # 0032053
Jennifer L. Branch #0038893
Andrea Reino #0084531
GERHARDSTEIN & BRANCH CO. LPA
Attorneys for the Plaintiffs
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 fax
agerhardstein@gbfirm.com
jbranch@gbfirm.com
areino@gbfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 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