CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

WWW.CAMPAIGNFREEDOM.ORG

Litigation Backgrounder

Corsi v. Ohio Elections Commission: You Are a Political Action Committee Because We Say So

Summary of the Issue

If two or more people get together to write a blog or publish a pamphlet giving their opinions on public policies, and occasionally on a candidate, can Ohio force them to register with the State before speaking or spending even a dollar? According to the Ohio Elections Commission (OEC) and Ohio's courts, the answer is "yes."

And if those people fail to register—whether because of principle, ignorance, or naïveté—they can expect to be dragged before commissions and courts. As the OEC considered this issue, the Chairman said to one such individual: "I noted in your affidavit you say, 'Do I have to hire a lawyer to avoid these things?' Yeah, I guess so. I think that's--it's very complicated without going to those lengths."

Background

Three years ago, Ed Ryder, the local Republican Party Chairman, picked up a home-produced "little pamphlet" at a county fair. The pamphlet denounced and praised various local and federal officeholders, including some candidates for election and reelection. Ryder recognized the pamphlet's author as a local blogger who had criticized him and some of his party's candidates in the past.

The pamphlet was distributed by the Geauga Constitutional Council, a pseudonym for Edmund Corsi, who insists that he's the only member of the Council. Outside of using the name of the Council when inviting speakers to talk about issues relevant to the community and occasionally having coffee with like-minded friends to discuss politics, the Council exists simply as Corsi's own blog. While Corsi updates the blog regularly about politics, the meetings were not used as a forum to advocate for or against candidates.

Ryder, who is also a member of the county's board of elections, noticed the pamphlet did not have a disclaimer stating its author, even though Ryder knew who published it and only PACs are required to have disclaimers. Nevertheless, Ryder filed a complaint with the county board, which referred the matter to the Ohio Elections Commission, the Buckeye State's version of the Federal Election Commission. After a hearing, the OEC

levied a fine against the Council, ruling that the Council should have registered as a PAC with the OEC before speaking. That decision was affirmed on appeal through the Ohio court system, and the Ohio Supreme Court, by a vote of 4-3, chose not to review the previous rulings.

As a result, a pamphlet disliked by a county party chairman became the excuse for dragging Corsi and his "group" through multiple agencies and courts. Making matters worse, Ohio snubbed binding U.S. Supreme Court precedent and placed many organizations and bloggers at risk of becoming regulated entities in Ohio.

The State of the Law

To protect First Amendment speech rights, including those exercised by nonprofit groups, bloggers, and those who self-publish pamphlets, the U.S. Supreme Court has repeatedly ruled that only groups with "the major purpose" of urging the election or defeat of candidates can be regulated as PACs. This makes sense, as there are enormous reporting burdens associated with PAC status, such as the disclosure of all donors, which would unduly burden small groups and individual speakers.

Reporting requirements for expenditures urging the election or defeat of candidates are constitutional, as are reporting requirements for donations earmarked to fund such expenditures.

However, groups that primarily engage in issue speech or other activities can't be regulated as PACs. To determine whether a group is a PAC requires the state to consider a group's activities and finances to determine if it truly spends a majority of its efforts urging people to vote for or against candidates. Otherwise, as the Court noted in the landmark campaign finance case of *Buckley v. Valeo*, "the relation of the information sought … may be too remote … [and] impermissibly broad." In short, the reporting burdens on such groups would chill speech on issues and topics unrelated to advocacy for or against any candidate.

Justice Brennan expressed such concerns with PAC requirements in the controlling opinion in *FEC v. Massachusetts Citizens for Life*. "Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports … it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." As Chief Justice Roberts famously wrote two decades later, when "the First Amendment is implicated, the tie goes to the speaker, not the censor." Otherwise, grassroots political activity—conducted by people who cannot afford attorneys and accountants—will largely cease to exist.

