CENTER *for* COMPETITIVE POLITICS

*Congress shall make no law...*

WWW.CAMPAIGNFREEDOM.ORG

# Protecting the First Amendment in Delaware

## Lawsuit Challenges Voter Guide Restrictions

**The Issue in Brief**

Should the state have the power to regulate groups that publish nonpartisan voter guides in the same way that it regulates candidate committees, political parties and PACs? That's the issue at stake in *Delaware Strong Families v. Biden,* a case challenging a new Delaware law that violates the First Amendment by placing unconstitutional burdens on groups publishing nonpartisan voter guides.

As written, the law appears to require groups to choose between publishing information on candidates or violating the privacy of their supporters who might contribute as little as $9 a month. As a result of the law, Delawareans will find it more difficult to get information about elected officials and candidates.

The Delaware law, which took effect in January, creates a new form of regulated speech known as a "third-party advertisement." The law appears to subject groups that publish voter guides to essentially the same regulatory and disclosure burdens as parties, PACs and candidate committees.

The lawsuit was filed October 23, 2013 on behalf of Delaware Strong Families (DSF), which published a nonpartisan voter guide in 2012 and hopes to publish a similar guide next year. The lawsuit notes that "[a]bsent a declaratory judgment [by the court], DSF will not publish and disseminate its voter guides in 2014, for fear of risking enforcement of the Delaware Elections Disclosure Act. Thus, Delaware's campaign finance regime—left untouched—will chill speech in a manner found unconstitutional by the Supreme Court" in the landmark 1976 decision of *Buckley v. Valeo*."

As a part of its mission, DSF informs voters about the positions of candidates for federal, and state office on issues of importance to the community. It accomplishes this task by releasing voter guides listing every candidate seeking state or federal office, as well as those candidates' positions on a variety of issues. Even though the group does not endorse candidates and the voter guides are neutral and nonpartisan, the law would force the group to turn over contribution lists to the state and make detailed filings that the Supreme Court has found to be unconstitutional in other cases.

"It's wrong for the State to require that Delaware Strong Families register with the government, hand over contributor lists, and comply with the State's regulatory morass just to get permission to distribute information about every candidate running for office

and where they stand," said Nicole Theis, the president of Delaware Strong Families (DSF), "There is nothing in the First Amendment that says that we need to beg the state for a license to speak."

DSF would face stiff penalties for publishing the voter guides in 2014 without abiding by the new law.

"If DSF were to continue issuing voter guides and then neglect or refuse to file these burdensome reports, the organization would face a fine of $50 a day," said Allen Dickerson, Legal Director of the Center for Competitive Politics, which is representing DSF in court. "The Buckley Court upheld disclosure of a group's contributors only if its communications objectively urge people to vote for a specific candidate. The government cannot impose extensive regulatory burdens, or violate the privacy of donors, where an organization does not advocate for any candidate."

**The First Amendment Protects Free Speech**

The portion of the First Amendment that applies in this case says "Congress shall make no law … abridging the freedom of speech." As a matter of longstanding constitutional principle, the First Amendment applies equally to the state legislatures via the Fourteenth Amendment.

In the seminal 1976 campaign finance case of *Buckley v. Valeo*, the Supreme Court ruled that the governmental interest in "independent reporting requirements on individuals and groups that are not candidates or political committees" dissolves unless the "contributions…[are] earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee" or "when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley* also determined that express advocacy meant directly advocating the election or defeat of a candidate as expressed through words such as "vote for" or "elect."

The Court explicitly drew this distinction to prevent a recently enacted federal campaign finance regime from regulating speech discussing issues of public policy, since "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."

The Court also held that the government could only force PAC status upon organizations with "the major purpose" of nominating or electing a candidate. The Court did so explicitly to avoid permitting the law to be "interpreted to reach groups engaged purely in issue discussion."

The Supreme Court subsequently affirmed this decision in 1986, noting that "[i]mposing the full panoply of regulations that accompany status as a political committee under the [law]" is only permissible if an entity's express advocacy "spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity." *FEC v. Mass. Citizens for Life, Inc*., 479 U.S. 238 (1986) ("MCFL").

