

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

<b>OHIO COUNCIL 8 AMERICAN</b>	:	<b>Case No. 1:10-cv-504</b>
<b>FEDERATION OF STATE,</b>	:	
<b>COUNTY AND MUNICIPAL</b>	:	<b>Judge</b>
<b>EMPLOYEES, AFL-CIO,</b>	:	
<b>6800 North High Street</b>	:	<b><u>COMPLAINT FOR</u></b>
<b>Worthington, Ohio 43085</b>	:	<b><u>TEMPORARY RESTRAINING</u></b>
	:	<b><u>ORDER, DECLARATORY AND</u></b>
<b>and</b>	:	<b><u>INJUNCTIVE RELIEF</u></b>
	:	
<b>THE HONORABLE NADINE</b>	:	
<b>ALLEN</b>	:	
<b>10164 Kingsport Drive</b>	:	
<b>Cincinnati, OH 45241</b>	:	
	:	
<b>and</b>	:	
	:	
<b>THE HONORABLE PETER J.</b>	:	
<b>CORRIGAN</b>	:	
<b>1825 Hampton Rd.,</b>	:	
<b>Rocky River, Ohio 44116</b>	:	
	:	
<b>and</b>	:	
	:	
<b>MARTHA GOOD</b>	:	
<b>3532 Herschel View St.</b>	:	
<b>Cincinnati, OH 45208</b>	:	
	:	
<b>and</b>	:	
	:	
<b>THE OHIO DEMOCRATIC PARTY</b>	:	
<b>340 East Fulton Street</b>	:	
<b>Columbus, Ohio 43215</b>	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>JENNIFER BRUNNER</b>	:	
<b>180 East Broad Street</b>	:	
<b>Columbus, Ohio 43215,</b>	:	
<b>In her official capacity as Secretary of</b>	:	
<b>State of Ohio</b>	:	





Ohio primary elections do allow political party affiliations for judicial candidates; it is only at the general election that this valuable information is denied to the voters. Ohio is the only state in the union in which judges participate in partisan primary elections but then are forced onto nonpartisan general election ballots. Plaintiffs seek an order prohibiting enforcement of the general election ballot restrictions in order that in this modest way important information about judicial candidates becomes available to voters.

2. Plaintiffs also challenge two provisions of the Ohio Code of Judicial Conduct: Rule 4.2 (B) (4), stating that a judicial candidate shall not, “After the day of the primary election, identify himself or herself in advertising as a member of or affiliated with a political party;” and Rule 4.4 (A), stating that “A judicial candidate shall not personally solicit or receive campaign contributions.” Similar Kentucky rules were recently held unconstitutional by the United States Court of Appeals for the Sixth Circuit in *Carey v. Wolnitzek*, \_\_\_ F.3d \_\_\_, 2010 WL 2771866 (6th Cir 2010). Plaintiffs seek to expand the public dialogue with and about judicial candidates by enjoining enforcement of these three Ohio Rules.

3. Plaintiffs include judicial candidates presently running for election or reelection in Ohio. Plaintiffs also include voters acting through their union and others acting through their political party. Through this lawsuit Plaintiffs hope to end the content based suppression of election speech by judges without compromising judicial impartiality. Great public good will flow from expanding free speech in the context of judicial elections. As explained by the Sixth Circuit when striking down similar Kentucky restrictions,

[W]hile political identification may be an unhelpful way to pick judges, it assuredly beats other grounds, such as the all-too-familiar formula of running candidates with familiar or popular last names. In that respect this informational ban increases the likelihood that one of the least relevant grounds for judicial selection – the fortuity of one’s surname – is all that the voters will have to go on.

*Id* at \*10.

4. Any loss of free speech is irreparable. Plaintiffs therefore seek an immediate ruling – *no later than August 24, 2010* – in order to permit the Defendants Ohio Secretary of State and local boards of election to prepare ballots listing party affiliation for judicial candidates in the 2010 general election and to permit the Plaintiff judicial candidates to campaign promptly without the restrictions of the unconstitutional judicial conduct rules.

## **II. JURISDICTION AND VENUE**

5. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4). Venue is proper under 28 U.S.C. §1391 and Local Rule 82.1 (c).

## **III. PARTIES**

6. Plaintiff Ohio Council 8 American Federation of State, County and Municipal Employees, AFL-CIO (“Ohio Council 8 AFSCME”) is a statewide labor organization that represents more than fifty thousand (50,000) workers across Ohio. Ohio Council 8 AFSCME brings this action on behalf of its members who vote in Ohio and who seek as much information as possible about Ohio judicial candidates, including party affiliation. Among the Ohio Council 8 AFSCME members are individuals who identify as Democrats, individuals who identify as Republicans and individuals who identify as independents.