A Commission Run Amok

Ohio's PAC law states that in order to be compelled to register as a PAC, a group must have the "primary or major purpose" of expressly advocating for or against candidates. The problem is that neither the OEC nor the state courts made any effort to actually

determine Corsi/Geauga Constitutional Council's "primary or major purpose."

The Council's blog alone has hundreds of posts, with only a few advocating for or against candidates. The few events the Council sponsored were purely issue-based. The Commission's chair, Bryan Felmet, admitted as much in the OEC hearing. In discussing the educational events organized by the Council, Felmet said "if that's all you did, you're not a PAC."

Corsi was examined by a county prosecutor, representing Ryder and the complaining county commission, as well as by the OEC's commissioners themselves. One commissioner, John Mrockowski, informed Corsi—in the still ongoing hearing—that "[s]ince I allowed you to talk, I guess you'll have to listen to me…Everything that you have done here, to me, shows me that you're a PAC…I've seen others come here that must comply with the law, fill out the forms, do what you need to do. And I think that's what you need to do, sir." However, during deliberations, Mrockowski admitted confusion and asked the Commission's Chairman whether the PAC statute required more than a simple determination that others had assisted Corsi in his efforts.

Mrockowski was not the only commissioner expressing confusion during the deliberations. One commissioner asked the Commission's executive director to "define the elements of a PAC," a legal question so central to the OEC's mission that its commissioners should be expected to already know the answer. At another point, Chairman Felmet said that "we have to determinate [sic]" whether "advocacy was a primary purpose or something less than a primary purpose." The staff member, who had already defined the elements of a PAC earlier in the hearing, had to correct the Chairman on the wording of the statute, which requires political activity to be the "primary or major purpose" of the organization. The difference is important: the Chairman's formulation could allow insubstantial or incidental political activity to trigger PAC status—the very error the Commission ultimately committed.

Finally, the Commission reasoned that "[t]he appropriate way to judge an organization…is through its self-proclaimed Mission Statement," which listed "supporting and helping" certain candidates as the Council's third objective. To decide if this counted as the "major" or "primary" purpose of an entity, the Commission resorted to the definitions found in a 1986 college dictionary rather than four decades of Supreme Court precedent. Such odd reasoning and lack of intellectual rigor is perhaps unsurprising, given that the Commission's staff director noted that he didn't believe Corsi's case "would go all the way to the Supreme Court or anything."

At no point did the Commission make any effort to determine what percentage of Corsi's time, or the minimal sums he paid to maintain a website, were devoted to advocating for the election or defeat of a candidate. And since any spending, even a dollar, can trigger PAC status and a registration requirement, the effect is that any two Ohioans who get together and think that they might at any point discuss partisan politics could be forced to register with the government.

No wonder that during his questioning of Corsi, the Commission Chairman informed him, as noted above, that he had to "hire a lawyer to avoid these things." If the OEC itself needs a lawyer at the table to walk through the statute's requirements, how are grassroots speakers to understand it?

The Appeal to the U.S. Supreme Court

In April 2011, the OEC ruled that the Council was a PAC under Ohio law. Although the commission stated that the organization's primary purpose was not to engage in political activity, engaging in politics was part of the organization's purpose based on the organization's mission statement, a few excerpts from its website, and a single voter guide. Yet, as noted in the appeal to the Supreme Court, "no finding was ever made that these statements and publications comprised a majority, plurality, or even a substantial portion of the Council's activity or expenditures."

The OEC did not examine the overall amount of political activity before ruling that the Council must register with the government, and finding it in violation for failing to do so before speaking. It appears that the OEC can pick what information to examine, and then subject organizations to registration and the same burdensome reporting requirements as political parties and committees based solely on some evidence of some political activity. That is not, and should not, be the law.

The Ohio Court of Appeals applied the First Amendment in a manner inconsistent with the major purpose test required by *Buckley* and *FEC v. Massachusetts Citizens for Life*. This inconsistency in determining which organizations are PACs leaves groups vulnerable to unconstitutional governmental regulation and reporting burdens that will limit speech. This is especially troubling where, as here, a political opponent hauls a group before state tribunals. Ohio's statute and its enforcement by the OEC are inconsistent with Supreme Court precedents and the First Amendment.

