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NEWSLETTER

# Election Law News

March 2020

## Top 5 Political Law Issues for Government Contractors in This Election Year

**By D. Mark Renaud**

As we head into an election year that is already flush with campaign contributions at the federal, state, and local levels, this article summarizes five key limits or restrictions on political donations and campaign finance activities that all government contractors must heed.

**Pay to Play Is Here to Stay.** The Supreme Court of the United States recently denied cert in a case involving one of the federal pay-to-play rules. Although these rules are not applicable to most non-financial services contractors, the fact is that courts have upheld pay-to-play laws time and time again. Such laws, then, which at the state and local level preclude government contracts when the contractor, its PAC, officers, directors, or certain employees (or even family members) make certain types of contributions, are here to stay and will only continue to multiply. The provisions vary widely by jurisdiction (such as New Jersey, Illinois, and Connecticut), but they are at the intersection of the First Amendment and government con-

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## Eighth Circuit Vindicates Free Speech Rights in Arkansas Campaign Contribution Case

**By Carol A. Laham and Jeremy J. Broggi**

The U.S. Court of Appeals for the Eighth Circuit vindicated free speech rights by enjoining enforcement of an Arkansas statute that prohibits making campaign contributions more than two years before an election. Judge David Stras, joined by Judges Michael Melloy and Jane Kelly, held on behalf of the unanimous panel that Arkansas' "blackout period" likely violated the First Amendment.

Under Arkansas law, an individual may donate up to $2,700 to a candidate in a primary election, and up to $2,700 to a candidate in the general election. However, a candidate may only accept contributions within two

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tracts. In order to develop state and local government business with confidence, your contracting firm must establish and maintain a political contribution preclearance program to intercept and avoid any impermissible contributions, and to accurately certify compliance and report as required. Nobody likes the government interfering in fundraising and the campaign finance space, but, given that a successful challenge to pay-to-play rules is less and less likely, staying ahead of the curve with a rigorous compliance program is the only option.

**The Contractor Must Provide Guidance When an Executive Fundraises.** At the federal level and in many states (especially those with pay-to-play laws), corporate contributions are prohibited. This includes a corporate subsidy of political fundraising organized by an executive. Nonetheless, executives often will want to be politically active and fundraise for candidates or act in a campaign's kitchen cabinet. Absent pay-to-play laws, this is usually fine, but the employing contractor must ensure that the executive follows the applicable campaign finance/pay-to-play rules and avoids any activity that could give rise to an impermissible corporate in-kind contribution. This includes the use of company client lists, the use of administrative assistant time, charging travel costs to the company, etc. Executives should be briefed on the required rules for their voluntary political activity, and legal and compliance oversight should ensure that the guidelines are followed. Note, in the jurisdiction where there are pay-to-play laws, fundraising by executives may be prohibited.

**The Ban on Federal Contributions by Federal Contractors Includes Super PACs Too.** Federal law prohibits corporate contributions to federal candidates and committees. Federal law also prohibits contributions by federal contractors, regardless of whether the contractors are corporate in nature or not. The symmetry between these laws was broken when the Supreme Court in *Citizens United* permitted corporations to make unlimited independent expenditures and the D.C. Circuit permitted the creation of independent-expenditure (IE) only political committees or super PACs to receive unlimited contributions for IEs. Regular corporations may contribute to super PACs, but federal contractors, given the additional statutory restrictions, may not. The Federal Election Commission over the past few years has handed out several civil penalties for violations of this restriction, so this rule is important to keep in mind. (Similar rules apply to state or local contractors in various jurisdictions.)

**Political Costs Are Unallowable.** It cannot be stressed enough that political costs, like lobbying costs, are unallowable and may not be charged to the government. Contractors must be meticulous in ensuring that the administrative costs of their PACs and any costs, such as travel, related to handing out PAC or corporate contribution checks are not included in an indirect overhead or G&A pool that is allocated to a government contract. For those who use time cards, employees must be properly trained to charge political and lobbying time to unallowable charge codes. For tax purposes, political costs are also nondeductible.

**There Are Permissible Ways for Candidates and Office holders to Visit Your Business Site in Election Years.** Most contractors welcome a visit by members of Congress to their business sites. In-state and in-district members of Congress are very happy to make such visits, especially in election years. The big problem in election years, however, is how to avoid such a visit becoming an impermissible corporate contribution. The good news is that the treatment of such a visit will depend on the timing of the event, the audience for the event (all employees, executives only, the public), and the content of the discussion. There are site visits that can definitely occur up until Election Day without any impermissible corporate contribution or, even worse, the dreaded reciprocity obligation with respect to other candidates in the race. Of course, without proper guidance, such an event can bring about federal violations and problems for a preferred candidate.

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# Pennsylvania Fines Advocate for Stricter Lobbying Laws $19K for Violating Lobbying Law

**By Caleb P. Burn and Eric Wang**

The Pennsylvania State Ethics Commission recently handed down a large penalty to Common Cause Pennsylvania. The group has advocated for a more expansive state lobbying law, and so perhaps the fine was a case of the proverbial "man bites dog." The fine nevertheless is a reminder of several important aspects of the lobbying laws that must be taken seriously.