7. Plaintiff Honorable Nadine Allen is a resident of Hamilton County, Ohio and an appointed judge of the Court of Common Pleas in that County. She is currently a candidate for election to a seat on the Hamilton County Court of Common Pleas.

8. Plaintiff Honorable Peter J. Corrigan is a resident of Cuyahoga County, Ohio and a judge of the Common Pleas Court in that County. He is currently a candidate for reelection to a seat on the Cuyahoga County Court of Common Pleas.

9. Plaintiff Martha Good is a resident of Hamilton County, Ohio. She is currently a candidate for election to a seat on the Ohio First District Court of Appeals.

10. Plaintiff Ohio Democratic Party (“ODP”) is a political party in Ohio representing 2.5 million registered democratic voters. The ODP brings this action on behalf of itself and its members who vote in Ohio and who seek as much information as possible about Ohio judicial candidates, including party affiliation.

11. Defendant Jennifer Brunner is the Ohio Secretary of State and is the Chief Election Officer responsible for administering all statewide elections. She is sued in her official capacity.

12. Defendant Hamilton County Board of Elections is the Secretary of State’s representative for county election matters in Hamilton County (ORC § 3501.06).

13. Defendant Cuyahoga County Board of Elections is the Secretary of State’s representative for county election matters in Cuyahoga County (ORC § 3501.06).

14. Defendant Members of the Supreme Court of Ohio are responsible for enacting and enforcing the Ohio Judicial Code of Conduct. Each member is sued in his or her official capacity.

15. Defendant Jonathan E. Coughlan, is the Disciplinary Counsel. His appointment is approved by the Ohio Supreme Court. He is responsible for investigating and prosecuting complaints of judicial misconduct. He is sued in his official capacity.

16. Defendant Board of Commissioners on Grievances and Discipline consists of members appointed by the Ohio Supreme Court. The Board is responsible for investigating and adjudicating complaints of judicial misconduct.

17. Defendant Jonathan Marshall is the Secretary of the Board of Commissioners on Grievances and Discipline. He is responsible for initially reviewing complaints of judicial misconduct during judicial campaigns. He is also responsible for appointing the probable cause panel and prepares the formal complaint. He is sued in his official capacity.

18. Defendant Judge Otho Eyster is the Chair of the Board of Commissioners on Grievances and Discipline. He is responsible for initially reviewing complaints of judicial misconduct during judicial campaigns and enforcing the Ohio Code of Judicial Conduct.

19. Defendant Steve Rodeheffer is the Vice Chair of the Board of Commissioners on Grievances and Discipline. He is responsible for initially reviewing complaints of judicial misconduct during judicial campaigns and enforcing the Ohio Code of Judicial Conduct.

#### **IV. FACTS**

##### **A. Description of Ballot Restrictions in Ohio Judicial Elections**

20. All candidates for Common Pleas, Court of Appeals and Supreme Court are elected by the People of the State of Ohio. This requirement that judges be elected is

set out in the Ohio Constitution, O Const Art IV, §6. The Ohio Constitution does not require that judicial elections be nonpartisan. *Id.*

21. The first opportunity judges have to present themselves for election by the people is in the primary election.

22. The primary election ballots in Ohio list judges by their political party. These ballots are referred to as “office type” ballots. O.R.C. § 3505.03.

23. The next opportunity for judicial candidates in Ohio to present themselves for election by the voters is in the general election.

24. Ohio law prohibits judicial candidates in the general election from appearing on an “office type ballot,” which allows party affiliation. O.R.C. § 3505.03.

The prohibition is clear in O.R.C. § 3505.04:

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.

25. All judicial candidates competing in a general election in Ohio are considered nonpartisan candidates. O.R.C. § 3501.01(J).

26. All nonpartisan judicial candidates must appear only on a nonpartisan ballot. O.R.C. § 3505.04.

27. Thus, no judicial candidate in Ohio may appear on any general election ballot with a party designation.

28. Ohio is the only state in the union in which judges participate in a partisan primary but are then restricted to nonpartisan status in the general election.

29. Judicial candidates are the only candidates in Ohio who appear on an office type ballot in the primary election but on a non partisan ballot in the general election. Legislative and executive branch candidates who appear on an office type ballot in the primary also appear on an office type ballot in the general election.

