IN THE UNITED STATES DISTRICT COURT
FOR THE 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
	:	Chief Judge Susan J. Dlott
Plaintiffs,	:	
	:	ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
v.	:	
JENNIFER BRUNNER, *et al.*,	:	
Defendants.	:	

This matter is before the Court on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (doc. 2). The Court held an evidentiary hearing on the matter on August 13, 2010, during which Plaintiffs presented evidence through the testimony of six witnesses subjected to cross-examination by defense counsel.

Plaintiffs – comprised of a statewide labor organization, three Ohio judicial candidates, and the Ohio Democratic Party – ask the Court to enjoin enforcement of Ohio Revised Code ("O.R.C.") § 3505.04 and Rule 4.4 (A) of the Ohio Code of Judicial Conduct on grounds that they violate Plaintiffs' First Amendment rights and deny them equal protection under the law.[1, 2]

[1] Code § 3505.04 prohibits the printing of party identifiers on nonpartisan general election ballots; Rule 4.4(A) prohibits judicial candidates from personally soliciting or receiving campaign contributions.

[2] Plaintiffs' motion also sought injunctive relief with respect to Rule 4.2 (B)(4) of the Ohio Code of Judicial Conduct, which at the time of the filing of Plaintiffs' Complaint and Motion prohibited a judicial candidate from identifying himself or herself as a member of or affiliated with a political party after the primary election. Amendments to that Rule, adopted by

Granting Plaintiffs' Motion would allow judicial candidates to include a party affiliation next to their names on the general election ballot and would allow judicial candidates to personally solicit and receive campaign contributions.

Defendants are the Supreme Court of Ohio, the Ohio Secretary of State, the Hamilton and Cuyahoga Boards of Election, other officials responsible for regulating or enforcing the challenged provisions, and intervenor defendant the Ohio Republican Party. Defendants deny that the statute and rule are unconstitutional and contend that the restrictions in place are justified by the State's interest in minimizing partisanship in judicial elections and avoiding the appearance of coercion or *quid-pro-quo*.

Having considered the evidence and the arguments of counsel, the Court finds that Plaintiffs have not met their burden of demonstrating an entitlement to injunctive relief. For the following reasons, the Court will DENY Plaintiffs' Motion.

I. BACKGROUND

Ohio stands alone in the way it fills vacancies on its state court benches: candidates first compete in a partisan primary and then in a nonpartisan general election.[3] The primary election

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the Supreme Court of Ohio on August 12, 2010, mooted Plaintiffs' request for relief regarding that Rule. *See* doc. 22-1, "Amendments to the Ohio Code of Judicial Conduct."

[3] Seven states have partisan judicial elections, thirteen have nonpartisan elections, sixteen have retention elections (in which the governor appoints judges from a pool of qualified candidates recommended by a bipartisan nominating committee and voters then hold judges accountable in an election), two have legislative elections, and ten appoint judges. *See Carey v. Wolnitzek*, Case Nos. 08-6468, 08-6538, 2010 WL 2771866, at App'x A (6th Cir. July 13, 2010). Ohio and Michigan have partisan nominations and a nonpartisan general election to fill judicial seats, but Michigan differs from Ohio in that only supreme court candidates are subject to partisan nomination, and those nominations are accomplished at political party conventions or by nominating petition, not by a primary election.

ballots list judicial candidates on their political party's primary election ballot. These ballots are referred to as "office type" ballots. O.R.C. § 3505.03. The winners of these partisan primaries go on to have their names listed on the general election ballot, along with the names of any independent judicial candidates.[4] All judicial candidates competing in a general election in Ohio are considered nonpartisan candidates. O.R.C. § 3501.01(J). Pursuant to O.R.C. § 3505.04, the statute Plaintiffs are challenging in this case,

> 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.

Based on this statute, no judicial candidate in Ohio may appear on any general election ballot with a party designation.

Judicial candidates are the only candidates in Ohio who appear on an office type ballot in the primary election but on a nonpartisan 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.

Plaintiffs also challenge Rule 4.4 of the Ohio Code of Judicial Conduct, which judicial candidates must adhere to when engaging in campaigns for elections to office. Pursuant to that Rule, a judicial candidate shall not personally solicit campaign contributions except as follows:

> (1) A judicial candidate may make a general request for campaign contributions when speaking to an audience of twenty or more individuals;

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[4] An independent judicial candidate can qualify for the nonpartisan, general election ballot without having first run in a primary race.

