Should nonpartisan Delaware group be regulated?

By Allen Dickerson and Zac Morgan

Delaware Online

Published October 29, 2013

Last week, a 501(c)(3) nonprofit group, Delaware Strong Families, filed a federal lawsuit challenging various provisions of the state's new campaign finance law.

Specifically, Delaware Strong challenges a new statute, which regulates speech merely because it mentions a candidate for office. In the past, Delaware Strong has created and distributed neutral, nonpartisan voter guides listing every state and federal candidate on the Delaware ballot, and noting each candidate's position on issues ranging from same-sex marriage to the estate tax. The information in the guides is gathered directly from the candidates themselves.

The guides do not endorse candidates, rank their responses or encourage anyone to vote a certain way. They are purely informational. In fact, the guides are similar to election guides often published by newspapers – with the obvious exception that newspapers can and do endorse candidates.

Thanks to the new law, if Delaware Strong wants to distribute its voter guides before the 2014 election, it must register with the state, and file reports listing the names and addresses of its donors. Essentially, the new law makes Delaware Strong a PAC – the equivalent of a Delaware branch of American Crossroads.

This is no accident. Andy Lippstone, Gov. Jack Markell's chief legal counsel, has already admitted that the nonpartisan Delaware Strong voter guide is precisely the sort of speech the law targeted for regulation. Meanwhile, David Earley of New York University's Brennan Center for Law and Justice does not believe "the burden [on Delaware Strong] is all that great, it is just filing a few forms and listing a few donors ... it is not that big of a deal." And The News Journal, fundamentally misunderstanding the nature of Delaware Strong's speech, has criticized it for undermining the electorate's ability to know who supports particular candidates – even though Delaware Strong cannot and does not support or endorse candidates.

Obviously, Delaware Strong worries that subjecting it (and other similar groups) to the equivalent of PAC status "may create a disincentive ... to engag[ing] in political speech." What's more, "its practical effect ... in this case is to make engaging in protected speech a

severely demanding task." Delaware Strong's argument here is not a new one – this paragraph merely quotes the great liberal Supreme Court Justice William Brennan's opinion in *FEC v. Massachusetts Citizens for Life*. (Interestingly, this legendary jurist is the namesake of the Brennan Center for Justice).

Just a few years ago, the Supreme Court re-affirmed Justice Brennan's wisdom, noting in its *FEC v. Wisconsin Right to Life* decision that PAC requirements "impose well-documented and onerous burdens, especially on small nonprofits."

But in the spirit of fairness, let's take Mr. Earley at his word, and assume Delaware's law "is not that big of a deal." So what?

The First Amendment protects groups from being required to report the names and addresses of their donors to the government, unless the government can offer a valid reason for its demand. An unbroken line of Supreme Court precedent dating back to the unanimous 1976 opinion in *Buckley v. Valeo* prevents the government from grabbing donor lists unless a target organization objectively encourages a vote for or against a candidate. Only under these circumstances, according to the Supreme Court, can the government demand a donor list – in the interest of making sure a contributor is not attempting to exchange contributions for a political favor from her candidate of choice. (Incidentally, Justice Brennan signed on to the Buckley decision.)

So it doesn't matter how easy it might be for Delaware Strong to "file a few forms." Frankly, myriad unconstitutional laws are not "all that burdensome."

There's no exception to constitutional protections just because the government manages – at least, in its own judgment – to make such violations bearable.

How much trouble is it for students to suffer through 30 seconds of prayer at their high school graduation? On net, does it really matter if a public university spikes just one article about contraception in its school paper? If you still make your flight on time and nobody physically abuses you, how much of a burden is it to be pulled aside by the TSA because of your race?

How burdensome would it be if Delaware decided to pass a media disclosure bill: a law designed to ensure nobody could be unduly swayed by bias in a newspaper's so-called "objective" reporting. All such a law would require is for newspapers to disclose everyone they talked to for an article, and to provide a list of the paper's subscribers. Not much of a burden. One might say it's just filing a few forms and listing a few subscribers.

Somehow, we doubt Justice Brennan would have stood for such a law – probably for the same reasons he signed on to the opinion in *Buckley v. Valeo*. Neither would we. The First Amendment is a charter of rights, not a test of convenience.