**B. Enforcement of Ballot Restrictions in Ohio Judicial Elections**

30. The Defendant Ohio Secretary of State is responsible for certifying the forms of ballots and names of statewide judicial candidates. O.R.C. § 3505.01¶1 provides:

The secretary of state shall certify to the board of elections of each county the forms of the official ballots to be used at the general election, together with the names of the candidates to be printed on those ballots whose candidacy is to be submitted to the electors of the entire state.

31. The Secretary of State is also required to issue instructions by directives and advisories in accordance with O.R.C. § 3501.53 to members of the boards as to the proper methods of conducting elections. O.R.C. § 3501.05 (B). The Secretary of State is further obligated to “compel the observance by election officers in the several counties of the requirements of the election laws.” O.R.C. § 3501.05(M). Conversely, the county boards of elections must perform all duties as prescribed by the Secretary of State. O.R.C. § 3501.11(P).

32. Consistent with her duties, the Secretary of State each election issues a directive to all county boards of elections members, directors, and deputy directors which includes ballot forms for Office Type Ballots and Nonpartisan Ballots.

33. Local boards of election are responsible for certifying the forms of ballots and names of local judicial candidates. O.R.C. § 3505.01.

34. For judicial candidates who run in districts that span multiple counties, the board of elections of the most populous county is responsible for certifying to the board of each county in the district the names of the candidates to be printed on the ballots.

O.R.C. § 3505.01 (A) (2).

**C. Description of Judicial Conduct Rule Re Identifying Oneself as a Member of a Political Party**

35. Judicial Candidates must comply with the Ohio Code of Judicial Conduct when engaging in campaigns for elections to office.

36. Through the end of the day of the primary election a judicial candidate is permitted to identify him or herself in person or in advertising as a member of or affiliated with a political party. Ohio Code of Judicial Conduct Rule 4.2 (C) (7).

37. However, starting the day after the primary election and continuing through the general election, no judicial candidate may identify him or herself in advertising as a member of or affiliated with a political party. Ohio Code of Judicial Conduct Rule 4.2 (C) (4).

**D. Description of Judicial Conduct Rule Re: Soliciting Campaign Contributions**

38. There is an outright ban on a judicial candidate asking for contributions: “A judicial candidate shall not personally solicit or receive campaign contributions.” Ohio Code of Judicial Conduct Rule 4.4 (A).

39. Judicial candidates may only solicit contributions indirectly through a committee which is restricted in time as to when it may begin soliciting and receiving contributions (approximately 120 days before the primary) and when it must end

doing so (120 days after the general election or a primary defeat). Ohio Code of Judicial Conduct Rule 4.4 (F) & (G).

**E. Enforcement of the Judicial Code**

40. The Ohio Supreme Court enacted the Ohio Code of Judicial Conduct (“Code”). If a judge or judicial candidate is suspected of violating the Code, the Defendant Disciplinary Counsel, or a certified Grievance Committee, has the authority to investigate, file a complaint, and prosecute a complaint. Supreme Court Rules for the Government of the Judiciary of Ohio (“Gov. Jud. Rule”) Rule II § 2(A).

41. During a judicial campaign, the Rules related to judicial campaigns are enforced by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Board”). Gov. Jud. Rule II § 5. The members of this Board are appointed by the Ohio Supreme Court. Supreme Court Rules for the Government of the Bar of Ohio (“Gov. Bar. Rule”) Rule V § 1 and Gov. Jud. Rule II § 1. Under certain circumstances, the Board may refer the judicial grievance to the Disciplinary Counsel. Gov. Jud. Rule II § 5 (A) (3). Ultimately the Supreme Court is the final arbiter of any sanction. *Id.* Rule II § 5(E).

42. Sanctions for rule violations include fines, suspension, removal from office and even disbarment. Gov. Jud. Rule II, § 5 (D)(1)(a)-(e) and Gov. Bar R. V § 6.

**F. Impact of the Non Partisan Ballot Requirement on Plaintiffs Allen, Corrigan, and Good and the Members of Plaintiffs Ohio Council 8 AFSCME and the Ohio Democratic Party**

43. Plaintiff Judge Allen has been a sitting judge since 1987. From 1987 through December 2009 she was a Hamilton County Municipal Judge.

44. In December 2009 Judge Allen was appointed to an open seat on the Hamilton County Court of Common Pleas.

45. On Judge Allen's nominating petition dated November 30, 2009, she declared her party affiliation to be Democrat.

46. Judge Allen voted in the May, 2010 primary election and publicly declared that she was a Democrat in order to vote the democratic primary ballot.

