No. _____

In The
Supreme Court of the United States

WILLIAM M. O'NEILL

Petitioner,

v.

JONATHAN COUGHLAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, a judicial candidate for the Supreme Court of Ohio, received a letter from Respondent Disciplinary Counsel, fifteen weeks before the general election, advising that Respondent had received a letter from a political adversary of the Petitioner, complaining that Petitioner's campaign materials violated multiple canons of Ohio's Code of Judicial Conduct. Petitioner filed suit in federal court–challenging the constitutionality of the canons under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The district court held that the three canons were unconstitutional under the First Amendment and enjoined their enforcement. The Sixth Circuit vacated the judgment, holding that the district court should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971). The questions presented are:

1. Is the mere initiation of an investigation by disciplinary counsel of a letter, complaining that a judicial candidate's campaign materials violate canons of the judicial code, an ongoing state proceeding requiring abstention under *Younger*, as the

Sixth Circuit determined here, in a ruling that conflicts with decisions of the Fourth and Fifth Circuit Courts of Appeals, holding that investigations (as opposed to formal charges) by administrative agencies of alleged violations of law do not constitute ongoing state proceedings under *Younger*, also followed by the Eighth Circuit?

2. Does a State Defendant waive *Younger* abstention when he pursues a litigation strategy at odds with that doctrine (by claiming that the controversy is not ripe, because no proceeding is pending and his actions are too incipient to even constitute a threat of prosecution, and by seeking dismissal of the complaint on the merits on the ground that the challenged canons are constitutional) and when he does not raise the issue of abstention until after the district court has granted a preliminary injunction in an opinion finding, on the merits, that the challenged canons are unconstitutional, but has

made no express statement on the record urging the district court to exercise its jurisdiction as in *Sosna v. Iowa*, 419 U.S. 393, 396-97, n.3 (1975); *Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 479-80(1977); *Brown v. Hotel Employees*, 468 U.S. 491, 500, n. 9 (1984)?

3. Does this case present extraordinary circumstances, warranting a federal court to decline to abstain under *Younger*, given that, under the state disciplinary system, there would be no opportunity to raise constitutional issues in state court until after the election?

LIST OF THE PARTIES

The parties to the proceedings in the lower court were the Honorable William M. O'Neill, as appellee and Jonathan Coughlan, in his official capacity as Disciplinary Counsel to the Supreme Court of Ohio, as appellant.

There are no corporate parties to this action to require the inclusion of a corporate disclosure statement pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI

William M. O'Neill respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing en banc is set forth in the Appendix at App. 73-74. The Opinion of the Court of Appeals, reported at 511 F.3d 638 (6th Cir. 2008), is set forth at App. 1-21. The Final Judgment of the United States District Court for the Northern District of Ohio is set forth at App. 22-24 The Memorandum and Order of the District Court granting summary judgment to the Petitioner and denying summary judgment to the Respondent, is set forth at App. 25-35. The Memorandum and Order of the District Court denying the motion to vacate, dissolve or modify its preliminary injunction, reported at 436 F.Supp.2d 905 (N.D.Ohio 2006), is set forth at App. 36-44. The Memorandum Opinion and Order of the District Court granting the petitioner's Motion for a Preliminary Injunction is set forth at App. 46-72.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 9, 2008. The Order of the Court of Appeals denying rehearing and rehearing *en banc* was entered on May 13, 2008. This petition is being filed within 90 days of the order denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution is reprinted in the Appendix to this Petition at App. 75. Relevant provisions of the Ohio Code of Judicial Conduct are reprinted at App. 76-77.

STATEMENT OF THE CASE

In thirty-nine states, judges are either elected to the bench in the first instance, or subject to retention elections after being appointed.[1]

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[1]Judges are elected in: Alabama; Arizona; Arkansas; California; Florida; Georgia; Idaho; Illinois; Indiana; Kentucky; Louisiana; Maryland; Michigan; Minnesota; Mississippi; Missouri;

Each of those states maintains a code of judicial conduct, which regulates the manner in which candidates for the bench may campaign for judicial office.[2]

In Ohio, judicial campaigns are governed by Canon 7 of the Code of Judicial Conduct, which contains several provisions imposing limits on judicial campaign speech. Three sections of that Canon are at issue here.

Canon 7(B)(1) provides: "A judge or judicial candidate shall maintain the dignity appropriate to judicial office."

Montana; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Washington; West Virginia; and, Wisconsin. Appointed judges are subject to retention elections in: Alaska; Colorado; Iowa: Kansas; Nebraska; Utah; and, Wyoming. See, American Judicature Society, Methods of Judicial Selection, available online at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm? State= (last visited August 7, 2008).

[2]American Judicature Society, *Judicial Campaigns and Elections, Campaign Conduct*, available online at http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state= (last visited August 1, 2008).

Canon 7(B)(3)(b) provides: "After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party."

Canon 7(D)(2) provides:

> During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard do any of the following:
>
> * * *
>
> (2) Use the term "judge" when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves . . . .

Ohio is not unusual in having such restrictions.

Analogous provisions require candidates for judicial office to conduct "dignified" campaigns in many states.[3]

The codes of judicial conduct in a number of states prohibit judicial candidates from identifying themselves as being affiliated with a given political party, or seeking the support of a political party during an election campaign.[4]

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[3]See, e.g.: Colo. Code of Jud. Conduct, Canon 7(B)(1)(A); Fla. Code of Jud. Conduct, Canon 7(A)(3)(a); Id. Code of Jud. Conduct, Canon 5(A)(4)(a); Ill. Code of Jud. Conduct, Rule 67, Canon 7(A)(3)(a); Kan. Code of Jud. Conduct, Canon 5(A)(3)(a); Ky. Code Jud. Conduct, Canon 5(B)(1)(a); Mich. Code of Jud. Cond., Canon 7(B)(1); Miss. Code of Jud. Conduct, Canon 5(A)(3)(a); Neb. Code of Jud. Conduct § 5-205, Canon 5(A)(3)(a); N.M. Code of Jud. Conduct, § 21-700(B)(1); 22 N.Y.C.R.R. § 100.5(A)(4)(a); N.D. Code of Jud. Conduct, Canon 5(A)(3)(a); Ok. Code of Jud. Conduct, Canon 5(A)(3)(a); Pa. Code of Jud. Conduct, Canon 7(B)(1)(a); S.D. Code of Jud. Conduct, Canon 5(A)(3)(a); Tenn. Code of Jud. Conduct, Canon 5(A)(3)(a); Utah Code of Jud. Conduct, Canon 5(D)(1); W.Va. Code of Jud. Conduct, Canon 5(A)(3)(a); Wis. Sup. Ct. R. 60.06(3)(a); Wyo. Code of Jud. Conduct, Canon 5(A)(3)(a).