> (2) A judicial candidate may sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate.

The Rule also prohibits a judicial candidate from personally receiving campaign contributions. A judicial candidate may establish a campaign committee to manage and conduct a campaign for the candidate, subject to applicable law. *Id*.

A significant impetus for this lawsuit was the Sixth Circuit Court of Appeals' recent decision in *Carey v. Wolnitzek*, in which the court held that Kentucky's Code of Judicial Conduct canon regarding party affiliation and solicitation violated the First Amendment. Case Nos. 08-6468/6538, 2010 WL 2771866 (6th Cir. July 13, 2010). Plaintiffs ask this Court to expand *Carey*'s holding by enjoining enforcement of Ohio's Rule restricting a judicial candidate's solicitation and receipt of campaign contributions and by requiring the Secretary of State to put judicial candidates on a partisan ballot.

II. LEGAL STANDARD

Rule 65 of the Federal Rules of Civil Procedure authorizes the Court to grant preliminary injunctive relief. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008); *see also Langley v. Prudential Mortgage Capital Co., LLC*, 554 F.3d 647, 648 (6th Cir. 2009) (quoting *Winter*, 129 S. Ct. at 374).[5] "A preliminary injunction is an extraordinary remedy never

[5] The Sixth Circuit has stated that a district court is to consider the following four factors when deciding to issue a preliminary injunction: "(1) whether the movant has a 'strong'

awarded as of right." *Id*. (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2218-19 (2008)). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id*. (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). "The proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

III. ANALYSIS

A. Party Identifiers on the Ballot

1. Likelihood of Success on the Merits

The Supreme Court has explained the process for determining the constitutionality of state election law as follows:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "'character and magnitude'" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. . . . Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'"

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likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction" and explained that "[t]hese factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). *Winter* clarifies that the party seeking preliminary relief must demonstrate that irreparable injury "*is likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 375-76.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (internal citations omitted). Plaintiffs assert that, by prohibiting judicial candidates from appearing on the partisan general election ballot, O.R.C. § 3505.04 places a severe burden on voters' right to associate and cast meaningful votes, the Democratic Party's rights to select and champion its nominee and educate voters, and judicial candidates' freedom of speech to express their qualifications. (Doc. 35 at 5.) Plaintiffs assert that the state cannot demonstrate an interest sufficiently compelling to justify that burden.

A judicial candidate launched a similar challenge to O.R.C. § 3505.04 in *Haffey v. Taft*, 803 F. Supp. 121 (S.D. Ohio 1992). In *Haffey*, an independent judicial candidate sought a preliminary injunction, arguing that O.R.C. § 3505.04 violated his right to free association, free speech, and equal protection pursuant to the First and Fourteenth Amendments. Specifically, the plaintiff argued that the primary election gave an unfair advantage to the party-affiliated candidates.

In analyzing whether the plaintiff was likely to succeed on the merits of his claim that O.R.C. § 3505.04 violated the First and Fourteenth Amendment, the *Haffey* Court applied the balancing test laid out by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts, including the Sixth Circuit, apply the *Anderson* analysis when considering constitutional challenges to state election regulations. Under the *Anderson* balancing test,

> [a court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's

> rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. First, in considering the magnitude of the plaintiff's injury, the court noted that O.R.C. § 3505.04 did not prevent the plaintiff from placing his name on the ballot: "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 (quoting *Georges v. Carney*, 691 F.2d 297, 301 (7th Cir. 1982)). Then, the court determined that the interest asserted by the state in support of O.R.C. § 3505.04, *i.e.*, to keep politics out of the general judicial election, was "not only [] sincere, but also [] fully justif[ied] any small injury to Plaintiff's rights." *Id*. at 126. Ultimately, the court ruled that the plaintiff was not entitled to a preliminary injunction requiring that judicial election ballots designate party affiliations because the plaintiff failed to establish a likelihood of success on the merits or irreparable injury and, in fact, an injunction would harm others and not be in the public interest.

