IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRIEDA AARON, et al.	:	
	:	
Plaintiffs,	:	Case No. 1:17-cv-846
	:	
v.	:	Judge Michael R. Barrett
	:	
CHIEF JUSTICE MAUREEN O'CONNOR, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANT OHIO SUPREME COURT CHIEF JUSTICE MAUREEN O'CONNOR'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER [DOC # 8]

This is a frivolous case before the Court on a meritless request for emergency relief. The Court should deny that relief for several reasons.

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). As the United States Supreme Court recognized nearly forty years ago, this principle requires federal courts to refrain from interfering in state-court proceedings. *Id.* at 54; *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). However, this is exactly what Plaintiffs ask this Court to do—unnecessarily interfere with an exclusively state-court proceeding. Such a result would be improper.

In addition to the improper request for this Court to interfere in state-court proceedings, Plaintiffs base their request on unfounded allegations and speculation. Their contentions range from out-right falsehoods—alleging that the Ohio Supreme Court Chief Justice instructed a

judge to draft a false letter—to the utterly absurd—that the Ohio Supreme Court would uphold slavery. The complaint is riddled with Plaintiffs' and their counsel's "beliefs" and "speculation" rather than objective truths. Many of the allegations are exceedingly unprofessional. Others are incomprehensible. Such allegations do not belong in a complaint, let alone warrant federal court intervention into state-court proceedings.

Plaintiffs ultimately suggest that this Court second guess laws passed by the Ohio General Assembly and upheld by the Supreme Court of Ohio based on the mere allegation that the laws worked an undefined hardship on them. Such a request is not supported by the law. And, to be certain, contrary to Plaintiffs' contention, that one justice dissented in a case challenging those laws does not make those laws unconstitutional.

Plaintiffs ask this Court to enjoin a trial court judge—the Honorable Mark Schweikert—from presiding over their underlying state-court cases, based on a pending disqualification request Plaintiffs submitted to the Chief Justice of Ohio one business day before filing this lawsuit. In Ohio, the Chief Justice rules on requests for disqualification. Ohio Const. Art. IV, § 5(C); Ohio Rev. Code § 2701.03. But here, Plaintiffs also seek to enjoin the Chief Justice from ruling on Plaintiffs' disqualification request. If this Court grants Plaintiffs' request, nothing more would happen in their cases. Effectively, it would be a stay on all state-court proceedings involving these Plaintiffs.

It would, however, set a dangerous precedent whereby any plaintiff or defendant seeking to "judge shop" could run to federal court seeking injunctive relief every time they received an unfavorable ruling in a case or did not like the judges assigned to a case by the Chief Justice. Judicial process of the state of Ohio would come to a screeching halt. The assignment of cases would not be determined by reason or at random, but by which party could get to the federal

courthouse first. The federal courts would be placed in the position of case managers for virtually all state court cases where adversaries disagree – which is true in almost every case otherwise they would not be in court to begin with.

This Court should deny Plaintiffs' request for a temporary restraining order ("TRO"). Plaintiffs fails to satisfy *any* of the factors for emergency relief. First, Plaintiffs cannot establish a likelihood of success on the merits. The *Younger* abstention doctrine disposes of Plaintiffs' case, and their TRO. And Plaintiffs cannot succeed on the merits for a second reason. They do not state a viable claim for relief. They do not state a cognizable 42 U.S.C. §1983 claim, or make any other constitutional claim. Accordingly, the merits—or, more accurately, the lack of merits—support denying Plaintiffs' request for emergency relief.

The remaining equitable factors also weigh against Plaintiffs' request. Plaintiffs cannot show irreparable harm if this Court denies their motion. While Plaintiffs assume that the Chief Justice will deny their request to disqualify Judge Schweikert, no matter what happens, they have had the opportunity to present their arguments to the Chief Justice. Also notable, without emergency relief, the status quo will remain (*i.e.*, the state-court proceedings will continue unfettered). As "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," the equities favor *denying* the TRO request. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Lastly, unnecessary interference in state-court proceedings based on unsupportable conspiracy theories would harm the public's confidence in the integrity of the Ohio judiciary and the orderly processing of cases. As the Supreme Court has noted time and again, unnecessary federal-court intervention offends principles of comity and undermines the "presumption" that state courts will "safeguard federal constitutional rights." *Middlesex Cty.*, 457 U.S. at 431. "The

presumption of judicial impartiality cannot be trumped by free-floating invective, unanchored to specific facts." *Brooks v. N.H. Supreme Court*, 80 F.3d 633, 640 (1st Cir. 1996).