[4]*See, e.g.*: Ark. Code of Judicial Conduct, Canon 5(A)(1)(d) and (f)(candidates may not seek or use party endorsements or identifying party affiliation); Fla. Code of Jud. Conduct, Canon 7(C)(3)(candidates should refrain from making their party affiliation known); Id. Code of Jud. Conduct, Canon 5(A)(1)(d)(may not endorse or seek the endorsement of a political organization); Ky. Code of Jud. Conduct, Canon 5(A)(2)(shall not identify self as a member of a political party in advertising or

Restrictions on the use of the term "judge," in a judicial campaign are, however, concededly rare.[5]

The restrictions imposed on judicial campaign speech in thirty-nine states implicate the First Amendment in light of the holding in *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002).

Those restrictions are administered by state bar disciplinary systems which are systemically unable to provide a prompt adjudication of the

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speeches); Nev. Code of Jud. Conduct, Canon 5(C)(1) and commentary (may identify party affiliation in response to a direct question but not in campaign materials); N.D. Code of Jud. Conduct, Canon 5(A)(1)(d)(may not seek or accept party endorsements); Ore. Code of Jud. Conduct, J.R. 4-102(C)(shall not knowingly identify himself as a party member); Wash. Code of Jud. Conduct, Canon 7(A)1)(e)(should not identify self as a party member) Wis. Sup. Ct. R. 60.06 (2)(b)(party membership prohibited).

[5] A significant number of states prohibit a candidate from knowingly misrepresenting his qualifications to the electorate, and Montana prohibits a judge who is a candidate for judicial office from using the prestige of that office to promote his candidacy. Mont. Canons of Jud. Ethics, Canon 35, No. 30. Only Ohio expressly prohibits the use of the word "judge" without providing additional, qualifying information.

First Amendment rights of judicial candidates in the only period that matters, during a contested election.

To force federal courts to abstain from adjudicating the rights of such candidates in deference to the ponderous machinery of the state disciplinary systems is to deprive those candidates of a forum in which to timely vindicate the rights which *White* recognized.

A. The Petitioner's Judicial Campaign

In 2004, the Petitioner was a judge on the Ohio Court of Appeals and a candidate for Associate Justice of the Ohio Supreme Court.

The question of judicial campaign finance reform was, and is, a hotly contested aspect of state supreme court races in Ohio. State Chief Justice Thomas Moyer has recognized that the system of campaign contributions in Ohio undermines public confidence in the judiciary.[6]

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[6] See the remarks delivered by Chef Justice Moyer to the California Commission for Impartial Courts, July 14, 2008, available online at www.courtinfo.ca.gov/jc/tflists /documents/moyer.pdf.

Other Ohio Supreme Court Justices have been more blunt, comparing the solicitation of contributions to the outright sale of justice.[7]

Against this backdrop, Judge O'Neill made the need for judicial campaign finance reform the centerpiece of his campaign, refusing to accept contributions over ten dollars, and stressing, in his speeches and literature, the theme that "money and judges don't mix." App. 2-3.

On his campaign website, Judge O'Neill identified himself as the candidate committed to reforming what he saw as a broken system, with the following claim: "The time has come to end the public's suspicion that political contributions influence court decisions. The election of Judge O'Neill is the best step toward sending the message: 'This Court is Not For Sale!'" App. 3.

After the primary, Judge O'Neill continued to identify himself as a Democrat in his campaign brochure, notwithstanding the prohibitions of Canon 7(B)(3)(b).

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[7]Adam Liptak and Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, October 1, 2006, at A1.

In addition, his campaign committee identified itself as the "Judge William O'Neill for Supreme Court Committee" without further stating that its candidate was presently a member of the Ohio Court of Appeals. App. 48.

On July 15, 2004, James Trakas, then Chairman of the Cuyahoga County Republican Party, wrote to the Respondent in his capacity as Ohio Disciplinary Counsel, alleging that the campaign materials described above violated the Code of Judicial Conduct. App. 3, 48.

The Trakas letter alleged that Judge O'Neill had violated two specific Canons of Judicial Conduct – Canons 7(B)(3)(b) and 7(D)(2) – and had engaged in campaign speech disparaging of the Ohio judiciary in general, an allegation which on its face implied a violation of the broadly worded Canon 7(B)(1), which requires judges and judicial candidates to preserve the dignity of the state judiciary. App. 3, 48.

The July 15, 2004 letter was sent to the Respondent in mid-campaign, sixteen weeks prior to the November general election. App. 3.

On July 21, 2004, just fifteen weeks before the general election, the Respondent sent a letter to Judge O'Neill, apprising him of the Trakas letter, and informing him that he was expected to respond to those allegations on or before August 4, 2004. App. 4.

Significantly, that letter noted that the Respondent was required to request a response from Judge O'Neill, and that the request for a response did not necessarily mean that charges would be filed against him. App. 50.

The sanctions for violating the Code of Judicial Conduct range from a public reprimand to permanent disbarment.[8]

B. The Ohio Disciplinary Process

Because the mechanics of judicial discipline in Ohio bear heavily on the question of whether the state disciplinary system itself (a) affords judicial candidates an adequate forum in which to assert their First Amendment rights (b) during the pendency of an election, and (c) informs the question of whether, for purposes of abstention,

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[8] Ohio R. Gov. Bar V, §§ 6 (H) and (J).

under *Younger v. Harris*, 401 U.S. 37 (1971), an ongoing state proceeding was underway when Judge O'Neill filed his federal case, the procedural aspects of that system merit mention here.