Similar to Plaintiffs in the present case, the plaintiff in *Haffey* relied heavily on the Sixth Circuit's decision in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), a case that involved non-judicial elections. In *Rosen*, the Sixth Circuit affirmed the district court's decision granting summary judgment to the plaintiff after finding that O.R.C. § 3505.03 violated the First and Fourteenth Amendments. Section 3505.03 prohibited nonparty candidates for non-judicial elective office from placing "Independent" on the ballot next to their name but allowed affiliated candidates to place "Republican" or "Democrat" next to their names. The *Rosen* Court, employing the *Anderson* balancing test, found that the prohibition burdened the right of voters to

cast their votes effectively and placed an unequal burden on Independent candidates. *Rosen*, 970 F.2d at 177.

The *Haffey* Court distinguished *Rosen*. First, whereas Rosen had presented evidence that voting cues on the ballot itself made it virtually impossible for an independent candidate to prevail in the general election, Haffey made no such showing. The "voting cue," *i.e.*, the party designation, that allegedly gave party-affiliated judicial candidates an advantage was on the primary ballot, not the general election ballot, and any advantage was attenuated because the primary occurred five months earlier. *Haffey*, 803 F. Supp. at 126. Second, the state in *Rosen* did not identify a legitimate interest keeping the designation "Independent" off of its partisan ballot whereas in *Haffey*, the state interest in keeping politics out of the general election of the judiciary was both important and legitimate. *Id*. The court also observed,

> In *Rosen*, the Sixth Circuit appears to have anticipated Haffey's situation when it stated that "[w]ith respect to the political designations of the candidates on ... the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns."

Id. at 126 n. 4, citing *Rosen*, 970 F.2d at 175 (emphasis added). In other words, *Rosen* suggests that a state could validly prohibit political designations on ballots, but that if it allows any designations, it may not discriminate by permitting some designations but not others.

In the present case, Plaintiffs posit that Ohio's statute places a "severe" burden on the rights of Plaintiffs and is unconstitutional because the state's interest is not of "compelling" importance. In support of this argument, Plaintiffs presented evidence that the absence of partisan voting cues on the ballot may correlate to lower voting rates in nonpartisan judicial races as compared to partisan races. Plaintiffs also assert that Defendants' stated interest in

support of O.R.C. § 3505.04, maintaining the perception of judicial impartiality, no longer justifies the alleged restrictions on Plaintiffs' First and Fourteenth Amendment rights in the wake of *Carey v. Wolnitzek*. Plaintiffs cite to *Carey* on this point:

> The State argues that it must hide the candidate's party affiliation on the last day of the election in order to avoid the appearance of impropriety. However, as *Carey* observed, "[i]f concern over judicial partisanship and the influence of political parties on judging truly underlies the [party affiliation] clause, the authorization to belong (secretly) to a political party amounts to a gaping omission. A party's undisclosed potential influence on candidates is far worse than its disclosed influence, as the one allows a full airing of the issue for the voters while the other helps to shield it from public view."

(Doc. 41 at 4, citing *Carey*, 2010 WL 2771866 at *10.) As this excerpt reveals, however, *Carey* concerned Kentucky's affiliation and solicitation clauses, not a provision of the state's election law requiring nonpartisan general judicial election ballots. As such, *Carey* is not controlling on this issue.

As did the court in *Haffey*, this Court finds that Plaintiffs have not, at this early stage of the litigation, put forth evidence to demonstrate that prohibiting a political party designation next to judicial candidates' names on the general election ballot constitutes a "severe" restriction on Plaintiffs' constitutional rights. Judicial candidates are permitted to state in person or in advertising that they are a member of, or affiliated with, nominee of, or endorsed by a political party. Ohio Code of Judicial Conduct Rule 4.2. Judicial candidates may appear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all of the candidates endorsed by the party in an election. *Id*. Because Plaintiffs have not demonstrated that the burden on Plaintiffs' rights is severe, the Court's review

of the statute is less exacting, and the burden may be justified by the state's important regulatory interests. *See Timmons*, 520 U.S. at 358.

Plaintiffs next argue that their addition of persons as party plaintiffs who are not judicial candidates alters the analysis and requires a different result than that in *Haffey*. It is true that *Haffey* did not involve the constitutional claims of voters and a political party. However, the Supreme Court has stated, "we are unpersuaded ... by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 362-63. This undermines Plaintiffs' argument that the addition of voters and the Democratic Party to the case makes *Haffey* inapposite.

