

LEGAL NOTE

Does the First Amendment Render Nonpartisan Elections Meaningless? The Sixth Circuit's *Carey v. Wolnitzek* Decision

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In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Supreme Court held that a canon of judicial conduct prohibiting judicial candidates from announcing their views on legal or political issues violated the First Amendment. In her concurrence Justice O'Connor stated:

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. . . . Minnesota has chosen to select its judges through contested popular elections. . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges (*Republican Party of Minnesota*, 536 U.S. at 788, 792, J. O'Connor concurring).

In a sense Justice O'Connor expressed her concern that states choosing elections as their judicial selection system reap what they sow. Indeed, since her retirement from the Supreme Court, Justice O'Connor has engaged in a public campaign to replace state judicial elections with alternatives she believes are better suited to the judiciary (see, e.g., Podgers, 2009).

Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010), did not specifically involve the subjective and normative issues raised by Justice O'Connor regarding what might be the best or most appropriate judicial selection system; yet, it addressed many of the constitutional issues raised in the *Republican Party of Minnesota* case. In the *Carey* decision written by Circuit Judge Jeffrey S. Sutton and joined by Chief Circuit Judge Alice Moore Batchelder, the Sixth Circuit relied upon that Supreme Court precedent to hold unconstitutional a judicial canon promulgated by the Kentucky Supreme Court restricting certain campaign activities because the canon violates the First Amendment.

Kentucky holds nonpartisan elections to select its judges. That is, in both the primary and general elections, no party labels or other partisan identifiers are attached to the ballot, as "political parties have no formal role in any state of the judicial selection process" (*Carey*, 614 F.3d at 194). Further, all candidates for judicial office must abide by the Kentucky Code of Judicial Conduct which "generally prohibits . . . inappropriate political activity" (hereafter, "Canon 5"; *id.*). More specifically, Canon 5

includes the following, all of which were adopted in 2005 and are at issue in the *Carey* case:

The party affiliation clause. “A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering. If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party.” Canon 5(A)(2).

The solicitation clause. “A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.” Canon 5(B)(2).

The commits clause. “A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court.” Canon 5(B)(1)(c).¹

Marcus Carey, a candidate for the Kentucky Supreme Court in 2006, filed suit in federal court against various parties serving in agencies such as the Kentucky Judicial Conduct Commission, seeking a declaration that these clauses in Canon 5 are unconstitutional on their face (as opposed to as applied). No formal charges had been filed against him, but Carey claimed he feared he was barred by the various provisions in Canon 5 from 1) divulging his party affiliation, 2) signing fund-raising letters, and 3) responding to judicial questionnaires. Before the general election, the District Court for the Eastern District of Kentucky issued a preliminary injunction enjoining enforcement of the party affiliation and solicitation clauses, while it dismissed the commits-clause challenge on threshold grounds. Carey was permitted to amend his complaint on the commits clause, which he did before the general election. Thus, all three clauses were before District Judge Karen Caldwell, who in an unpublished decision on the merits ruled in favor of Carey’s challenges to the party affiliation and solicitation clauses, holding that these clauses violated the First Amendment. However, Judge Caldwell ruled against Carey’s claim on the commits clause, holding it did not violate any constitutional provisions (*Carey v. Wolnitzek*, WL 4602786, E.D.Ky. 2008). Though Carey lost the election, he appealed the district court ruling on the commits clause to the

¹ Interestingly, the Kentucky Supreme Court pre-dated the Supreme Court’s *Republican Party of Minnesota* decision when it ruled in *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), that the state’s “announce clause” prohibiting judicial candidates from announcing views on disputed legal or political issues unconstitutionally violated state and federal rights to freedom of speech. Subsequently, Kentucky adopted the party affiliation, solicitation, and commits clauses of Canon 5 as a way to ensure that judicial candidates and judges are fair and impartial while avoiding the appearance of bias and partiality.

Sixth Circuit, while the various state defendants appealed the decision on the party affiliation and solicitation clauses.

The Sixth Circuit first determined that Carey's claims met threshold requirements, as they were ripe for review and not moot. Turning to the merits, the Sixth Circuit began by noting its "sympathy for the concerns that prompted the canon, so much so that we embrace a central premise of it: Judicial elections differ from legislative elections, and the Kentucky Supreme Court has a compelling interest in regulating judicial campaign speech to ensure the reality and appearance of an impartial judiciary" (*Carey*, 614 F.3d at 194).

In terms of the level of judicial scrutiny, the court held that since the judicial canon restricted the content of speech on a core First Amendment issue, "[s]trict scrutiny applies to all three aspects of this First Amendment challenge. [*Republican Party of Minnesota v. White*, for one, suggests as much, even if the decision does not compel that conclusion" (*Carey*, 614 F.3d at 198). Since the state has a compelling interest in promoting impartiality with respect to the parties in a case, the critical question was whether the state's means were sufficiently narrowly tailored to satisfy strict-scrutiny analysis.

With respect to the party affiliation clause, Judge Sutton wrote that this canon was not narrowly tailored, as it did both "too much . . . [and] too little, to advance the government's [compelling] objectives" (*Carey*, 614 F.3d at 201). In particular, the party affiliation clause was similar to the announce clause ruled unconstitutional in *Republican Party of Minnesota*, as it prohibited candidates from announcing their party identification. This is critical information to voters, since party affiliation is a proxy that conveys information not on just a single issue (as with the announce clause in *Republican Party of Minnesota*) but on many issues at once. Thus, the party affiliation clause unconstitutionally suppressed too much speech. As well, this clause suppressed the communication of party affiliation at the candidate's initiative, but not in response to a query from a voter. Since party identification was not a "forbidden topic" the party affiliation clause also did "too little to advance the State's interest in impartiality and the avoidance of partisan influence" (*Carey*, 614 F.3d at 202). For these reasons, the Sixth Circuit affirmed the decision of the district court, holding the party affiliation clause unconstitutional on its face.