When a grievance is received by the Respondent, he is required to investigate the matter, and may solicit a response from the subject of the grievance.[9]

The Respondent must generally complete his investigation within sixty days, and reach a decision regarding the disposition of a given matter within thirty days after his investigation is completed.[10]

This ninety day period – which governs only the initial investigation – is hardly set in stone.

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[9] Ohio R. Gov. Bar V, § (4)(C)(investigation is mandatory) and Section (4)(G)(an investigating agency may require the target of an investigation, and any other lawyer or judge to cooperate during the course of its investigation).The disciplinary machinery applied to judges, judicial candidates and lawyers is the same in Ohio for purposes of this case. App. 12.

[10] Ohio R. Gov. Bar V, § (4)(D).

The Secretary of the Board of Commissioners may, upon written request, permit the Respondent to complete his investigation within 150 days of the date on which a grievance is filed.[11] This would allow roughly six months for the investigation and report.

In complex cases, cases involving litigation, or for good cause, the Chair of the Board of Commissioners may extend the period for investigation beyond 150 days.[12]

If an investigation is not completed within 150 days, it may also be assigned to a local grievance committee, which must complete its own investigation within sixty days.[13]

In such a case, 240 days would elapse between the receipt of a grievance and the issuance of a report.

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[11] Ohio R. Gov. Bar V, § (4)(D)(1).

[12] Ohio R. Gov. Bar V, § (4)(D)(2).

[13] Id.

The Rules for the Government of the Bar do require that investigations be completed no more than one year after a grievance is received.[14] The one year limit is not jurisdictional, however, and will not bar the filing of a disciplinary complaint absent some proof of prejudice.[15]

If, at the end of his investigation, the Respondent decides that charges should be brought against the subject of a grievance letter, he must prepare a formal complaint for submission to the Board of Commissioners.[16]

He may not submit that complaint, however, until he has provided a copy to the subject of his investigation, and allowed the subject to respond to the allegations contained therein.[17]

Once the formal complaint of misconduct is filed, the Secretary of the Board of Commissioners is required to submit it, together with

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[14] Id.

[15] Ohio R. Gov. Bar V, § (4)(D)(3).

[16] Ohio R. Gov. Bar V, §§ (4)(I)(1), (2) and (7).

[17] Ohio R. Gov. Bar V, § (4)(I)(2).

results of his investigation, to a probable cause panel charged with determining whether probable cause exists to believe that an ethical violation has occurred.[18]

The panel is required to reach its determination based solely upon the formal complaint, and the investigatory materials, but the Rules do not specify when it must act.[19]

If the panel determines that there is probable cause to believe a violation has occurred, it must certify the formal complaint to the Board of Commissioners.[20] Within twenty days, the subject of the complaint is required to file his answer.[21]

Thereafter (the Rules do not specify when) the Secretary of the Board of Commissioners is required to appoint the hearing panel to hear the case "upon reasonable notice."[22]

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[18] Ohio R. Gov. Bar V, § 6 (D)(1).

[19] *Id.*

[20] *Id.*

[21] Ohio R. Gov. Bar V, § 6 (E).

[22] Ohio R. Gov. Bar V, §§ 6 (D)(3) and (G).

The panel may continue the hearing for good cause. The Rules do not specify how long the panel has to set a hearing, or to hear the case.[23]

The hearing panel may, after taking testimony, recommend dismissal if it unanimously finds "the evidence is insufficient to support a charge or count of misconduct," or may find that the judicial canons have been violated, and recommend sanctions, ranging from a public reprimand to permanent disbarment.[24]

The decision of the hearing panel is subject to review by the entire Board of Commissioners.[25]

That determination is filed with the Clerk of the Ohio Supreme Court, which then issues a show cause order as to why the decision and recommendation of the Board of Commissioners should not be adopted.[26]

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[23] Ohio R. Gov. Bar V, §§ 6 (D)(3)(appointment of hearing panel) and (G)(setting and continuing the hearing).

[24] Ohio R. Gov. Bar V, § 6 (H) and (J).

[25] Ohio R. Gov. Bar V, § 6 (K).

[26] Ohio R. Gov. Bar V, §§ 6 (L) and 8 (A).

Only at this stage, the subject of a grievance may submit briefs to the Ohio Supreme Court setting forth his objections to the finding of the hearing panel.[27]

C. The District Court Litigation

Rather than await the outcome of this ponderous process, which could take years to adjudicate his claims, the Petitioner – whose speech was called into question weeks before an election – sought relief in district court, the jurisdiction of which was invoked pursuant to 28 U.S.C. §§ 1331, 2201 and 2202, and pursuant to 42 U.S.C. § 1983.

Petitioner filed his Complaint, together with a Motion for a Temporary Restraining Order and Preliminary Injunction, on August 12, 2004, twelve weeks before the general election. App. 47-48. Four days later, the district court held a hearing on his Motion for a Temporary Restraining Order. While the Respondent appeared through counsel, he declined to address the merits of the First Amendment claims raised by the Petitioner. App. 46.

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[27] Ohio R. Gov. Bar V, § 8 (B).

At no time during that hearing, did the Respondent assert that he had commenced a state proceeding against the Petitioner, or that the court was required to abstain from this case under *Younger*. App. 28, 37-38. In fact, he took a position utterly inconsistent with that contention: he claimed that his own actions had not progressed far enough to give rise to a case-or-controversy sufficient to support Article III standing. App. 15-16, 26-27.

At the conclusion of that hearing, the district court issued a temporary restraining order barring the Respondent from enforcing the contested canons. App. 46.

Two weeks later, the Respondent submitted a brief opposing preliminary injunctive relief and unambiguously moving the district court to dismiss Petitioner's case on the constitutional merits. The Respondent expressly argued that all three of the canons fully satisfied the First Amendment. App. 27. That brief also again characterized his actions as so preliminary, tentative and rote as to fail to give rise to a justiciable case or controversy.