47. During the primary election that was held on May 4, 2010 Judge Allen was listed on the Democratic ballot. This meant she was identified as a candidate for office as a member of the Democratic Party.

48. Voting in the 2010 general election begins on September 28, 2010. Under existing law Judge Allen will not be listed on the ballot as a Democrat. Rather, no party affiliation will be provided and she will appear on a nonpartisan ballot. Thus, Judge Allen is denied any opportunity through the ballot language to indicate that she is participating in the general election as the candidate for her seat that prevailed in the democratic primary.

49. Plaintiff Judge Allen seeks the right to choose to have the general election ballot indicate that she is a Democratic Party candidate for judge.

50. Plaintiff Judge Corrigan has been a sitting judge since January 2005. Since then he has served as a Cuyahoga County Common Pleas Judge. He is running for reelection this year.

51. On Judge Corrigan's nominating petition dated December 8, 2009 he declared his party affiliation to be Democrat.

52. Judge Corrigan voted in the May, 2010 primary election and publicly declared that he was a Democrat in order to vote the democratic primary ballot.

53. During the primary election that was held on May 4, 2010 Judge Corrigan was listed on the Democratic ballot. This meant he was identified as a candidate for office as a member of the Democratic Party.

54. Voting in the 2010 general election begins on September 28, 2010. Under existing law Judge Corrigan will not be listed on the ballot as a Democrat. Rather, no party affiliation will be provided and he will appear on a nonpartisan ballot. Thus, Judge Corrigan is denied any opportunity through the ballot language to indicate that he is participating in the general election as the candidate for his seat that prevailed in the democratic primary.

55. Judge Corrigan faces an additional challenge. On the 2010 general election ballot for most of Cuyahoga County there will be two Peter J. Corrigan's running for office. The other Peter J. Corrigan is a Republican. He is running in a highly contested, highly publicized congressional race that includes most of Cuyahoga County. Voters repeatedly confuse the two Peter J. Corrigan's. One clear way for Plaintiff Corrigan to distinguish himself on the general election ballot is for him to be identified as a Democrat.

56. Plaintiff Judge Corrigan seeks the right to have the general election ballot indicate that he is a Democratic Party candidate for judge.

57. Plaintiff Martha Good is a judicial candidate this year for the Ohio First District Court of Appeals in the 2010 general election. She has experience running

for office in Hamilton County. In 2004 and 2008 she ran for the partisan position of Hamilton County Clerk of Courts. In 2005 she ran for Municipal Court.

58. On Plaintiff Good's nominating petition dated December 8, 2009 she declared her party affiliation to be Democrat.

59. Plaintiff Good voted in the May 2010 primary election and publicly declared that she was a Democrat in order to vote the democratic primary ballot.

60. During the primary election that was held on May 4, 2010 Martha Good was listed on the Democratic ballot. This meant she was identified as a candidate for office as a member of the Democratic Party.

61. Under existing law Plaintiff Good will not be listed on the ballot as a Democrat. Rather, no party affiliation will be provided and she will appear on a nonpartisan ballot. Thus, Ms. Good is denied any opportunity through the ballot language to indicate that she is participating in the general election as the candidate for the seat for which she prevailed in the democratic primary.

62. Plaintiff Good seeks the right to have the general election ballot indicate that she is a Democratic Party candidate for judge.

63. Plaintiffs Judge Allen, Judge Corrigan, and candidate Good firmly believe that the general election ballot can list them as democratic candidates without in any way undermining their sworn duty to be fair and impartial to all litigants who come before them. Indeed, Plaintiff Corrigan believes that indicating party affiliation publicly on the general election ballot makes his as a judge more accountable to the public at large than they are under the current law requiring a nonpartisan ballot.

64. Voters, including members of Plaintiff Ohio Council 8 AFSCME and members of Plaintiff Ohio Democratic Party, are confused and misled by the current general election ballot restriction. Specifically, some voters use party affiliation and success in the primary election as part of their process for selecting a candidate. Current Ohio law prevents voters from learning through the ballot language whether a candidate for judge prevailed in a party primary and if so, in which party primary. This causes voter confusion and/or causes many voters simply not to vote for judicial candidates in the general election.

**G. Impact of the Rules of Judicial Conduct on Plaintiffs Allen, Corrigan and Good and the Members of Plaintiffs Ohio Council 8 AFSCME and the Ohio Democratic Party**

65. As current candidates for judicial office, the Rules set out in the Ohio Code of Judicial Conduct regarding to judicial candidates apply to Plaintiffs Allen, Corrigan, and Good.