Plaintiffs have not established a right to the extraordinary remedy of a TRO. Indeed, they come nowhere close. The Chief Justice asks this Court to deny Plaintiffs' request for a temporary restraining order.

BACKGROUND

On December 15, 2017, Plaintiffs filed with the Clerk of the Ohio Supreme Court a document titled "Affidavit of Disqualification of Chief Justice Maureen O'Connor and Judge Mark Schweikert." Compl. Ex. 1, doc. 1-1. The Affidavit does not relate to an existing Supreme Court case, but purportedly seeks disqualification related to a number of cases pending in front of Judge Schweikert in the Hamilton County Court of Common Pleas. *Id.*

The affidavit, executed by Plaintiffs' counsel Matthew J. Hammer, alleges that both the Chief Justice and Judge Schweikert have "a bias and a prejudice against Plaintiffs and their claims" and should be "disqualified to sit in the management of the cases . . . " *Id.* at 1. Plaintiffs' underlying medical malpractice cases are not in front of the Chief Justice. *See generally id.* Instead, Plaintiffs purport to have filed the Affidavit with respect to the Chief Justice pursuant to "S.C. Prac.R. 14.6." They claim that she should not be permitted to decide whether to disqualify Judge Schweikert. *Id.* at 2.

There is no Supreme Court Rule of Practice 14.6. Rather, it appears Plaintiffs were attempting to disqualify the Chief Justice pursuant to S.Ct.Prac.R. 4.04(B), which provides in relevant part that a "party to a case pending before the Supreme Court . . . may request the recusal of a justice by filing a request with the Clerk of the Supreme Court. " Under S.Ct.Prac.R. 4.04(C), once such a request is made, the justice named in such a request submits a written

response to the clerk indicating whether the justice will recuse himself or herself. Plaintiffs filed this lawsuit, including their motion for a TRO, on December 18, 2017—one business day after they filed their Affidavit of Disqualification with the Ohio Supreme Court. The allegations in this lawsuit are almost verbatim those made in the Affidavit of Disqualification. *Compare*, Compl., doc. 1 *with* Compl. Ex. 1, doc. 1-1. The Chief Justice has not yet ruled on or responded to Plaintiffs' Affidavit.

ARGUMENT

A temporary restraining order is "an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). To determine if relief is appropriate, courts balance: (1) whether there is a strong likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable injury if the order is not granted; (3) whether third parties will suffer substantial harm if the order is issued; and (4) whether the public interest will be served by granting the order. *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). The proof required to obtain a temporary restraining order 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). Plaintiffs fall far short of satisfying this heavy burden.

I. Plaintiffs are not likely to succeed on the merits of their constitutional claims.

The first factor courts consider in ruling on a request for temporary injunctive relief is whether the plaintiff has demonstrated a strong or substantial likelihood of success on the merits. *In re Eagle-Picher Industries, Inc.*, 963 F.2d 855, 859 (6th Cir.1992). Here, Plaintiffs' failure to demonstrate a likelihood of success on the merits warrants denying their requested TRO.

Plaintiffs assert no set of circumstances beyond speculation and ethereal harms or address in any manner the legal requirements for issuing a TRO. Plaintiffs' claims are barred by *Younger* abstention, and Plaintiffs have not stated a cognizable claim. Under these circumstances, this Court should deny emergency relief.