As the *Buckley* Court determined, to do otherwise would "offer[] no security for free discussion" because the fine distinction between expressly supporting a candidate and merely discussing issues "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

While subsequent Court rulings have offered some sanctuary to more responsibly limited disclosure laws, the Court never sanctioned a law as overreaching as Delaware's. For example, the disclosure regime the Court upheld in *Citizens United* was more limited than Delaware's. First, it applied to a specific type of speech—federal electioneering communications, distributed via broadcast media, which "referred to [a federal candidate]…by name shortly before a primary and contained pejorative references to her candidacy." Second, it required disclosure only after the expenditure of a larger sum of money, and required the disclosure of certain contributors of a larger size. Indeed, the disclosure regime at issue in *Citizens United* specifically shielded contributors to corporate entities from being publicly disclosed unless the contribution was given specifically to finance a particular communication.

The Supreme Court also forbade the government from requiring PAC status as a precondition of corporate speech. In the *Citizens United*, the Court noted that because of the "onerous restrictions" imposed upon PACs, and because "PACs have to comply with these regulations just to speak," PACs are not an acceptable substitute for direct corporate speech.

This unbroken line of Supreme Court precedent prohibits the very chill of constitutionally protected issue speech that has occurred in this case.

Delaware's regime requiring the disclosure of associational activity unrelated to express advocacy (or its functional equivalent) concerning candidates or parties chills political speech and serves no compelling government interest. Similarly, its burdensome organization and reporting requirements for groups unengaged in express advocacy or its functional equivalent discourages political speech, and are not justified by any constitutionally sufficient government interest.

**Facts in the Case**

DSF is a small nonprofit organization dedicated to promoting "Biblical worldview values, resources, and programs and [to] educate and empower citizens to stand strong for those values in all arenas."

In order to maintain its tax status as a non-profit under Section 501(c)(3) of the U.S. tax law, DSF is prohibited from engaging in political advocacy for or against candidates. Instead, DSF fulfills its mission through purely educational initiatives, such as outreach to churches, posting petitions about issues of import to the group, and offering advice to Christian leaders interested in promoting traditional values.

As a major part of its educational mission, DSF informs voters about the positions of candidates for federal, state, and countywide office on a variety of issues. It does this through nonpartisan voter guides. The guides list every candidate seeking state and federal office, as well as every candidate's position, if available.

To defend its right to distribute these educational guides, DSF has been forced to file a lawsuit against the Attorney General and the State Elections Commissioner in the U.S. District Court for the District of Delaware.

**Delaware Amends Its Campaign Finance Law**

On August 15, 2012, Delaware Governor Jack Markell signed into law H.B. 300, the Delaware Elections Disclosure Act. The new law took effect in January and its requirements go much further than any law previously reviewed by the U.S. Supreme Court. The law creates a new form of regulated speech known as a "third-party advertisement", which can be any communication distributed through the mail or posted on the Internet which merely mentions any "clearly identified candidate" within 60 days of a general election, or 30 days of a primary election.

Those groups which run "third-party advertisements" are forced to hand over the names and addresses "of each person who has made contributions…during the election period in an aggregate amount or value in excess of $100; the total of all contributions from such person during the election period, and the amount and date of all contributions from such person during the reporting period."[1] The closer to an election the third-party advertisement is, the faster these reports must be made to the state. An election period can cover nearly four years, so a supporter who gives as little as $9 a month to a group could find his name and home address publicly revealed.

As a result of this and other provisions in the Delaware Elections Disclosure Act, if any group spends more than $500 *just mentioning the existence of a candidate for office* in a communication, Delaware law essentially treats the group as a Delaware political action committee. This table shows that the reporting burdens are nearly identical to those imposed on PACs.

| **Third-Party Advertisement Report**<br>*After spending more than $500 on any combination of independent expenditures or electioneering communications, a Delaware group must...* | **Political Committee (PAC) Report**<br>*After spending more than $500 or receiving more than $500 in contributions, a Delaware PAC must…* |
|---|---|
| Disclose all contributions to the organization during the election period of over $100, including names and addresses of contributors. §8031(a)(3). | Disclose all contributions to the organization during the election period of over $100, including names and addresses of contributors. §8030(d)(2). |

[1] Del. Code Ann. tit. 15, § 8031(3).