66. Plaintiff judicial candidates must abide by a double standard under Rule 4.2(B) (4). Before the primary they may advertise that they are members of a political party but after the primary they may no longer so advertise – even though they just participated in and won a partisan primary. They would like the option to advertise to voters their party affiliation because it is an issue important to voters; demonstrates openness and consistency throughout the election period; and generally conveys their personal philosophy with respect to a number of issues without undermining their duty to be fair and impartial on specific matters that come before them as judges.

67. Plaintiff judicial candidates, like most candidates dislike fundraising. But campaigns need funds to succeed. Rule 4.4 restricts Plaintiff judicial candidates from personally soliciting funds for their campaigns. They seek the right to solicit and receive campaign contributions because they believe direct solicitations can be more efficient than indirect solicitations by a committee. They also believe that they are more accountable regarding solicitations when they are participating in the effort themselves. Also, by helping with their campaign fundraising they increase personal engagement and exposure to the voting public without undermining their duty to be fair and impartial on specific matters that come before them as judges.

68. Voters, including members of Plaintiff Ohio Council 8 AFSCME and members of Plaintiff Ohio Democratic Party, are confused and misled by the Rules of Judicial Conduct regarding judicial elections. Specifically, some voters use party membership and affiliation to aid them in selecting a candidate. The Rules allow judges to advertise their party membership before a primary election but not afterwards. Also, the Rules prohibit judges from personally soliciting campaign funds, thus limiting the ability of judges to raise sufficient funds to meet and educate the voters about their judicial candidacies.

69. Plaintiff judicial candidates in the past, currently, and in future judicial races, have an interest in advertising their party membership throughout the election year and have an interest in soliciting and receiving campaign contributions directly. If they act on this interest they are subject discipline by Defendants.

#### **H. Need For Injunction**

70. There is no adequate remedy at law.

71. Plaintiffs have a substantial likelihood of success in this matter. The general election ballot restriction in R.C. §3501.01(J) and §3505.04 and the restrictions imposed by Rules 4.2(B) (4) and Rule 4.4 deny to Plaintiffs their right to free speech and free association and deny to Plaintiffs their right to equal protection under the law. None of the restrictions imposed on the judicial candidates described in this complaint apply to or limit similarly situated legislative or executive branch candidates. .

72. R.C. §3501.01(J) and §3505.04 and the restrictions imposed by Rules 4.2(B) (4) and Rule 4.4 of the Code of Judicial Conduct are overbroad and otherwise unconstitutional on their face and as applied to the conduct of the Plaintiffs.

73. The limits on the political expression imposed on judicial candidates by R.C. §3501.01(J) and §3505.04 and the restrictions imposed by Rules 4.2(B) (4) and Rule 4.4 of the Code of Judicial Conduct restrict core political speech and are not narrowly tailored to serve a legitimate governmental interest.

74. Each of the Judicial candidates and all of the members of Ohio Council 8 AFSCME and the Ohio Democratic party is denied his/her rights, deterred and prohibited from full political participation and faces irreparable harm. Moreover, the public deserves a system wherein all candidates and citizens are free to participate in campaigns to the fullest extent allowed by law. The need is urgent for court action on this pressing problem. Only prompt action by this federal court ordering declaratory and injunctive relief will serve the public interest.

#### **V. CLAIM FOR RELIEF**

#### **First Claim – 42 U.S.C. §1983 - - United States Constitution**

75. Defendants, acting under color of law, have violated rights secured to the Plaintiffs by the First and Fourteenth Amendments to the United States Constitution including the right to free expression, the right of association, the right to due process of law, and the right to equal protection under the law.

**VI. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs request that this Court:

- A. Issue a Declaratory Judgment that the statutes, rules and practices at issue in this case violate the constitutional rights of the Plaintiffs;
- B. Issue a preliminary and permanent injunction against the Defendants and all those acting in concert prohibiting enforcement of the challenged statutes and rules at issue in this action;
- C. Enjoin Defendants Brunner, the Hamilton County Board of Elections, and the Cuyahoga County Board of Elections from enforcing O.R.C. § 3505.04.
- D. Order Defendant Brunner to issue a directive instructing all Ohio boards of elections to comply with this order.
- E. Order Defendant Brunner and all board of elections to place all judicial candidates on the “Office Type” ballots submitted to voters during the 2010 General Election and indicate their party affiliation, as designated on their nominating petition.
- F. Award to Plaintiffs reasonable costs, expenses and attorney fees;
- G. Award such other and further relief as this court shall deem just and reasonable.

Respectfully submitted,

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