> In this case, Disciplinary Counsel merely initiated the duty to investigate. As stated in part in Paragraph 19 of the Complaint, "a formal disciplinary charge has yet to be filed against Plaintiff, **and thus, there is no pending proceeding against plaintiff** . . ." Thus, Disciplinary Counsel has not yet exercised its discretion to file a Complaint against Plaintiff, nor has it even completed the investigation. Rather, Plaintiff would have this Court transform a grievance letter sent by a third party to Disciplinary Counsel as a "threat of prosecution."[28]

His brief also sought to distinguish an unreported Sixth Circuit decision as involving an ongoing state disciplinary proceeding, in contrast to this case, which involved merely "an investigation."[29]

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[28] Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary or Permanent Injunction / Defendant's Motion to Dismiss, Docket No. 11, August 31, 2004 (Case No. 1:040CV-1612)(N.D.Ohio)(emphasis added).

[29] In *Harper v. Office of Disciplinary Counsel*, No. 96-3186, 1997 WL 225899 (6th Cir., May 2, 1997), the Sixth Circuit said, in dicta, that Canon 7(B)(1) served an important interest, but held that abstention barred the court from considering the merits.

On September 14, 2004, the district court granted a preliminary injunction, barring the Respondent from enforcing the contested judicial canons. App. 70-72.

The court found that Canon 7(B)(3)(b), which prohibits a judicial candidate from identifying his or her party affiliation after the primary election, was unconstitutionally overbroad, both on its face and as applied to Judge O'Neill, under *White* and *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989). App. 52-61.

The district court reasoned that the state has no interest in deciding what information voters may be trusted to rely upon in deciding, for themselves, between competing candidates for office, and that any state interest asserted was belied by the fact that, under the contested canon, a candidate remained free, after the primary, to identify his party affiliation orally, and to advertise in any form that he enjoyed the support of a given political party. App. 55, 60.

The court also found Canon 7(D)(2) – which prohibits judicial candidates from using the word, "judge," without specifying the court on which they sit as incumbents – to be facially overbroad,

reasoning that the state has no compelling interest in prohibiting candidates from engaging in truthful speech regarding their status and qualifications. App. 61-62.

Finally, the district court held that Canon 7(B)(1), which prohibits undignified campaign speech, was not narrowly tailored to advance an important governmental interest, and was overbroad as applied to Judge O'Neill. It did so after concluding that the canon swept within its reach a substantial number of protected campaign messages, and thus was not narrowly tailored to advance a compelling state interest. App. 63-65.

The Respondent neither appealed from that injunction, nor sought reconsideration of that decision in the district court. App. 5.

Then, on October 6, 2004, the Respondent filed a strange, procedural orphan with the district court, which he captioned a "supplement" to his motion to dismiss. In it, for the first time, he alleged that there was a pending state disciplinary action against Judge O'Neill, which required the district court to abstain from hearing this case under the rule announced in *Younger*. App. 5, 39.

In March 2006, the Respondent moved the district court to dissolve the injunction on abstention grounds, asserting precisely the same abstention arguments that he had presented in his "supplement" many months earlier. App. 5, 39.

The district court denied that motion in June 2006, concluding that an ongoing state disciplinary proceeding commenced against Petitioner when Respondent received the Trakas letter, but holding that Respondent had waived *Younger* abstention by arguing the constitutional merits. App. 39-44.

In January 2007, the district court granted summary judgment for Judge O'Neill and denied summary judgment to the Respondent, on the merits. App. 34-35. In doing so, the court adopted the reasoning that had lead it to preliminarily enjoin the enforcement of the contested disciplinary canons some two years earlier. App. 30-32.

D. The Sixth Circuit Appeal

Respondent appealed, and on January 9, 2008, the United States Court of Appeals for the Sixth Circuit vacated the judgment of the district court,

holding that it should have abstained from reaching the merits under *Younger*. App. 13-14.

The Sixth Circuit panel majority determined that an ongoing state proceeding had commenced against Judge O'Neill when the Respondent received the Trakas letter. App. 11-12.

The panel majority rejected the claim that the Respondent had waived abstention through his litigation conduct and the positions he had taken in the district court. App. 7-11.

The majority noted that this Court has yet to address the question of what sort of litigation conduct, by a state actor, will suffice to waive abstention and consent to the jurisdiction of a district court. App. 7.

It nonetheless found that the ability of courts to raise abstention, sua sponte, or on appeal, implied that, absent an express manifestation of consent to federal jurisdiction, a state may invoke abstention late in a case, and that the Respondent had not waived abstention simply by contesting the First Amendment merits below. App. 11.

In her dissent, Circuit Judge Moore disagreed, noting that the Respondent had not only argued the merits in the district court, but had also taken legal positions inconsistent with the invocation of *Younger* abstention in doing so. App. 14-15.

Judge Moore noted that the rule adopted by the majority would preclude judicial candidates from seeking to vindicate their First Amendment rights in federal courts in most cases, since those who sought relief prior to being accused of misconduct would present claims vulnerable to the accusation that they were not ripe for review, while those who sought relief after being accused before state bar officials stood in jeopardy of being put out of court on the basis of abstention. App. 14.

She found that the slow moving state disciplinary process did not afford Judge O'Neill an adequate, or timely, forum within which to assert his First Amendment claims during the only period that mattered – prior to the November election. App. 18-19. And she opined that, notwithstanding an inapposite decision of the Ohio Supreme Court, the mere receipt of the Trakas letter did not commence a state proceeding for purposes of *Younger* abstention. App. 16-17.