To be sure, the inconsistency between Ohio's partisan primary and nonpartisan general election for the judiciary, combined with the fact that judicial candidates can publically tout their political affiliation, casts a cloud on the State's purported justification for denying judicial candidates a spot on the office type general election ballot. However, based on the reasoned earlier decision of our sister court, the Court finds that although Plaintiffs may ultimately succeed on their challenge to O.R.C. § 3505.04, they have not at this point shown a strong likelihood of success on the merits.

2. Likelihood of Irreparable Harm

Plaintiffs make generalized statements about the irreparable harm they will suffer in the absence of an injunction: "Denying a candidate fair access to the ballot constitutes irreparable harm. Denying a voter information needed to follow her candidate from the primary through the general election constitutes irreparable harm, and denying a citizen his right to free speech

constitutes irreparable harm." (Doc. 2 at 21.) In *Elrod v. Burns*, the Supreme Court stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976). However, this standard inextricably entwines the merits of the claim with the injury sustained. In *Elrod*, the movant had sufficiently demonstrated a probability of success on the merits of his First Amendment claim. *Id*. at 374. Such is not the case here. Although Plaintiffs provided evidence that fewer votes are cast for judicial candidates than for candidates in partisan races, there was no evidence that this phenomenon had an adverse impact on the candidates. No evidence was presented to establish that the Plaintiff candidates' *election* was more likely if their party affiliation was added to the ballot. Simply put, the evidence presented at this point does not clearly demonstrate a likelihood of injury to the candidates themselves if the status quo is maintained.[6]

Furthermore, contrary to Plaintiffs' suggestion, that the statute prohibits party designation next to a judicial candidate's name on the general election ballot does not deny a voter information needed to follow a particular candidate from the primary to the general election. The Ohio County Boards of Elections publish candidate lists prior to the general election that names the persons running for judicial offices and lists their party affiliation. (*See*

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[6] Judge Peter J. Corrigan, who is running uncontested for reelection to his seat on the Cuyahoga County Court of Common Pleas, has a unique argument with respect to injury. Judge Corrigan, who won the Democratic Primary, will appear (like all judicial candidates) on the nonpartisan general election ballot. On the same general election ballot, a different Peter J. Corrigan will be listed as a Republican candidate for congress. (Corrigan Aff. ¶ 16, filed as doc. 2-3.) Voters repeatedly confuse Judge Corrigan with congressional candidate Peter J. Corrigan. (*Id*.) Judge Corrigan states that a clear way to distinguish himself on the general election ballot is for him to be identified on that ballot as a Democrat. (*Id*.)

That voters may confuse Judge Corrigan with congressional candidate Corrigan in the 2010 general election does not constitute irreparable injury to Judge Corrigan. He is running uncontested in the election, and the presence or absence of a party identifier next to his name on the ballot is unlikely to affect the outcome.

Aug. 13, 2010 Hearing PX-13 (Cuyahoga Conty Board of Elections Nov. 2, 2010 General Elections Candidates List), PX-14 (Hamilton County Candidates List General Election Nov. 2, 2010)). A voter may access this list on the internet or at the boards of elections. That a voter would have to undertake some affirmative action to obtain a list of the candidate and his or her party affiliation does not per se equate to an unconstitutional denial of information.

Finally, 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 v. Washington State Republican Party*, 552 U.S. 442, 453 n.7 (2008) (citing *Timmons*, 520 U.S. at 362-63). Plaintiffs have failed to demonstrate that irreparable injury to any of the Plaintiffs – voters, judicial candidates, or a political party – is likely in the absence of an injunction. Under *Winter*, Plaintiffs' failure to make this showing makes the extraordinary relief of an injunction improper. 129 S. Ct. 365. Nonetheless, the Court will briefly state its findings with respect to the remaining factors for consideration.

3. Balance of Equities

Plaintiffs state that an order from this Court granting them the relief they seek would not affect the ballot other than to require the Secretary of State to list the party affiliation of judicial candidates who were nominated through a partisan primary. Defendants argue that the practical effect of such a ruling would be much broader. Specifically, Defendants state that 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 claim a similar right.

