Written by **Joe Wolverton, II, J.D.** on January 5, 2012

Fed. Appeals Court Strikes Down Part of Washington PAC Donation Statute

The case challenging the measure was filed by Family PAC, a conservative political committee formed to oppose Washington's domestic partnership law through a voter referendum. In the suit, plaintiffs objected to three separate provisions of the new election law, only the third of which was held unconstitutional by the Ninth Circuit.

The first section objected to by Family PAC required a political committee to report the name and address of each person contributing more than $25 to the committee. The second provision that was challenged imposed a requirement on PACs that they report the occupation and employer of each person contributing more than $100 to the committee.

Family PAC's third averment specifically challenged the three-week moratorium on PAC donations. The Ninth Circuit declared that the rule violated the First Amendment's guarantee of unabridged free speech.

The ruling cited the bases for Family PAC's complaint: "Potential donors to Family PAC have indicated that they are unwilling to donate if Family PAC is required to report their name and address pursuant to [the disclosure laws]." Family PAC also presented evidence that, but for the $5,000 contribution limit, it would have received contributions of $60,000 and $20,000 from Focus on the Family during the Referendum 71 campaign.

Washington Attorney General Robert McKenna was a named defendant in the suit, and he countered Family PAC's position, asserting that the law was designed to protect those Washingtonians who take advantage of the state's popular vote-by-mail scheme. Under the terms of that system, voters may mail in their ballots 18 days before the scheduled date of the election. If PACs are allowed to accept money right up until the day of election, the state argues, then those voters who choose to mail ballots early will deprived of the opportunity to hear all of the information relevant to the election and thus their votes may be unfairly disadvantaged.

As the court summarized the argument:

> The theory is that all voters should know who is paying for ballot measure campaigns by the time they cast their votes, and because voters have the option of voting before election day, this informational interest cannot be adequately protected unless large contributors make themselves known 21 days in advance of the election: "Given the timing of Washington's vote-by-mail system, which encompasses the vast majority of voters in the state, and the timing of Wash. Rev. Code § 42.17.105(8), there is a substantial relation between the governmental interest and the timing of

> this disclosure provision."

The Ninth Circuit was not persuaded, however. According to the ruling, the court decided that the ends of the law did not justify the means employed to achieve them:

> Now, however, campaign contributions can be reported and made publicly available within minutes, and certainly within 24 hours. Given that reality, a 21-day ban on large contributions cannot be viewed as necessary or narrowly tailored to effectuate the original purpose.
>
> The fact that voters have access to ballots earlier than before, and that they may choose to vote before all the election debate is in fact over, is not a sufficient reason to save this statute as it pertains to [ballot measures].

As regards the First Amendment consideration, the Washington statute was viewed as a previous restraint and a "ban on political speech" which triggers a requirement that the court apply a strict scrutiny standard in considering the constitutionality of the law in question.

Strict scrutiny is a standard employed by a court to balance government interest against the constitutional right being invoked. Traditionally, courts apply the strict scrutiny standard in two types of cases: first, those claiming that a fundamental constitutional right has been abridged; and second, those cases regarding the government's treatment of a "suspect class," (minorities or women, for example).

This bifurcation of constitutional rights into those which are "fundamental" and those which are expendable is itself unconstitutional and was developed in a footnote to a Supreme Court decision in 1944 regarding the detainment of Americans of Japanese descent during World War II.

Such judicial segregation of the various protections contained in the Bill of Rights is contrary to the intent of the Founders and the key concept of the separation of powers. In enunciating and following this hierarchy of standards, the Supreme Court (and lower federal courts) has endowed itself as the arbiter of not only those things that are constitutional, but of that which is more constitutional than others. How can a court, any court, determine the relative value of any of the rights protected by the first 10 amendments to the Constitution? By what authority is such a categorization made?

In finding in favor of Family PAC regarding the time-limitation on donations, the Court held:

> It is true that some voters may choose to vote early, and they may not learn of some large contributions until they have already voted. The state certainly has an interest in assuring that all voters, including those who vote early, have the information they need to make informed choices. Voters who cast their ballots while the campaigning is still in full swing, however, make a voluntary choice to forgo relevant information that may come to light in the final weeks of the campaign. The state's interest in ensuring that these voters — the number of whom has not been identified — are maximally informed is therefore a weak one. It is outweighed by countervailing interests, including the right of ballot measure committees to raise and spend funds, the right of individuals to contribute funds to ballot measure committees and the interest of the voting public in the messages that those committees may convey in the final weeks of the election.

Although the defendants are likely discouraged by the decision of the Ninth Circuit, the court's strict scrutiny analysis of the law led them to set forth the parameters that any subsequent alteration to the law would have to follow in order to pass constitutional muster. According to the ruling, a ban on donations to PACs would have to be limited "to a time more carefully calculated to reflect the current

time necessary to gather and organize and disseminate the relevant information about contributions and contributors that the government legitimately seeks to convey."

Due to frequent legal challenges, Attorney General McKenna has often been a visitor to federal courts since the passage of the election law.

As reported by *Jurist*:

> Washington has been involved in multiple lawsuits involving elections this year. In November, the Ninth Circuit Court of Appeals ruled that the names of signers of a petition to abolish a domestic partnership law could be released because it was not a violation of the First Amendment or unreasonably dangerous to do so. A US district court also ruled in January on the constitutionality of Washington's primary election system. The court held that the system was constitutional because it would not confuse a reasonable voter, as plaintiffs said it would.

Reuters reports that "James Bopp, a lawyer for Family PAC, praised the decision to strike down the state's rare blackout period that limited ballot measure fund-raising before an election."

Spokesmen for the state did not return requests for comment; however, a spokesman for the Attorney General's office indicated that the decision was being reviewed by that office.

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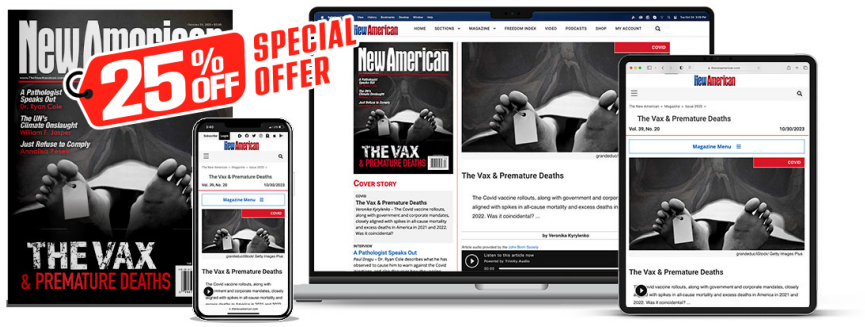

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