REASONS FOR GRANTING THE WRIT

I. DISCIPLINARY COUNSEL'S NASCENT INVESTIGATION OF A LETTER SUBMITTED TO HIM BY THE POLITICAL ADVERSARY OF A JUDICIAL CANDIDATE, COMPLAINING OF THE JUDICIAL CANDIDATE'S POLITICAL EXPRESSION, DOES NOT CONSTITUTE AN ONGOING STATE PROCEEDING SATISFYING THE FIRST PRONG OF THE ABSTENTION DOCTRINE OF *YOUNGER v. HARRIS*, 401 U.S. 37 (1971) AND THE SIXTH CIRCUIT'S DETERMINATION THAT IT DID, CONFLICTS WITH DECISIONS BY THE FOURTH, FIFTH AND EIGHTH CIRCUIT COURTS OF APPEALS. *TELCO COMMUNICATIONS v. CARBAUGH*, 885 F.2D 1225 (4TH CIR. 1989); *LOUISIANA DEBATING AND LITERARY ASSOCIATION v. CITY OF NEW ORLEANS*, 42 F.3D 1483 (5TH CIR. 1995); *PLANNED PARENTHOOD OF GREATER IOWA, INC. v. ATCHISON*, 126 F.3D 1042 (8TH CIR. 1997).

The Sixth Circuit's decision at issue here conflicts with those of the Fourth, Fifth and Eighth Circuits about what activity by a State agency constitutes an ongoing state proceeding triggering the *Younger* doctrine.

The majority of the panel, over Judge Moore's dissent, determined that the submission of a letter complaining about Petitioner's campaign statements to Ohio Disciplinary Counsel constituted the beginning of a state judicial process, triggering *Younger* abstention.[30]

The state "proceedings" to which the Sixth Circuit held the district court was obliged to defer were in the most embryonic stages. Respondent himself noted that an investigation into the allegations contained in the Trakas letter had just begun.

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[30] In reaching this conclusion, the majority relied on a decision of the Ohio Supreme Court finding that statements made in a written grievance were entitled to the absolute immunity accorded statements made in judicial proceedings from an action for defamation. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N. E. 2d 585 (1993). *Hecht* in no way touched upon nor analyzed the role of a citizen's written grievance in the context of balancing state versus federal jurisdictional interests.

Under the Ohio disciplinary system, then, an actual enforcement proceeding concerning the allegations in the Trakas letter was as much as a year away when that letter was received by the Respondent. Such a prosecution would not occur until **after** the Petitioner had responded to the letter sent, as a matter of routine, by the Respondent; **and** the Respondent had completed his investigation; **and** the Respondent had issued his report; **and** a probable cause panel had been appointed, **and** convened, **and** made a recommendation to file charges with the Board of Commissioners, **and**; until those charges were, in fact, filed.

Since *Younger* itself was decided, the Court has recognized that the concerns of federalism and comity which animate the abstention doctrine generally "have little force in the absence of a pending state proceeding." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 509 (1972). Thus:

> When no state . . . proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that

> circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Steffel v. Thompson, 415 U.S. 452, 462 (1974).

The Sixth Circuit found that the disciplinary process in Ohio begins with the receipt of a grievance, in this case, the Trakas letter.

It did so upon the strength of *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585 (Ohio 1993), a case in which the Ohio Supreme Court held that the absolute privilege against defamation, that attends statements made in the course of judicial proceedings, protects statements made by a client in a grievance against his lawyer.

But the public policy rationale that undergirds extending immunity from defamation claims to grievants does not justify a finding that state bar disciplinary proceedings begin – for all purposes, or for purposes of *Younger* abstention – the minute Chairman Trakas posts a letter to Respondent. As Judge Moore noted in dissent,

> The court based its holding that statements made in the course of disciplinary

> proceedings enjoy immunity against defamation claims in large part on public-policy considerations. Accordingly, we should not extend the holding of *Hecht* to hold that the filing of a grievance initiates a pending judicial proceeding for the purposes of *Younger* abstention

As Judge Moore also noted, to do otherwise conflicts with decisions of the Fourth and Fifth Circuit Courts of Appeals that analyzed the role investigations by administrative agencies occupy in evaluating abstention under *Younger* and determined that they did not satisfy *Younger's* first prong. *Telco Communications, Inc. v. Carbaugh*, 885 F. 2d 1225 (4th Cir. 1989); *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F. 3d 1483 (5th Cir. 1995).

It also conflicts with the Eighth Circuit's decision in *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042 (8th Cir. 1997) finding that the State Defendant's letter advising the Plaintiff that it was subject to state administrative regulations requiring a "certificate of need," did not constitute commencement of state proceedings for purposes of *Younger*.

In *Telco Communications*, Virginia's Office of Consumer Affairs sent a letter notifying a fund raiser that it had violated Virginia's charitable solicitation laws and invited a response from the fund raiser. The fund raiser sought relief on First Amendment grounds in federal court.

The Fourth Circuit found that *Younger* abstention was not appropriate where no formal enforcement action had been undertaken. *Telco*, 885 F.2d at 1229. Specifically, the court held that the "period between the threat of enforcement and the onset of formal enforcement proceedings" is an appropriate time for a litigant to bring his First Amendment challenges in order to preserve the opportunity to adjudicate those rights in federal court. *Id. Accord, Certa v. Harris*, 2001 WL 1301404 (4th Cir. 2001).

The Fifth Circuit Court of Appeals reached the same conclusion. In *Louisiana Debating and Literary Association*, a citizen filed four complaints with the New Orleans Human Relations Commission alleging that the plaintiff clubs had discriminated against him. *Louisiana Debating and Literary Association*, 42 F.3d at 1487.

The Commission sent the plaintiffs letters and requested a response. I*d.* Plaintiff clubs brought suit in federal court seeking protection of their privacy and associational rights under the Constitution.

The Fifth Circuit, in evaluating the City's claim that the district court should have abstained from exercising jurisdiction, noted the need to balance the "interests and rights that bring into play 'our Federalism' on the one hand, and federal courts' protection of constitutional rights on the other; a balancing . . . that reflects the majesty and scope of our living Constitution." *Id.* at 1488.

The court determined that the district court had properly declined to abstain, finding that the complaint and Commission's notification letter "had not progressed even as far as that in *Telco*." *Id.*

Similarly in *Planned Parenthood*, the Eighth Circuit Court of Appeals rejected the State Defendant's argument that Younger abstention was warranted in the face of a letter advising Plaintiff that its proposed clinic construction was subject to state certificate of need proceedings.