A. *Younger* abstention requires dismissal of Plaintiffs' claims.

The *Younger* abstention doctrine espouses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cty*, 457 U.S. at 431. Important public policies and considerations underlie *Younger* abstention. First, "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law." *Pennzoil Co. v. Texaco*, 481 U.S. 1, 10 (1987). A second and "more vital consideration" is comity. *Id.* Federal courts should give "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Middlesex Cty.*, 457 U.S. at 431. This proper respect due to state processes precludes "any presumption that the state courts will not safeguard federal constitutional rights." *Id.*

The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Juidice v. Vail*, 334 U.S. 327, 334 (1977); *Pennzoil Co.*, 481 U.S. at 11. "Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation." *Middlesex Cty.*, 457 U.S. at 432. When vital state interests are involved, a federal

court should abstain unless state law clearly prevents plaintiffs from raising their constitutional claims. *Id.*

1. Not only are vital state interests involved but Plaintiffs can and have raised their constitutional claims in the state-court proceedings.

The issue before this Court is whether to enjoin the Chief Justice from performing her *state* constitutional and statutory duties. *Younger* abstention involves three considerations: "1) whether the underlying proceedings constitute an ongoing judicial proceeding, 2) whether the proceedings implicate important state interests, and 3) whether there is an adequate opportunity in the state proceedings to raise a constitutional challenge." *Gilbert v. Ferry*, 401 F.3d 411, 419, *rev'd in part by* 413 F.3d 578 (6th Cir. 2005) (rehearing) (reversing holding as to *Rooker-Feldman* doctrine but continuing to affirm dismissal based on *Younger* abstention).

In *Gilbert*, which involved similar circumstances, the plaintiffs sought recusal of four justices from the Michigan Supreme Court. 401 F.3d at 413. The Sixth Circuit held that the motions for recusal constituted an ongoing judicial proceeding, and that "when and under what circumstances Michigan Supreme Court justices should recuse themselves" is an important state interest. *Id.* at 419. As for the third factor, the Court found that plaintiffs' "lengthy brief in support of their motion to recuse contained the same arguments and proofs as presented in their complaint filed in federal court" and that these briefs presented "an adequate opportunity to raise their constitutional challenge." *Id.* Based on the three *Younger* considerations, the Sixth Circuit held that *Younger* abstention barred the plaintiffs' federal court action. *Id.*; *see also Strand v. Dawson*, 468 F. App'x 910, 911 (10th Cir. 2012) (holding *Younger* abstention required dismissal of complaint seeking recusal of state-court judge); *Chalupowski v. Berry*, 151 F. App'x 1, 2 (1st Cir. 2005) (same); *Bodell v. McDonald*, 4 F. App'x 276, 279 (6th Cir. 2001) (same).

The same conclusions follow here. As in *Gilbert*, Plaintiffs are involved in ongoing state-court proceedings where they seek the recusal of judges, including a supreme court justice. As the Sixth Circuit has held, when and under what circumstances justices should recuse themselves is an important state interest. *Gilbert*, 401 F.3d at 419. And, as in *Gilbert*, Plaintiffs can make their arguments in state court. Indeed, like the *Gilbert* plaintiffs, Plaintiffs' lengthy motion to disqualify the Chief Justice is substantially similar to their federal complaint. *Compare* Compl., doc. 1 *with* Compl. Ex. 1, doc. 1-1. Accordingly, because all elements for *Younger* abstention apply, Plaintiffs are unlikely to succeed on the merits of their claims.

2. No exception to *Younger* abstention applies.

The *Younger* doctrine has few exceptions, and none apply here. Courts have recognized only three exceptions to *Younger*: (1) when state proceedings are motivated by a desire to harass or are conducted in bad faith; (2) when a challenged statute flagrantly and patently violates an express constitutional prohibition; or (3) when there is an extraordinarily pressing need for immediate federal equitable relief. *Gorenc v. City of Westland*, 72 F. App'x 336, 339 (6th Cir. 2003). "These exceptions have been interpreted narrowly." *Id.*; *see also Kalniz v. Ohio State Dental Bd.*, 699 F. Supp. 2d 966, 973 (S.D. Ohio 2010) ("The exceptions to *Younger* have generally been interpreted narrowly by the Supreme Court and the Sixth Circuit.").

The first exception applies when there is a "bad-faith prosecution of an individual." *Tindall v. Wayne Cty. Friend of the Court*, 269 F.3d 533, 539 (6th Cir. 2001). The exception is extremely rare, and "no Supreme Court case . . . ever authorized federal intervention under this exception." *Id*. This exception does not apply here. Plaintiffs commenced the underlying state-court proceedings. No one is harassing Plaintiffs. The second exception does not apply because Plaintiffs are not challenging a statute.