The Court will not speculate as to whether Defendants predictions would come true. However, there is no doubt that the immediate burden of a ruling in Plaintiffs' favor would result in the Secretary of State having to modify and then certify the general election ballot prior to August 24, 2010 – a date less than one week away. Plaintiffs, on the other hand, face no additional burden if the status quo is maintained. Accordingly, the balance of equities favors the Defendants.

4. Public Interest

As the Supreme Court stated in *Winter*, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." 129 S. Ct. at 376-77. This case challenges Ohio's longstanding system of partisan primaries followed by nonpartisan general election of judicial candidates. The system devised by Ohio's legislature is unquestionably inconsistent and, consequently, deserving of scrutiny. However, the effect of a ruling by this Court that the system is unconstitutional would have broad reaching implications.

It is extremely difficult for a trial judge to ascertain at the preliminary injunction stage whether a plaintiff might ultimately prevail on its claims: "The arguments that flow from the facts, while not exactly half-baked, do not have the clarity and development that will come later at summary judgment or trial. In this setting, it can seem almost inimical to good judging to hazard a prediction about which side is likely to succeed." *Alliance for Wild Rockies v. Cottrell*, No. 09-35756, 2010 WL 2926463 at *12 (9th Cir. July 28, 2010) (Mosman, District Judge, concurring). There is no demonstrated need for expediency in this case. It is in the public interest that the Court maintain the status quo until such time as it becomes clear, through the

normal course of discovery and argument, whether the statute violates the constitutional rights of judicial candidates, voters, and the political parties.

B. Ban on Personal Solicitation and Receipt of Campaign Funds

1. Likelihood of Success on the Merits

The Sixth Circuit's decision in *Carey* directly impacts the Ohio Judicial Code solicitation clause challenged by Plaintiffs. At the time Plaintiffs filed this lawsuit, Ohio's solicitation clause provided that "[a] judicial candidate shall not personally solicit or receive campaign contributions." Former Ohio Code of Judicial Conduct Rule 4.4(A).[7] *Carey*, decided and filed July 13, 2010, held that Kentucky's solicitation clause, which read: "[a] judge or candidate for judicial office shall not solicit campaign funds," was unconstitutionally overbroad. 2010 WL 2771866 at *15. This lawsuit quickly followed. However, the members of the Supreme Court of Ohio, who are responsible for enacting and enforcing the Ohio Judicial Code of Conduct, also responded quickly.

On August 11, 2010, this Court received notice that the Supreme Court of Ohio had revised Rule 4.4(A). (Doc. 22.) The revised Rule no longer prohibits judicial candidates from all forms of personal solicitation. Now, a judicial candidate may (1) make a general request for campaign contributions when speaking to an audience of twenty or more individuals and (2) sign

[7] Prior to its amendment, effective August 12, 2010, the entire text of Ohio Code of Judicial Conduct Rule 4.4(A) was as follows:

> A judicial candidate shall not personally solicit or receive campaign contributions. A judicial candidate may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The judicial candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate. (*See* doc. 22-1.) The question, then, is whether this revised Rule is likely to pass constitutional muster under *Carey*.

The Sixth Circuit acknowledged that Kentucky's canon prohibiting judicial candidates from soliciting campaign funds served the state's "compelling interest in an impartial judiciary" and "its interest in preserving the appearance and reality of a non-corrupt judiciary." *Carey*, 2010 WL 2771866 at *12. "Litigants have a due process right to a trial before a judge with no 'direct, personal, substantial pecuniary interest' in the outcome . . . and the legitimacy of the judiciary rests on delivering on that promise and in furthering the public's trust in the integrity of its judges." *Id*. (internal citations omitted).

However, the *Carey* court concluded that Kentucky's canon was not narrowly tailored to the government interest asserted, noting that "[p]rohibiting candidates from asking for money suppresses speech in the most conspicuous of ways." *Id*. The court went on to say that at least two areas covered by the clause might be legitimate limitations on a candidate's right to ask for a campaign contribution: face-to-face solicitations, particularly by sitting judges, and solicitations of individuals with cases pending in front of the court. *Id*.