Citing *Telco* and *Louisiana Debating and Literary Association*, the Eighth Circuit explained: "Here, the plaintiff was not yet subject to coercive proceedings, and the CON administrative proceedings had not yet begun in earnest before plaintiff filed in federal court." *Planned Parenthood*, 126 F.3d at 1047.

Important in assessing the propriety of abstention under *Younger* is the distinction between an investigation and formal administrative enforcement proceedings initiated to prosecute alleged state law violations. The Fourth Circuit in *Telco* "declined to hold that *Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff," noting that "where no formal enforcement action has been undertaken, any disruption of state process will be slight." *Telco*, 885 F.2d at 1229. Otherwise, the court explained, requiring abstention whenever enforcement is threatened "would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it." *Id.*

The finding of the Sixth Circuit panel majority, that the mere submission of a letter by a political opponent to disciplinary counsel satisfies the ongoing state proceeding requirement of *Younger* is erroneous, and in conflict with the decisions of the Fourth, Fifth and Eighth Circuit Courts of Appeals. Petitioner seeks resolution of this conflict by this Court.

II. THIS CASE PRESENTS THE UNRESOLVED BUT IMPORTANT QUESTION OF WHETHER A STATE DEFENDANT WAIVES ABSTENTION UNDER *YOUNGER v. HARRIS*, 401 U.S. 37 (1971), WHEN HE PURSUES A LITIGATION STRATEGY WHOLLY AT ODDS WITH *YOUNGER* ABSTENTION, DOES NOT RAISE ABSTENTION UNTIL AFTER THE DISTRICT COURT HAS ISSUED A PRELIMINARY INJUNCTION BASED ON THE UNCONSTITUTIONALITY OF THE CONTESTED CANONS, BUT HAS NOT MADE AN EXPRESS STATEMENT URGING THE DISTRICT COURT TO EXERCISE FEDERAL JURISDICTION AS IN *SOSNA v. IOWA*, 419 U.S. 393, 396-97, n.3 (1975); *OHIO BUREAU OF EMPLOYMENT SERVICES v. HORDORY*, 431 U.S. 471, 479-80 (1977), and; *BROWN v. HOTEL EMPLOYEES*, 468 U.S. 491, 500, N. 9 (1984).

A state actor can waive its right to assert abstention under *Younger v. Harris*, 401 U.S. 37 (1971). *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986).

This Court has repeatedly acknowledged that a federal court can proceed to adjudicate a constitutional claim–notwithstanding the fact that the procedural posture of the case meets the conditions for abstention under *Younger* – when a State Defendant ***by express statement*** urges the federal court to exercise jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 396-97, n.3 (1975); *Ohio Bureau of Employment Services v. Hordory*, 431 U.S. 471, 479-80 (1977); *Brown v. Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491, 500, n. 9 (1984).

The question lingers, however, whether a State Defendant can be found to have waived its claim to abstention under *Younger* by its ***conduct***.[31] *See, O'Neill v. Coughlan*, 511 F.3d 638, 641 (6th Cir. 2008). (acknowledging that "no controlling authority has decided this precise issue.") And if so, what litigation conduct suffices to effect such waiver.

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[31] See, e.g., *Lapides v. Board of Regents*, 35 U.S. 613 (2002) (removal of suit to federal court by State Defendant effected a waiver of sovereign immunity); *see also, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)(discussing "constructive waiver" of immunity).

Respondent's litigation strategy in this case serves as an apt example of conduct effecting a waiver of his right to assert *Younger* abstention. In response to Petitioner's complaint, the Respondent urged dismissal on the ground that Petitioner's claims were not ripe for review. He vigorously and repeatedly asserted that the letter he had received, complaining of Petitioner's campaign statements, initiated nothing more than an investigation, and that there, in fact, "was ***no pending proceeding*** against" the Petitioner.[32]

Additionally, Respondent moved to dismiss the action on the merits–arguing that each of the challenged judicial canons was constitutional as a matter of law.

When, however, the district court, in a careful and thorough opinion granting a Preliminary Injunction, explained why the three canons were unconstitutional under the First Amendment, the Respondent attempted to avoid the defeat handed to him by the that court's ruling, by invoking the *Younger* doctrine.

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[32]*See supra*, Note 28 and accompanying text (emphasis added in both instances).

Respondent's litigation strategy sets forth a road map for State Defendants facing a constitutional challenge under 42 U.S.C. §1983. A State Defendant can appear and defend and test his theories on the merits in federal court. If, however, he fails to prevail in the federal action, he need only retrieve the *Younger* doctrine from his pocket to avoid an unhappy result.

The decision finding Respondent's conduct did not waive *Younger* abstention, essentially allows State Defendants to stage a dress rehearsal on the merits in federal court.

Other courts of appeals have grappled with the issue of under what circumstances, *Younger* abstention is waived, with confounding results. State Defendants have been found to have waived Younger abstention when they have raised abstention in the district court, but did not on appeal, *Winston v. Children Youth Serv.*, 948 F. 2d 1380, 1385 (3rd Cir. 1991); *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-52 (1st Cir. 1987) or, conversely, when they have failed to raise abstention in the district court, but raised it in the first instance on appeal. *Kleenwell Biohazard Waste and General Ecology Consultants, Inc.*, 48 F.3d 391, 394 (9th Cir. 1995).

In contrast, appellate courts have raised abstention under *Younger* sua sponte to find that abstention was, in fact, warranted.[33] *Morrow v. Winslow*, 94 F.3d 1386, 1390,1398 (10th Cir. 1996); (despite parties stated willingness in the district court to proceed in the federal forum); *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2003); *See also, Louisiana Debating and Literary Association*, 42 F. 3d 1483, 1490 (5th Cir. 1995) (*Younger* abstention raised in district court and "partially briefed" in appellate court would be considered by court of appeals.)

In still other instances, courts, reasoning that waiver can be shown "only by express statement" and not by failure to raise the issue, have found that *Younger* abstention was not waived in the absence of such a statement on the record. *Columbia Basin Apartment Association v. City of Pasco*, 268 F.3d 791, 800 (9th Cir. 2001); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992).