The third exception involves two inquiries: (a) whether there is an available state forum for plaintiffs' constitutional claims, and (b) whether the state judicial officers have a conflict of interest or are biased. *Goodwin v. County of Summit*, 45 F. Supp. 3d 692, 704 (N.D. Ohio 2014). As discussed above, Plaintiffs do have a forum to raise their constitutional claims, and indeed, have raised those claims. *See supra* pp. 6-7. The second part of the third exception (bias) requires somewhat more discussion.

While Plaintiffs allege bias, they provide only conclusory assertions, their personal beliefs, conspiracy theories, and speculation. This is insufficient. Bias is "an extraordinary" exception, and "the petitioner alleging such must offer actual evidence to overcome the presumption of honesty and integrity in those serving as adjudicators." *Dann v. Bd. of Prof'l Responsibility of the Tenn. Supreme Court*, 277 F. App'x 575, 580 (6th Cir. 2008). Indeed, "the burden of establishing a disqualifying interest rests on the party making the assertion." *Schwiker v. McClure*, 456 U.S. 188, 196 (1982). Plaintiffs cannot satisfy this burden.

"[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (second alteration in original) (quotation omitted). Indeed, a "claim requires more than the frenzied brandishing of a cardboard sword" or a claim "pasted together from various bits and pieces of marginally relevant information." *Brooks v. N.H. Supreme Court*, 80 F.3d 633, 639 (1st Cir. 1996). "[P]urely conclusory allegation[s]" do not provide the evidence needed to show "that abstention will jeopardize [their] due process right to an impartial adjudication." *Id.* at 640.

"The presumption of judicial impartiality cannot be trumped by free-floating invective, unanchored to specific facts." *Id.* But this is exactly what Plaintiffs have done. Their complaint throws around unsupported allegations and inflammatory speculation in an attempt to show bias.

Such tactics should not be allowed to prevail. They are unprofessional and have no place in any judicial proceeding.

Sifting past the rhetoric, Plaintiffs' complaint appears to make two arguments for bias—prior adverse rulings and campaign contributions. Neither of which is accurate or valid.

a. Alleged adverse rulings do not support bias.

Throughout the Complaint, Plaintiffs complain about all the trial court judges, except one, because the judges have not ruled in Plaintiffs' favor or in the way that Plaintiffs wanted them to rule. *See, e.g.*, Compl., doc. 1 at ¶ 25. Apparently, according to Plaintiffs there is only one trial judge in the entire state of Ohio capable of trying these cases – to their satisfaction. Plaintiffs imply that, because they believe the rulings are purportedly incorrect, bias must be present. *Id.* at ¶ 56. Indeed, say Plaintiffs, they are not receiving "a fair shake." *Id.* at ¶ 66. They also complain that the Chief Justice ruled in a way contrary to their interests in a separate case to which they were not parties. *Id.* ¶ 50.

To justify recusal based on prior rulings, however, Plaintiffs must "show either extrajudicial bias or a deep-seated unequivocal antagonism toward the petitioner." *Scott v. Metro Health Corp.*, 234 F. App'x 341, 359 (2007). "[B]ias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it 'in' for the party for reasons unrelated to the officer's view of the law." *Id.* Plaintiffs present no such evidence. All they argue is that the judges made decisions not as Plaintiffs wanted and that the Chief Justice's judicial opinions, which are based on her interpretation and application of the law, do not support Plaintiffs' positions. This is insufficient.