| | |
|---|---|
| If not an individual, disclose the full name and address of anyone with a 50 percent stake in the entity and "one responsible party" if aggregate contributions from a non-individual exceed $1,200. §8031(a)(4)(a)-(b). | If aggregate contributions from a non-individual exceed $1,200, name and address of "one responsible party." §8030(d)(2). |
| At minimum, file report during the same reporting period used by PACs.. §8031(b). | Abide by mandatory reporting period. §8030(b). |
| 48 hour reporting if expenditure is made more than 60 days before a general election or 30 days before of a primary/special election. §8031(d). | If an independent expenditure or electioneering communication is made, must abide by same rule. |
| 24 hour reporting if expenditure is made 60 days or less before a general election or 30 days or less before a primary/special election. §8031(d). | If an independent expenditure or electioneering communication is made, must abide by same rule. |
| Mandatory retention of "complete records" of all expenditures and contributions for three years following the election. §8031(f). | Mandatory retention of "complete records" of all expenditures and contributions for three years following the election. §8005(3). |
| File report under penalty of perjury. §8031(a). | Candidate or PAC treasurer must file a sworn affidavit supporting the report. §8030(f). |

This creates obvious problems for DSF. The group just wants to disseminate a nonpartisan voter guide, not spend money to elect or defeat candidates. Indeed, the organization's 501(c)(3) status *depends* on DSF refraining from political advocacy. But the state has decided to treat DSF and similar groups that don't advocate for or against candidates as if it was a PAC.

All this stems from DSF's desire to pass out nonpartisan voter guides, and the state government forcing the organization to choose between violating the privacy of its contributors or acquiescing to overbearing regulation. Absent a favorable court ruling, these forced disclosures and ambiguous rules (with not-so-ambiguous penalties) will force DSF to self-silence in 2014.

**Such Intrusive Disclosure Has Never Been Upheld by the U.S. Supreme Court**

Under longstanding First Amendment precedent, the government may only compel the disclosure of an organization's contributors if it can demonstrate that the disclosure is narrowly tailored to a sufficiently important government interest. Since *Buckley v. Valeo*,

the Supreme Court only upheld disclosure of incorporated entity contributors if the communication objectively appeals to the respondent to vote for a specific candidate.[2] In other words, the government has no right to figure out who is contributing to groups that are not openly aligned with a candidate. The reason for this is twofold.

First, it prevents the government from learning who is contributing to organizations which simply engage with the public on issues. Even *Citizens United v. FEC*, often described as a great victory for disclosure, only sanctioned the disclosure of contributors who specifically earmarked their contribution for the propagation of communications objectively advocating for a candidate.[3]

Second, it prevents the government from squelching speech by sticking layer after layer of red tape on organizations. Compliance with campaign finance forms—especially for groups not organized to do so—can be complicated, confusing, and even harrowing when hefty fines are on the line. (It is worse, of course, where the State has not even released the forms and the rules for filling them out, despite a clear statutory requirement to do so).

Unless DSF prevails in its lawsuit, it will be forced to stop disseminating its guides. To do otherwise would risk sanctions by the state of Delaware, impose onerous burdens on the group, and possibly place the group's tax status in jeopardy. As importantly, this would deprive the voters of Delaware of objective, useful information about their representatives in Washington and Dover.

**Client**

DSF Families is a 501(c)(3) tax-exemption organization incorporated in Delaware. It seeks to promote its understanding of Biblical worldview values through education.

**Legal Team**

CCP's legal team is led by the Center's legal director, **Allen Dickerson**. Dickerson is joined by staff attorney **Zac Morgan** and local counsel **David Wilks** from the law firm **Wilks, Lukoff & Bracegirdle, LLC**.

**About CCP**

The Center for Competitive Politics is one of the nation's premier centers of public interest litigation. It is the only public interest organization 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 Super PACs.

---

[2] *Buckley v. Valeo*, 424 U.S. 1 (1976), *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986), *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 558 U.S. 310 (2010).

[3] *See* 11 C.F.R. § 104.20(c)(9) (Dec. 26, 2007).

In addition to its strategic litigation, CCP works to promote and defend First Amendment rights to free political speech, assembly, and petition through communication, activism, training, research, and education.