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[33] In *Bellotti v. Baird*, 428 U.S. 132, 143 n. 10, (1976), this Court noted that the absence of "full argument" in the court below of *Younger* abstention did not bar its consideration of the issue and that "it would appear that abstention may be raised by the court sua sponte."

In each instance, courts were left to divine whether a State Defendant–in the absence of an explicit statement stating precisely as much–had waived its right to assert abstention under *Younger*.

The unsettled state of the waiver issue permitted the State Defendant to advance its acrobatic argument here–allowing it to tergiversate from its claim that Plaintiff's challenge to the judicial canons was not ripe for review because of the inchoate nature of the state proceedings, and to assert that the federal court should abstain in deference to the "non-proceeding" at the state level–nearly one month ***after*** the district court had issued a lengthy opinion on the merits, finding the contested canons unconstitutional. Memorandum and Order, R.14, September 14, 2004, at 7-14.

The district court found, and the dissent agreed, that Defendant's advocacy of the position that proceedings in the Disciplinary Counsel's office were so preliminary and so tentative that Plaintiff's claims had not given rise to a justiciable case or controversy, and Defendant's vigorous litigation of Plaintiff's claims on the merits, in concert with his failure to even hint that

abstention was in order, until first raising *Younger* after the district court had issued a lengthy opinion explaining the canons' constitutional deficiencies, effected a waiver of any claim for abstention. *Id.* at 644-45.

The idiosyncracies and ambiguities of the decisional law governing waiver of abstention under *Younger*, beg for a clear resolution by this Court, as does the precedent set in this case that accommodates a litigation strategy by state defendants allowing them to hold the *Younger* abstention card in reserve, to be played only after a district court tells them how strong a hand their opponent has.

III. THERE EXISTS AN IMPORTANT QUESTION AS TO WHETHER THE RECEIPT, FROM A POLITICAL OPPONENT, OF A LETTER ALLEGING ETHICAL MISCONDUCT AGAINST A CANDIDATE FOR JUDICIAL OFFICE, IN THE MIDST OF HIS CAMPAIGN, BASED SOLELY ON THE CONTENT OF HIS CAMPAIGN SPEECH, AND WHICH CANNOT BE RESOLVED BY THE STATE DISCIPLINARY SYSTEM BEFORE THE ELECTION, PRESENTS SUCH AN EXTRAORDINARY CIRCUMSTANCE AS TO PERMIT A DISTRICT COURT TO EXERCISE ITS JURISDICTION, NOTWITHSTANDING THE CLAIM THAT AN ONGOING STATE DISCIPLINARY PROCEEDING, WHICH MERITS ABSTENTION, IS PENDING.

This Court has long held that a district court should abstain from exercising its jurisdiction, in deference to an ongoing state judicial proceeding, which implicates important state interest, when that proceeding affords the putative federal plaintiff an adequate opportunity to have his constitutional claims adjudicated in the state system. *Younger v. Harris*, 401 U.S. 37 (1971).

In *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1986), the Court held that state bar disciplinary proceedings were among the class of proceedings to which *Younger* applied.

Since *Younger*, however, the Court has noted that, in extraordinary circumstances, the district courts would be justified in exercising their jurisdiction, despite the existence of the prerequisites to abstention. *Middlesex County*, 457 U.S. at 435; *Younger*, 401 U.S. at 54-54.

The Court in *Younger* refused to speculate as to what such an extraordinary circumstance would involve, but left open the possibility that, in addition to bad faith on the part of the state, such a showing could be made.

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.

* * *

> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be.

Younger, 401 U.S. at 53-54.

Extraordinary circumstances exist, not in rare cases, but in cases where the need for equitable relief is urgent, so that "whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977).

This is a case in which extraordinary circumstances would justify the exercise of federal jurisdiction even if the factors that would ordinarily support abstention under *Younger* had been present. And it is not unique in that regard.

In *White*, 536 U.S. at 788, this Court expressly recognized that the protections of the First Amendment extend to judicial campaign speech.

In response to *White*, the House of Delegates of the American Bar Association amended the Model Code of Judicial Conduct to reflect the right of judicial candidates to comment on matters of public concern during the course of a judicial campaign.[34]

The states have been slow to adopt those revisions, however, and as of August 1, 2008, only nine of the thirty-nine states in which judges stand for election had adopted the changes proposed by the ABA.[35]

The tension between state judicial canons that restrict the campaign speech of judicial candidates, and the rule articulated in *White*, which affords First Amendment protection to judicial campaign speech, is obvious.

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[34] Cynthia Grey, *Developments Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), American Judicature Society, available at www.ajs.org/ (Last updated August 1, 2008, and last vistited August 4, 2008).

[35] *Id.* Those states are Arizona, Florida, Louisiana, Maryland, Minnesota, Nevada, New Mexico, South Dakota and Wisconsin. In addition, Iowa and Oklahoma have adopted also modified restrictions on judicial campaign speech. That said, it bears mention that in several of these states, generic rules against "undignified" campaign conduct remain in effect.

The problem is that candidates who attempt to enforce their First Amendment rights in federal court prior to being the subject of an allegation of misconduct will face the claim that they lack standing to contest the rules which trouble them, as Judge O'Neill did in the early phases of this case, while those who wait until they have been the subject of such an allegation would – under the rule adopted by the Sixth Circuit in this case – see their federal claims blocked by abstention.

In her thoughtful dissent below, Circuit Judge Moore observed how this combination will frustrate a candidate's access to a federal forum precisely when it is needed most; to resolve a pressing First Amendment question in the face of an approaching election.

> If plaintiffs seek vindication of their constitutional rights in federal court too early, then their cases will be dismissed for lack of ripeness. If these individuals bring federal suits upon ripening of the claims, then their cases will also be dismissed, this time under the *Younger* abstention doctrine. The majority opinion thus effectively forecloses access to the federal courts for individuals who claim

> that Ohio's Rules for the Government of the Bar and of the Judiciary are unconstitutional.

App. 15. That insight has proved to be accurate.