Recusal "cannot be based on decisions or rulings of a judge." *Id.* Indeed, even if a judge makes critical remarks in those rulings, this is insufficient to support a charge of bias or

partiality. *Id.* As one court has stated: "if a judge rules against you does that raise a presumption of bias that counsels in favor of recusing? The answer is not only 'no,' but of course not." *United States v. Chapman*, 2013 U.S. Dist. LEXIS 154649, *1 (E.D. Ky. 2013); *see also Jewell v. Ohio State Univ.*, 1991 U.S. App. LEXIS 19183, *5 (6th Cir. 1991) ("[A] judge's adverse rulings against a party do not render him biased and do not warrant recusal."); *Collins v. Wilkerson*, 2007 U.S. Dist. LEXIS 21173, *8-9 (S.D. Ohio 2007) ("A judge may not be removed from a case on grounds of bias simply because a party is dissatisfied with ruling made by the judge during the course of the case.").

b. Campaign contributions do not rise to the level of bias.

Campaign contributions from the healthcare industry and law firms do not show bias. Plaintiffs allege the Chief Justice has received campaign contributions from the healthcare industry and law firms. Compl., doc. 1 at ¶ 32. Even *assuming* these allegations are true, "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Caperton*, 556 U.S. at 884. Judicial candidates, like all elected officials, receive campaign contributions from a variety of sources. *See, e.g.*, Compl. Ex. 4, doc. 1-1. "That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. *Adair v. Mich. Dep't of Educ.*, 709 N.W.2d 567, 579 (Mich. 2006). It would be "impossible" for courts "to function if a lawful campaign contribution can constitute a basis for a judge's disqualification." *Id.* at 580; *see also* Compl., doc. 1 at ¶ 33 (acknowledging that all contributions to the Chief Justice's campaign were legal and ethical).

In fact, it is only the "exceptional case" with "extreme facts" that rise to the level of constitutional concern. *Caperton*, 556 U.S. at 884, 887. This is not such a case. And two cases illustrate why the campaign contributions to the Chief Justice's campaign do not warrant recusal.

In *Gibson v. Berryhill*, the U.S. Supreme Court held that an optometry board was biased because its members had a direct pecuniary interest in the outcome of a licensing case it was hearing. 411 U.S. 564, 578 (1973). There, the optometry board deliberated whether to revoke the licenses of all optometrists who were employed with a business rather than in private practice. *Id.* The Court held that the board had an improper pecuniary interest in the outcome because all the board members were optometrists in private practice. *Id.* at 578-79. If the board revoked business licenses, this "would possibly redound to the personal benefit of members of the Board." *Id.* at 578. Unlike *Gibson*, here, there are no similar allegations, nor could there be. The Chief Justice has no stake in or control over the outcome of the underlying litigation. There are no allegations that judgment for the defense would not "redound to [her] personal benefit"; nor could there be.

A second example is *Caperton*, which involved a multi-million dollar verdict. The decision was appealed through the courts, but before it reached the state supreme court, the defendant spent millions of dollars to have a new justice elected to the court. *Caperton*, 556 U.S. at 872-73. The U.S. Supreme Court held that "there is a serious risk of actual bias" in *Caperton* "based on objective and reasonable perceptions when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884. The Court considered the amount of the defendant's campaign contributions compared with the candidate's total contributions and the apparent effect such

contribution had on the outcome of the election. *Id.* The Court held that the defendant's contributions "eclipsed" the total spent by all other supporters. He had spent over $3 million and this amount exceeded, by 300 percent, the amount spent by the campaign committee. *Id.*

Plaintiffs have presented nothing similar to *Caperton* with respect to the campaign contributions given to the Chief Justice. Notably, Plaintiffs' state case commenced in February 2013. Compl., doc. 1 at ¶ 94. The Chief Justice was first elected to the Ohio Supreme Court in 2002, eleven years before Plaintiffs' litigation. *Id.* at ¶ 35. Thus, the defendants and attorneys in the state-court proceedings did not "influence" the Justice's 2002 race when the 2013 "case was pending or imminent." And as to the present, Chief Justice O'Connor is term limited and cannot run again for Chief Justice or for any other judicial office of the state of Ohio due to constitutional age limitations. No objective and reasonable person could remotely conclude that Chief Justice O'Connor's action are based in anything other than the law. The Chief Justice had already been on the bench for over a decade. Furthermore, although many organizations and individuals contribute to her campaign, including some from the healthcare industry and law firms, the records do not show the magnitude of contributions seen in *Caperton*. None of the donations, from any source, eclipse the total spent by all other supporters, and one individual did not spent over $3 million on one election. *See* Compl. Ex. 4, doc. 1-1. Rather, the record shows contributions by multiple organizations that are roughly comparable to one another and exceedingly modest when compared to $3 million. *Id.* Accordingly, the facts of this case do not rise to the level of the extraordinary and extreme case where bias is found based on pecuniary gain.