The court similarly ruled the solicitation clause unconstitutional. While this clause served a compelling government interest in an impartial and non-corrupt judiciary, citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), it failed the second prong of strict-scrutiny analysis since it was not narrowly tailored. As the Sixth Circuit stated:

Prohibiting candidates from asking for money suppresses speech in the most conspicuous of ways and, in the process, favors some candidates over others — incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all)

over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders (*Carey*, 614 F.3d at 204).

The court was not willing to say that all limitations on solicitations are unconstitutional; in particular, Judge Sutton surmised that face-to-face solicitations by sitting judges and solicitations of those with cases pending before the court might warrant reasonable limits. But the Kentucky solicitations clause covered much more, as it also prohibited signed mass mailings and public speeches, deemed “indirect methods of solicitation present[ing] little or no risk of undue pressure or the appearance of a quid pro quo” (*Carey*, 614 F.3d at 205). Moreover, the clause precluded the judicial candidate from solicitation of campaign donations but did not preclude another from making solicitations on the candidate’s behalf. “That leaves a rule preventing a candidate from sending a signed mass mailing to every voter in the district but permitting the candidate’s best friend to ask for a donation directly from an attorney who frequently practices for the court” (*id.*). The Sixth Circuit thus ruled the solicitations clause overbroad and facially invalid.

Though the district court found the commits clause constitutional, the Sixth Circuit was not nearly as convinced, and its ruling on this clause reflected its ambivalence. While the state has a compelling interest in ensuring the due process right that judges have not committed to one party or another before the judicial hearing, this clause goes further by precluding candidates from making even the appearance of commitments regarding issues. However, in determining whether this canon was overbroad, a factual account of the extent to which the clause precluded issue commitments was never made at the district court. Thus, the Sixth Circuit remanded this issue to determine the extent to which commitments included issues, which the court implied would be unconstitutional (*Carey*, 614 F.3d at 208-9).

District Judge Thomas Wiseman, sitting by designation in the case, concurred in part and dissented in part. He agreed with the majority’s reasoning holding the party affiliation and solicitation clauses unconstitutional. However, he argued that a specific definition would be impossible to achieve, making an analogy to the classic definition of pornography that a judge knows it when she or he sees it. Judge Wiseman also clearly believed that the commits clause was constitutional: “Maintenance of public confidence that a litigant will receive an unbiased hearing in the courts is as compelling an interest as any possessed by the Commonwealth of Kentucky. The canon here appropriately addresses that interest” (*Carey*, 614 F.3d at 219, J. Wiseman *concurring in part and dissenting in part*).

In its conclusion, the majority firmly asserted its commitment to rights of free speech:

There is room for debate about whether the election of state court judges is a good idea or a bad one. Yet there is no room for debate that, if a State opts to select its judges through popular elections, it must comply with the First Amendment in doing so (*Carey*, 614 F.3d at 209).

Consequently, this case will have clear implications for other states within the Sixth Circuit, particularly Michigan and Ohio, the only states in the country with partisan procedures to select judicial candidates for the general election ballot, but where the general elections are nonpartisan in nature (Hurwitz, 2011).

In so ruling, the Sixth Circuit seemed to anticipate two recent Supreme Court rulings that had not been issued at the time the *Carey* opinion was announced, both of which unwaveringly defended the concept of freedom of speech. The first is *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), where a divided Court held that the First Amendment mandated that corporate identity could not be used to suppress political speech in the form of independent electioneering expenditures. As a consequence, the Supreme Court held part of the Bipartisan Campaign Reform Act of 2002 unconstitutional. Despite popular criticism of this decision, it represents a strong commitment to freedom of speech. As the American Civil Liberties Union (2009) stated before the *Citizens United* decision: "The ACLU has consistently taken the position that section 203 [of the Bipartisan Campaign Reform Act] is facially unconstitutional under the First Amendment because it permits the suppression of core political speech, and our amicus brief takes that position again." In the Supreme Court's words: "The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether" (*Citizens United*, 130 S.Ct. at 886).

Moreover, in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), an 8-1 majority of the Supreme Court held that distasteful, even hurtful, speech on matters of public concern was protected by the First Amendment. As Chief Justice Roberts stated for the majority:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate (*Snyder*, 131 S.Ct. at 1220).

The Sixth Circuit in *Carey* concluded with essentially the same theme:

Through it all, no one should lose sight of the reality that a judicial candidate's right to engage in certain types of speech says nothing about the desirability of that speech. The First Amendment protects the meek and brazen, the "offensive" and agreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Today's case is about the meaning of the First Amendment, not about the virtues of some types of judicial campaign speech relative to others (*Carey* 614 F.3d at 209).

While the court in *Carey* tried to bypass the issue of what selection system might be best or most appropriate, there are a myriad of sources both in favor of judicial elec-

tions (see Bonneau and Hall, 2009) and against them (see Geyh, 2003). However, if one wants to find a strong commitment to freedom of speech, the Sixth Circuit's decision in *Carey* is an excellent place to begin. **jsj**

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