The court did not decide whether those particular face-to-face restrictions survived scrutiny because the Kentucky canon went well beyond those specific restrictions. Namely, the canon prohibited indirect methods of solicitation that presented little or no risk of undue pressure or the appearance of a quid pro quo, such as speeches to large groups and signed mass mailings. *Id*. at *13. Furthermore, the canon did too little to protect Kentucky's interests because it

permitted campaign committee members to solicit donations in person, and it did not bar the candidate from learning how individuals responded to the committee's solicitations. "If the purported risk addressed by the clause is that the judge or candidate will treat donors and nondonors differently, it is knowing who contributed and who balked that makes the difference, not who asked for the contribution." *Id*. The court concluded, "we do not decide today whether a State *could* enact a narrowly tailored solicitation 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 *14.

The Members of the Ohio Supreme Court revised Ohio's solicitation Rule in an obvious effort to turn Rule 4.4(A) into a narrowly tailored rule that would satisfy Sixth Circuit scrutiny in the wake of *Carey*. To wit, the revised Rule maintains its ban on one-on-one solicitation but permits precisely the types of solicitation the *Carey* Court said presented little risk of undue pressure or the appearance of a quid pro quo: speeches to large groups and signed mass mailings. The question is whether this makes the Rule narrow enough.

Rule 4.4(A) as revised recognizes the practical necessity of raising funds for judicial elections: it allows candidates to personally solicit donations in speeches to groups of twenty or more individuals and in personally signed letters. Therefore, it is plainly more narrowly drawn than the outright solicitation ban struck down in *Carey*. *Carey* suggests that certain types of one-on-one solicitation are more likely to present the risk of undue pressure than others. However, it stopped short of holding that a rule banning all in-person one-on-one solicitation would be unconstitutionally overbroad in light of a state's compelling interest in an impartial judiciary. Accordingly, this Court cannot conclude that Plaintiffs have established a likelihood of success

on the merits of their claim that Ohio's ban on one-on-one solicitations is facially unconstitutional under *Carey*.

2. Likelihood of Irreparable Harm

Neither have Plaintiffs at this stage of the case put forth evidence that demonstrates a likelihood of irreparable harm absent an order of this Court enjoining the enforcement of Rule 4.4(A). Plaintiff Martha Good, a judicial candidate who testified at the evidentiary hearing in this case, stated that she would personally solicit certain individuals, such as family members, if she was not forbidden from doing so by the Rule. However, Ms. Good then stated that all her family members are aware of her candidacy and have donated to her campaigns in the past. Ms. Good stated her belief that direct solicitation could be more effective than solicitations from a committee. However, Plaintiff judicial candidates presented no evidence that they had been unable to raise funds sufficient to run effective campaigns because of the ban on direct solicitation. Given the lack of evidence that judicial candidates are less able to run an effective campaign vis a vis their judicial opponents because of the ban on one-to-one solicitation, the Court cannot conclude that Plaintiffs have demonstrated a likelihood of irreparable harm if the Court does not enjoin enforcement of Rule 4.4(A).

3. Balance of Equities and Public Interest

Granting Plaintiffs Motion and invalidating Rule 4.4 at this point would result in Ohio having no regulations whatsoever on judicial solicitation. While every judicial candidate to give testimony in this case unequivocally stated they would never personally solicit campaign contributions from the bench, they would not be prohibited from doing so, nor would any other judicial candidate competing for judicial office. Abolishing all restrictions on personal

solicitation could undermine public confidence that the judiciary is fair, impartial, and independent. As the Sixth Circuit stated, "the legitimacy of the judiciary rests on delivering on that promise [that a litigant has a due process right to a trial before a judge with no 'direct, personal, substantial pecuniary interest' in the outcome] and in furthering the public's trust in the integrity of its judges." *Carey*, 2010 WL 2771866 at *12. Whether or not a judicial candidate's unbridled solicitation and receipt of campaign contributions actually resulted in favoritism, it certainly could erode the public's trust in the integrity of its judges. The balance of equities therefore tips in favor of the Defendants and, at this preliminary stage, calls for maintaining the status quo.

IV. CONCLUSION

The factors to consider in granting a temporary restraining order weigh in Defendants' favor. Accordingly, this Court **DENIES** Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. (Doc. 2.)

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court