* * *

Without any showing of bias, we are left with the Supreme Court's admonition that judges are "men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United State v. Morgan*, 313 U.S. 409, 421 (1941). Because the Chief Justice is fully capable of fulfilling her statutory duties and deciding the requests for disqualification and recusal, abstention should end this matter and certainly should end Plaintiffs' TRO motion.

B. Plaintiffs have not stated a cognizable claim for relief.

Plaintiffs do not have a likelihood of success on the merits for a second reason. They do not state a cognizable claim. Plaintiffs' only cause of action appears to be brought under 42 U.S.C. § 1983 and based on alleged due process violations. *See*, Compl., doc. 1 at ¶¶ 121-23.

To state a prima facie claim under 42 U.S.C. § 1983, a plaintiff needs to allege that: (1) the defendant acted under color of state law, and (2) the offending conduct deprived the plaintiff of rights secured by federal law. *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998). "If a plaintiff fails to make a showing on any essential element of a § 1983 claim, it must fail." *Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001).

The elements of a procedural due process claim include (1) a life, liberty, or property interest protected by the due process clause; (2) deprivation of this protected interest; and (3) lack of notice and an opportunity to be heard. *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999). Further, in order to assert such a claim in federal court, a plaintiff must first "plead . . . that state remedies for redressing the wrong are inadequate." *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983); s*ee also Daniels v. Williams*, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984). "If satisfactory state procedures are provided . . . then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson Cty. Pub. Sch. Sys.*, 360 F.3d

583, 587-88 (6th Cir. 2004). Accordingly, in order to state a procedural due process claim under section 1983 "the plaintiff must attack the state's corrective procedure as well as the substantive wrong." *Meyers v. City of Cincinnati*, 934 F.2d 726, 731 (6th Cir. 1991) (quoting *Vicory*, 721 F.2d at 1066). Applying these principles here confirms that Plaintiffs have not stated a viable due process claim. They are not likely to survive a motion to dismiss, let alone substantially likely to succeed on the merits.

As an initial matter, the Ohio Supreme Court has not yet ruled on Plaintiffs' Affidavit of Disqualification. *See* Compl. Ex. 1, doc. 1-1 at 25. Plaintiffs have not alleged (and cannot allege) that their remedies under Ohio law, specifically Ohio Rev. Code § 2701.03, are inadequate. A plaintiff cannot seek relief under § 1983 without first pleading and proving the inadequacy of state or administrative processes to redress alleged due process violations. *Jefferson*, 360 F.3d at 588. For this reason alone, Plaintiffs fail to state a claim.

Further, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause . . . establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *see also Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification d[o] not rise to a constitutional level."). Due process is only potentially at issue when (1) a judge "has a direct, personal, substantial pecuniary interest in reaching a [particular] conclusion," *Tumey v Ohio*, 273 U.S. 510, 523 (1927) (subsequently expanded to include even indirect pecuniary interest) or (2) in certain contempt cases, such as those in which the "judge becomes personally embroiled with the contemnor," *In re Murchison*,

349 U.S. 133, 141 (1955) (subsequently clarified to involve cases in which the judge suffers a severe personal insult or attack from the contemnor). Plaintiffs allege neither circumstance.

As explained above, Plaintiffs' allegations that the Chief Justice received some campaign contributions from various members of the healthcare industry, *prior to the filing of Plaintiffs' first case*, do not demonstrate a *personal* interest in the outcome of Plaintiffs' underlying cases. And the term limits Chief Justice O'Connor is now subject to only reinforces the fact that there is no personal interest in the outcome of the cases. Merely arguing an indirect "personal bias" or remote interest in a matter generally does not rise to the *constitutional* level. *Tumey*, 273 U.S. at 523; *accord Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986); *see also Railey v. Webb*, 540 F.3d 393, 400 (6th Cir.2008).