As background, Common Cause Pennsylvania is registered as an employer of lobbyists in Pennsylvania. As such, the group is required to file quarterly lobbying reports. The group failed to file its report for the second quarter of 2019. After 80 days of non-filing by the group, the State Ethics Commission imposed the $19,000 fine based on the state's sliding scale of administrative penalties, which ranges from $50 to $200 (depending on how many days have elapsed) for each day a report is filed late.

The first lesson from the Common Cause case is that "lobbying" is broadly regulated. It's not only the "Gucci Gulch" lobbyists for well-funded corporate clients that have to register. Nonprofit groups that advocate for public interest causes – including for stricter lobbying laws – also are subject to these laws.

The second lesson from this example is that penalties for noncompliance can often be high, although the amounts and rigorousness of enforcement vary from state to state. Pennsylvania's fines may seem high, but there are jurisdictions with even higher fines. As ***Election Law News*** has **reported previously**, a corporation was hit with a $90,000 fine – a fine of $1,000 per day – after one of its executives failed to register for sending one e-mail to the Chicago mayor. When a jurisdiction's fines accrue daily, they can quickly add up.

While inadvertent reporting failures are typically subject to civil penalties, intentional or knowing violations could result in criminal liability, as is the case in Pennsylvania. Some jurisdictions also impose a time-out on violators during which they are prohibited from lobbying. In Pennsylvania, a paid lobbyist who violates the state's lobbying laws may be subject to a five-year ban on lobbying, and the law specifies that "[c]riminal prosecution or conviction is not required for imposition" of this prohibition.

The third lesson from the Common Cause case is that reporting is typically required even for low activity levels or no activity at all. As the State Ethics Commission's final adjudication report noted, in Pennsylvania, registered employers of lobbyists are required to file quarterly reports for any calendar quarter in which their total lobbying expenditures in the state exceed $3,000. However, even if they fall below this threshold, they are still required to file "a statement of failure to meet the reporting threshold" by the reporting deadline. A failure to file either the report or the statement will result in liability.

Wiley's Election Law practice has deep expertise in the lobbying laws at the federal, state, and local levels. We not only advise clients on the registration, reporting, and related requirements, we also assist clients with preparing their lobbying reports.

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years of an election. And Arkansas made clear in its representations to the court that it deems both accepting and making contributions outside that two-year period a prosecutable offense.

The plaintiff in the case, Peggy Jones, is a political activist who wanted to donate to candidates for the 2022 election cycle but was prevented from doing so by the Arkansas statute. Jones believed that the prohibition violated her First Amendment rights of speech and association. She sought a preliminarily injunction. The district court held that Jones was likely to win on the merits of her First Amendment claim and preliminarily enjoined Arkansas from enforcing the statute against her.

The Eighth Circuit affirmed. The court began with the premise that when an individual contributes money to a candidate, she exercises her First Amendment right to participate in the public debate through political expression and political association. Although the Eighth Circuit recognized that the government may restrict that right to prevent quid pro quo corruption or its appearance, the court found that "Arkansas ha[d] not shown that contributions made more than two years before an election present a greater risk of actual or apparent quid pro quo corruption than those made later."

The Eighth Circuit's analysis is notable for two reasons. First, the decision correctly recognized that the U.S. Supreme Court's decision in *McCutcheon v. FEC,* 572 U.S. 185 (2014), effectively tightened the First Amendment level of scrutiny applicable to limits on campaign contributions. The Eighth Circuit relied on McCutcheon to justify a rigorous examination of the Arkansas statute. And the court expressly rejected Arkansas' argument that McCutcheon's approach to "exacting" or "closely drawn" scrutiny was not binding because it was articulated by a plurality. The Eighth Circuit's rejection of that argument is important because, as D.C. Circuit Judge Katsas recently pointed out, "the [McCutcheon] plurality sought to minimize the differences between strict and closely drawn scrutiny" and to apply the higher standard to laws limiting campaign speech. S*ee Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 559 (D.C. Cir. 2019) (Katsas, J., joined by Henderson, J., concurring in part and dissenting in part).

Second, the Eighth Circuit properly held Arkansas to its First Amendment burden. The court repeatedly faulted Arkansas for failing to produce evidence that its statutory blackout period had any actual effect on preventing quid pro quo corruption or its appearance. That is important because although the Supreme Court has long made clear that the burden is on governments to justify any restrictions they place on fundamental rights, too often lower courts confuse that burden and force citizens to prove that a law is unjustified. *See, e.g., Hatfield v. Barr,* 925 F.3d 950, 952 (7th Cir. 2019) (faulting plaintiff for failing to produce "data" or "any study" that would disprove a restriction's effectiveness in advancing the federal government's interests). By keeping the burden on Arkansas, where it belonged, the Eighth Circuit properly recognized that the First Amendment is a limitation on government, not a grant of government power.