Corsi v. OEC provides an opportunity for the Court to give life to the major purpose test of *Buckley* and *MCFL*, and to require the states to undergo an appropriate analysis based on all the evidence.

The appeal to the Supreme Court warns that "unless this Court weighs in, the major purpose requirement is poised to become a dead letter in the states. . . . Many states, including Ohio, have adopted systems whose vague and overbroad triggers 'offer[] no security for free discussion' — the very harm Buckley sought to avoid."

The questions presented by the appeal are:

1. May the major purpose test for political committee status, established by this Court in *Buckley v. Valeo* and *FEC v. Mass. Citizens for Life*, be satisfied without finding that regulated activity comprises the majority of an organization's activity or expenditures?

2. May a state meet its burden of demonstrating an organization's major purpose without determining the portion of its expenditures directed toward political communications?

Implications of Ohio's Ruling

Under the OEC's precedent and logic used in interpreting the law, the following persons or organizations might have to register as a PAC before speaking in Ohio:

- A husband and wife decide to attend a candidate rally and drive to Columbus.
- A group of college students start an environmental club that mostly publishes information on legislative issues but also a scorecard of legislative votes that urges students to "vote for the environment."
- An out-of-state blog, such as Daily Kos or RedState, decides to urge Governor Kasich's reelection or defeat as part of its blogging activities.
- A pamphleteer asks a friend to help distribute pamphlets.
- A local small-business group decides to spend $250 on advertising in support of several legislative candidates.
- A local labor union decides to publish a brochure with recommended local candidates that their members can distribute to family and friends.

Ohio Is Not Alone

Unfortunately, the major purpose test has been increasingly discarded by state legislatures across the country. In fact, Maine recently created a class of "non-major purpose PACs"—a direct flout of *Buckley*. Other states rely on monetary triggers and not the major purpose test.

In Colorado, the spending of a mere $200 forces PAC status on a group—even one that might have spent millions discussing issues or engaging in activities completely unrelated to politics at all. Although the Tenth Circuit ruled the $200 trigger unconstitutional, the state continues to enforce the trigger as law.

A similar event occurred in Utah. There, the state's free-floating PAC status rules were struck down as unconstitutional, with a federal judge reminding the state that the major purpose test is mandatory and "*Buckley* meant exactly what it said." Utah went back and re-wrote the law—allowing "*a*" major purpose to force PAC status, a rule which sweeps in legitimate issue groups and grassroots activists.

It is troubling that states are actively subverting the law and installing rules that Justice Brennan would recognize as unconstitutional. This trend is particularly troubling where the states involved are nationally competitive states like Nevada, Colorado, and Ohio. Speech should never be chilled, especially when it matters.

Conclusion

Forty years ago, in *Buckley v. Valeo*, the U.S. Supreme Court drew a line preventing the government from regulating grassroots speech out of existence. Despite unbroken re-affirmance of those principles, including the major purpose requirement, several states have crossed that line. In response to this development, grassroots activists and bloggers are told to hire lawyers before speaking. But, as Justice Anthony Kennedy said, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."

Legal Team

The Center for Competitive Politics and the 1851 Center for Constitutional Rights are representing Edmund Corsi and the Geauga Constitutional Council on the appeal to the U.S. Supreme Court.

The Center for Competitive Politics is one of the nation's premier centers of public interest litigation. It is the only public interest law firm with in-house litigation staff solely focused on the defense of First Amendment rights to free political speech, assembly, and petition. CCP was co-counsel in *SpeechNow.org v. Federal Election Commission*, which held that there can be no limits on contributions to independent expenditure committees. This case created what is now known as the Super PAC. CCP's amicus brief was also cited in the majority opinion in the *Citizens United* case. CCP's legal team represents two cases now pending before the U.S. Supreme Court.