

**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	:	
	:	
Plaintiffs,	:	Case No. 1:10-cv-00504-SJD
	:	
v.	:	Judge Susan J. Dlott
	:	
SECRETARY OF STATE	:	
JENNIFER BRUNNER, et al	:	
	:	
Defendant.	:	

**DEFENDANTS SUPREME COURT OF OHIO, OHIO DISCIPLINARY COUNSEL,
AND BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE’S
SUPPLEMENTAL BRIEF**

Throughout this litigation, plaintiffs have insisted that the Ohio Judicial Code’s Solicitation Clause is unconstitutional under the Sixth Circuit’s recent decision in *Carey v. Wolnitzek*, Nos. 08-6468/6538, 2010 U.S. App. Lexis 14367 (6th Cir. July 13, 2010). But as defendants have repeatedly observed, *Carey* expressly left open the option for States to prohibit all “face-to-face” and “one-to-one” solicitations by judicial candidates. *Id.* at *37, *42.

Plaintiffs now ask this Court to go beyond *Carey*. They seek facial invalidation of Ohio’s newly revised Solicitation Clause, which narrowly prohibits “face-to-face” and “one-on-one” solicitations, among others—the very categories preserved for State regulation in *Carey*. No federal court has facially invalidated a Solicitation Clause limited to these narrow activities. This Court should decline plaintiffs’ invitation to be the first.

I. Carey Preserved the Right of the States to Prohibit “One-to-One” Solicitations in Judicial Campaigns.

The plaintiff in *Carey* advanced an extreme position to the Sixth Circuit: Kentucky could not impose any restrictions on a judicial candidate’s solicitations based on concerns of judicial impartiality. See Marcus Carey’s Response/Reply Br. at 18, *Carey v. Wolnitzek*, Nos. 08-6468/6538 (6th Cir. Aug. 17, 2009) (“Because the impartiality concerns, if any, are of Kentucky’s own making, the state cannot use these concerns as a grounds for restricting core political speech.”).

The Sixth Circuit refused to entertain plaintiff’s argument: “[I]t is tempting to say that *any* limitation on a candidate’s right to ask for a campaign construction is one limitation too many. But there are at least two areas covered by [Kentucky’s] clause that test such an interpretation—face-to-face solicitations, particularly by sitting judges, and solicitations of individuals with cases pending in front of the court.” *Id.* at *36-37. It then found Kentucky’s Solicitation Clause facially overbroad only because it prohibited “mass-mailing solicitations or speeches to a large audience”—two activities that are now allowed in Ohio. *Id.* at *41.

Plaintiffs are correct that *Carey* did not conclusively decide that “face-to-face” and “one-on-one” solicitations could be banned outright in judicial campaigns, but, as the above language demonstrates, the Sixth Circuit came within of a hair’s breadth of doing so. For that reason, plaintiffs cannot establish a *strong* likelihood of success on the merits of their claim—that Ohio’s ban on “one-to-one” solicitations is facially unconstitutional under *Carey*.

Two recent decisions from other circuits further confirm that plaintiffs’ request is untenable. In *Siefert v. Alexander*, No. 09-1713, 2010 U.S. App. Lexis 12057, at *35-43 (7th Cir. June 14, 2010), the Seventh Circuit declined the plaintiff’s request to invalidate Wisconsin’s Solicitation Clause on its face. Furthermore, in *Wersal v. Sexton*, No. 09-1578, 2010 U.S. App.

Lexis 15664 (8th Cir. July 29, 2010), the Eighth Circuit rejected the plaintiff's call for facial invalidation of Minnesota's Solicitation Clause. The plaintiff, a judicial candidate, "encourage[d] [the court] to examine the facial constitutionality of these clauses," *id.* at *18, but the Eighth Circuit declined: "[W]e review the constitutionality of the solicitation clauses only *as-applied* to Wersal[]." ¹ *Id.* at *20 (emphasis added).

This Court should heed not only the Sixth Circuit's precautionary language in *Carey*, but also the Seventh and Eighth Circuit's recent decisions in *Siefert* and *Wersal* denying requests for facial invalidation of similar solicitation regulations.