Here, Plaintiffs have made insufficient, imprecise, speculative, and even outrageous allegations of personal bias and remote interest that fail to rise to the level of a constitutional violation, and therefore, fail to adequately allege a cause of action pursuant to 42 U.S.C. § 1983. Accordingly, they are not likely to succeed on the merits of their Complaint, and their request for a temporary restraining order should be denied.

* * *

In sum, Plaintiffs' underlying claims will be barred by *Younger* abstention. And even if *Younger* abstention is not applied, Plaintiffs have not alleged a viable cause of action. Plaintiffs do not have *any* likelihood, let alone substantial likelihood, of winning on the merits.

II. The balance of harms and the public interest both weigh against Plaintiffs' request for a temporary restraining order.

Balancing the potential harm to Plaintiffs absent a temporary restraining order against the risk of harm to the Ohio court system only further confirms that Plaintiffs' motion should be denied. As explained above, Plaintiffs suffer no harm if a TRO is denied. Plaintiffs seek

injunctions preventing both Chief Justice O'Connor and Judge Schweikert from taking action in their cases. Am. TRO, doc. 8 at 2. Without the requested injunction, Plaintiffs assume that the Chief Justice will deny their motion to disqualify Judge Schweikert. But the direction of the Chief Justice's decision is not relevant to this inquiry. If Plaintiffs' TRO motion is denied, the status quo would remain in place –the state-court proceedings will continue and Plaintiffs will get a ruling on their underlying requests for recusal and disqualification. Thus, denying the TRO would maintain the current status of Plaintiffs' cases, which is generally the purpose of emergency relief. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). Plaintiffs have alleged no harm, apart from unsupported allegations of bias that would occur if the status quo is maintained.

In contrast to the lack of harm that Plaintiffs will suffer if a TRO is denied, a decision to grant the TRO would "subject[] [Ohio's court system] to ongoing irreparable harm." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). When a judge is sitting in her "official capacity and deciding matters with respect to independent parties who invoked the jurisdiction of [her] court, the integrity and independence of judicial decisionmaking would be impaired" by unnecessary intervention from another court. *Barnes v. Winchell*, 105 F.3d 1111, 1121 (6th Cir. 1997). Although *Barnes* was decided in the context of judicial immunity, the principle remains the same. Allowing disgruntled parties to run to federal court when they disagree with their state-court judge would impair the judge's decision-making and the independence of Ohio's court system. In particular, it would hinder the judges' ability to decide recusal motions on their own if their judicial decision-making can be impeded by the filing of a federal case. *See e.g. Gilbert*, 401 F.3d 411. It could well lead to unnecessary recusals just to

avoid federal litigation. It could encourage litigants to run to federal court every time they disagree with a judge's ruling and refusal to recuse. It could impede the orderly consideration of affidavits of disqualification by the Chief Justice who could be stymied by every litigant unhappy with the Chief Justice's decision or the judge assigned to a case. Such an outcome would cause ongoing irreparable harm to Ohio's court system by impeding the orderly processing of cases and leaving the public with the impression that judges are assigned to cases based on one particular party's desired results.

The public interest similarly favors denying injunctive relief here. The Supreme Court has recognized that there is a public interest in "the minimization of friction between our federal and state systems of justice" and in "the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Withrow v. Williams*, 507 U.S. 680, 687 (1993) (quotation omitted); *see also Hazel v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 165177, *12 (S.D. Ohio 2016) (noting that the public interest is "served by denying the TRO because of the comity and federalism concerns implicated by a federal court enjoining a state-court judgment). The same principles supporting *Younger* also show why the public interest favors denying the TRO. Federal court intervention in purely state-court matters violates the doctrine of federalism and creates friction between the state and federal courts. Neither of these results is in the public interest.

CONCLUSION

For the reasons explained above, Ohio Supreme Court Chief Justice Maureen O'Connor respectfully asks this Court to deny Plaintiffs' request for a temporary restraining order.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Ohio Attorney General

/s/ *Nicole M. Koppitch*
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, the foregoing *Memorandum in Opposition* was filed electronically. Notice of the filing was sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. I further certify that a copy of the foregoing has been served by regular mail upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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