Since *White*, a number of federal court challenges to state judicial conduct codes have been dismissed for lack of ripeness because the plaintiffs themselves had not been charged with misconduct, or identified a speaker who had.[36]

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[36]*See: Indiana Right to Life v. Shepard*, 507 F.3d 545, 549-50 (7th Cir. 2007)(advocacy group lacked standing to contest judicial canon prohibiting candidates from answering pre-election questionnaires absent a showing that specific candidates were chilled in their expression by the contested canon or disciplined for violating it); *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 849-50 (9th Cir. 2007)(pre-enforcement challenge to judicial conduct code dismissed as unripe); *Pennsylvania Family Institute v. Black*, 489 F.3d 156 (3rd Cir. 2007)(advocacy group did not present ripe challenge to judicial canon when it could not identify candidates in danger of discipline for answering its questionnaire); *c.f.: Carey v. Wolnitzek*, No. 3:06-36-KKC, 2007 W.L. 2726121 (E.D.Ky., Sept. 17, 2007)(challenge to one judicial canon was ripe for review because it presented a question capable of repetition but permanently evading review, but other claims against judicial canons dismissed as unripe); *But see: Yost v. Stout*, No. 06-4122-JAR, 2007 W.L. 1652063 (D.Kan, June 6, 2007)(judicial candidate had standing to contest three canons of judicial conduct which he believed barred campaign speech in which he intended to engage, and claim was ripe for review).

And, since *White*, at least one other federal court challenge to a state judicial conduct code, in addition to this one, has also been dismissed on the basis of abstention, in deference to an ongoing state disciplinary proceeding.[37]

Judicial candidates, like Judge O'Neill, whose campaign speech is contested as violating the judicial canons of their state are systematically precluded from obtaining a federal court determination of their First Amendment rights. This forces them to rely on the state bar disciplinary machinery to obtain whatever determination they can.

The trouble with this is not that state agencies and supreme courts are inadequate to the task of adjudicating First Amendment questions.

The trouble is that they are institutionally inadequate to the task of doing so **quickly enough** to allow a candidate whose campaign speech is impugned by a political rival to know what he may, and what he may not say, prior to an election.

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[37] *See: Spargo v. State Commission on Judicial Conduct*, 351 F.3d 65, 85-86 (2d Cir. 2003), *cert denied*, 541 U.S. 1085 (2004).

The ponderous, temporally open-ended disciplinary system in place in Ohio is not an aberration. Many states have disciplinary systems that permit investigations into allegations of judicial misconduct to go on for extended, or even indefinite periods. [38]

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[38] *See e.g.* New York: 22 NY ADC §§ 7000.3, 7000.6 (Upon receipt of a complaint, and prior to the filing of a formal complaint, "an initial review and inquiry may be undertaken," which may then followed by an investigation. Neither the initial review nor investigation have any time limitations.); Illinois: Ill. Const., art. VI § 15(c) (same); Texas: Rules 3 - 10 of the Procedural Rules for the Removal or Retirement of Judges (same); California: Rules 107 - 130 of the Rules of the Commission on Judicial Performance (2007) (same); Georgia: Rule 4 of Rules of the Judicial Qualifications Commission ("Whenever the Commission reaches the conclusion that a complaint fails to state, or the facts developed upon an initial inquiry to the judge or an investigation fails to show, any reason for the institution of disciplinary proceedings, the Commission shall so advise the complainant."); Indiana: Ind. Admission and Discipline Rule 25, § 8 (Upon receipt of a complaint, and prior to the initiation of formal proceedings, the Commission may conduct an initial inquiry followed by an investigation of indeterminate length. A judicial officer subject to an investigation, however, may demand the Commission to either institute formal proceedings or enter a formal finding within sixty days.).

If state bar officials are allowed to invoke abstention to prevent a federal determination of a candidate's First Amendment rights, the chances of a candidate obtaining any determination of his rights during the period that most matters – before the election is over – are nil.

Such a result renders *White* toothless, and creates an extraordinary circumstance in which a right recognized by this Court exists without a concomitant federal remedy.

Finally, the incapacity of state disciplinary proceedings to render a prompt determination of the constitutional claims of judicial candidates raises yet another reason why *Younger* abstention should not apply in the first instance.

Circuit Judge Moore captured the dilemma faced by a candidate whose campaign speech is alleged to violate the Code of Judicial Conduct during his campaign.

> Although O'Neill might have ultimately brought his constitutional arguments before the Ohio Supreme Court, the administrative disciplinary process

> afforded him no explicit opportunity to do so prior to review by the court. As a result, the administrative process did not offer O'Neill an adequate state forum to raise constitutional issues before the election.

App. 18-19.

This Court has stated that, in order for *Younger* abstention to apply, a state proceeding must provide the putative federal plaintiff with an "adequate" opportunity to raise any constitutional claims he might have. *Middlesex County*, 457 U.S. at 432. Adequacy, in this regard, has a temporal component, the "'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.'" *Id.*, 457 U.S. at 437 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)).

In *Middlesex County*, the respondent claimed that New Jersey's state bar disciplinary system did not provide an adequate forum for the resolution of his constitutional defenses to allegations of attorney misconduct. *Id.* at 435-36.

In rejecting that contention, this Court noted that the respondent had not only succeeded in obtaining sua sponte review of those questions by the New Jersey Supreme Court through a writ of certiorari to that court, but that New Jersey law permitted the subjects of state disciplinary proceedings to seek interlocutory review of such questions in the state supreme court. *Id.*, at 436.

No such opportunity existed for Judge O'Neill, whose only opportunity to obtain a judicial determination of First Amendment rights, in relation to the Code of Judicial Conduct, would come at the end of the arduous, multi-step disciplinary process that culminates in a review, by the Ohio Supreme Court, of the final recommendation issued by the Board of Commissioners on Grievance and Discipline.

From a temporal perspective, such an opportunity is neither timely nor adequate. To a candidate whose campaign speech is the subject of an allegation of misconduct, facing an election in a few short weeks, such a delay might as well be forever.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court accept this case for review.

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