II. Ohio's Ban on "One-on-One" Solicitations is Not Facially Overbroad.

The plaintiffs attempt to salvage their overbreadth claim by listing examples of purportedly unconstitutional applications of the Solicitation Clause. But that compilation rests on two critical errors. First, plaintiffs misinterpret the scope of the newly revised Solicitation Clause. Second, plaintiffs mangle the well-established inquiry for facial overbreadth.

A. Ohio's Solicitation Clause Bans "One-On-One" Requests for Money.

Plaintiffs argue that the revised Solicitation Clause's language is vague and, thus, chills their lawful speech. Plaintiff Good even testified that she did not know what the word "solicitation" meant. To the contrary, Ohio's Clause uses plain, easily understandable language.

Judicial candidates "shall not personally solicit campaign contributions." Ohio Jud. Cond. R. 4.4(A). This definition is precise. When meeting prospective donors, the candidate may not personally "seek to obtain [contributions] by persuasion, entreaty, or formal application." American Heritage College Dictionary 1295 (3d ed. 1997). In other words, they may not initiate verbal pleas for campaign money (unless it is to a large gathering). The

¹ On page 5 of their supplemental brief, plaintiffs erroneously say that the Eighth Circuit found Minnesota's rule "facially unconstitutional."

Supreme Court has had no difficulty interpreting that term, see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978), and these plaintiffs should not either.

A judicial candidate is free to respond to a prospective donor's unsolicited inquiry (because an *unsolicited* offer to contribute campaign funds, by definition, does not involve a *solicitation*). She may inform this prospective donor of her campaign committee's address or provide the donor with a pre-addressed, plain envelope. No judicial candidate in Ohio has ever been disciplined on these grounds, because such conduct falls outside the plain language of the rule. Plaintiffs' fears to the contrary are unfounded. (And to further allay these fears, defendants have obliged plaintiffs' request for confirmation "in writing" that Rule 4.4(A) does not proscribe such conduct. See *Dove Aff.* ¶ 10.)

Furthermore, Judge Corrigan is free to hand out flyers that list the mailing address and website of his campaign committee. (In fact, state law requires that this information appear as a disclaimer on any campaign communication. See Ohio Rev. Code § 3517.105.) Such acts do not constitute personal solicitations of money *by the candidate*. Finally, Judge Corrigan is free to send signed thank-you notes to his donors expressing appreciation for their continued support. The only caveat: Rule 4.4(A)(2) requires the letters to use the address of Judge Corrigan's campaign committee (as opposed to his courthouse address or his personal address). None of the three plaintiffs objected to that minimal requirement.

B. A Ban on "One-On-One" Solicitation is Not Facially Overbroad.

In advancing their facial overbreadth claim, plaintiffs attempt—but fail—to demonstrate even a single unconstitutional application of the Solicitation Clause, let alone substantial ones.

First, Judge Allen complained that she could not herself receive campaign funds from donors. Plaintiffs have not offered, nor is the State aware of, any case supporting the theory that

the physical act of accepting money qualifies as protected candidate expression under the First Amendment. Even if there were an expressive component, however, the State would still have a compelling interest in proscribing the physical receipt of money by judicial candidates. The plaintiff in *Carey* acknowledged this point to the Sixth Circuit: “A judge’s openmindedness can . . . be affected by funds secured from those who approach the candidate of their own volition and offer financial support.” Marcus Carey’s Response/Reply Br. at 16, *Carey v. Wolnitzek*, Nos. 08-6468/6538 (6th Cir. Aug. 17, 2009). The *Carey* plaintiff then criticized Kentucky’s rule as underinclusive because it did *not* “prohibit[] a judicial candidate from accepting funds.” *Id.* For this reason, the State’s ban on the judicial candidate’s physical receipt of money does not violate the First Amendment.

Second, Plaintiff Good testified that she would like to solicit personally donations from her family members. But in the very next breath, she admitted that her family members were aware of her candidacy and that they all donated to her campaigns in the past. Thus, the Solicitation Rule’s ban on one-on-one solicitations has not inflicted any injury on Ms. Good’s interest in raising campaign money from her family and friends.

Third, Judge Corrigan testified that he wants to solicit contributions from attendees while “pressing the flesh” at church events, ward meetings, and parades. The State, however, has two compelling interests in prohibiting these one-on-one interactions. As Judge Allen acknowledged, the judicial office is “mysterious” to average citizens, and the mystique of the robe may lead some of those citizens to feel coerced in such personal settings. See *Bauer v. Shepard*, 634 F. Supp. 2d 912, 955 (N.D. Ind. 2009) (observing that the judicial candidate “himself admitted that personal solicitations have additional leverage”); *Ohralik*, 436 U.S. at 457 (“[I]n-person solicitation may exert pressure and often demands an immediate response.”). At

the very least, these settings may give those average citizens a mistaken impression that judges are influenced by money. See *Siefert*, 2010 U.S. App. Lexis 12057, at *40 (“[T]he appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means.”).

But even if there is a constitutionality infirmity in one or two of these circumstances, plaintiffs must demonstrate that Rule 4.4(A)’s “overbreadth [is] *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 553 U.S. 285, 293 (2008). They have not met that burden.

A commentator has found that an overwhelming majority of contributions to judicial races come from three groups: lawyers, institutional litigants, and interest groups. See Paul D. Carrington, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 *Cap. U. L. Rev.* 455, 474 (2002) (“[L]awyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates.”); accord *Siefert*, 2010 U.S. App. Lexis 12057, at *43. (Pages 8-12 of the Ohio Supreme Court’s trial brief cited multiple rationales for why one-on-one solicitation of these groups is inappropriate, to which plaintiffs offer no response.) By contrast, a comparatively small percentage of financial contributions to judicial races are derived from door-to-door solicitations or church-picnic requests.

In all, Ohio’s Solicitation Clause operates constitutionally in all applications presented to this Court. And even if plaintiffs have colorable arguments that the law’s application is suspect in one or two specific instances, they have not established the “substantial” number of applications required to demonstrate *facial* overbreadth. If plaintiffs wish to pursue those

specific claims, they must follow the guidance of the Eighth Circuit and pursue an *as-applied* challenge to the Clause. See *Wersal*, 2010 U.S. App. Lexis 15664, at *20.

III. Facial Invalidation of the Solicitation Clause Would Leave the State With No Restrictions on Judicial Solicitations for the 2010 Election.

Finally, plaintiffs fail to recognize the gravity of their requested relief. If this Court invalidates Rule 4.4 on its face, then Ohio will have *no regulations* on judicial solicitation for the upcoming election campaign. That result very well might severely undermine the public's confidence in the judiciary.

It may be true that principles of due process would prevent sitting judges from soliciting campaign contributions while on the bench, and the State could still punish judges for soliciting an outright bribe under its criminal laws. But that is the extent of the limitations on judicial solicitation without this canon. If Rule 4.4 is invalidated in its entirety, candidates could directly solicit contributions from lawyers with cases pending before the court, and do so on the courthouse steps or at a bar association function. A judicial candidate for an appellate court could solicit parties with cases pending in the trial courts. Indeed, a candidate could review the published list of July 2010 bar applicants and ask each prospective attorney to support her campaign, notwithstanding any concern that such a request might intimidate some of those aspiring attorneys.

The three plaintiffs respond that “they would never do such a thing.” (R.43, p.7). However, there are hundreds of other judicial candidates competing for judicial office in the upcoming election, and the State has a legitimate interest in providing clear guidance to those candidates so that improper behavior is defined and can be punished. See, e.g., *Disciplinary Counsel v. O’Neill*, 103 Ohio St. 3d 204, 214 (2004) (improper solicitation of court staff and spouses by sitting judge).

The teaching of *Carey* is clear: “Judicial elections differ from legislative candidates.” 2010 U.S. App. Lexis 14367, at *5. But if plaintiffs prevail in their request for facial invalidation of the Solicitation Clause, there would be no regulation of solicitation in the next two months. Judicial candidates would be free to solicit money on par with their legislative and executive branch colleagues. Given the chaos, uncertainty, and harm that might well result, plaintiffs’ request for a TRO/preliminary injunction should be denied.

Respectfully submitted,

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Certificate of Service

This will certify that the foregoing Supplemental Brief was filed electronically on August 17, 2010. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

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