The case is *Jones v. Jegley,* 947 F.3d 1100 (8th Cir. 2020).

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# Privacy Best Practices for Campaigns

**By Kathleen E. Scott and Joan Stewart**

Information about individuals drives modern campaigning. Indeed, the ability to collect and use personal information about voters and the issues they care about is crucial to structuring a targeted campaign message. At the same time, in this data driven world, individuals are paying increased attention to how their personal information is being collected and used. Accordingly, although non-profit organizations, are generally exempt from most privacy laws, we recommend that everyone—including campaigns-- implement privacy best practices to ensure that voters are informed as to how their personal information will be collected and used by a campaign and to provide assurances that campaigns are taking reasonable steps to protect their information.

Below are a few privacy disclosure and data security best practices for campaigns.

**Create a Privacy Policy.** When you collect information online–either through a website or app—use a privacy policy to keep your visitors informed about what personal information you are collecting about them and how you are using that personal information. Tell users what information you are collecting about them directly (such as when they sign up to receive emails about campaign events) and indirectly (such as when your campaign uses analytics to track which pages of your website are most visited or uses tracking cookies to send targeted ads to voters across multiple websites). Next, be upfront about how your organization is using this personal information. Will you use it to send them emails about the campaign, to create targeted social media messaging, to request campaign donations? These are all valid reasons and in line with what someone visiting a campaign's website should expect–but they should be disclosed. Lastly, make sure your privacy policy explains how you may share the individual's personal information. Are you sharing it with other campaigns, with PACs, with the national committee? It is a best practice to tell voters how their personal information may be shared. Make sure your privacy disclosures accurately reflect your campaign's actual privacy practices. While the FTC does not have authority over non-profits organizations, there may be other consequences if a campaign's stated privacy practices are judged deceptive because they don't reflect actual practices.

**Be Thoughtful about Data Security.** Evaluate your data security practices to ensure that they are reasonably designed to protect against unauthorized access of the personal information that you have collected about your supporters. In addition to protecting the individuals who provide you their information, security measures up front help to protect against the significant reputational costs of security breaches.

**Hold Your Vendors/Service Providers to High Standards.** When you share personal information with vendors or service providers—to send out email alerts, process donations, or run analytics on your website—hold your vendors and service providers responsible for the personal information you share with them. Have a written contract in place that sets out your requirements. Require that they have appropriate data security measures in place. Restrict these providers from using the personal information you have shared with them for any reason other than the job you have asked them to do and require that they delete the information once that job is done.

Personal information can help drive a focused campaign that helps voters invest and commit to an election or a cause. To ensure your use of personal information doesn't leave those voters disenchanted, tell individuals how you collect, use, and share their data. Protect their information and ensure anyone you share the information with does the same. If you have any questions about privacy and data security best practices, please contact our privacy team for assistance.

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# New Jersey AG Agrees to Permanent Injunction Preventing Enforcement of Donor Disclosure Law

**By Brandis L. Zehr and Hannah J. Miller**

After months of legal battle, New Jersey Attorney General Gurbir Grewal has agreed to a permanent injunction preventing enforcement of Senate Bill 150 against any independent expenditure committees. The settlement was approved by the presiding federal judge on March 11.

**Signed into law in June 2019,** SB 150 sought to impose reporting obligations for 501(C)(4) social-welfare organizations and political organizations that also engage in political advocacy. The law would have required these nonprofit groups spending at least $3,000 to influence legislation, regulations, and elections to disclose the names of their donors of $10,000 and more.

The American Civil Liberties Union, the Illinois Opportunity Project, and Americans for Prosperity, along with other groups, found themselves in mutual opposition to the dubiously-constitutional law.

New Jersey lawmakers are already discussing passing new "dark money" legislation, a possibility that the injunction does not foreclose.

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# Annual New Jersey Pay-to-Play Filing Due March 30

**By D. Mark Renaud and Karen E. Trainer**

Business entities that in 2019 received $50,000 or more in contracts with state or local government agencies in New Jersey must file an annual disclosure statement of political contributions with the New Jersey Election Law Enforcement Commission by March 30, 2020.

This "Business Entity Annual Statement" (Form BE) requires electronic reporting of cash contributions of any amount and non-cash contributions in excess of $300 to a long list of campaign, party, and political committees. Reportable contributions include those made by the business entity, the owners of more than 10% of the business entity; principals, partners, officers, directors, and trustees of the business entity (and their spouses); subsidiaries directly or indirectly controlled by the business entity; and a continuing political committee that is directly or indirectly controlled by the business entity.

Reports are due even if no reportable contributions have been made. For more information, see the New Jersey Election Law Enforcement Commission website. Wiley has extensive experience with this annual report as well as with the labyrinth of other pay-to-play laws in New Jersey and elsewhere around the country.

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# Supreme Court Requests Further Briefing in Associational Privacy Cases

**By Lee E. Goodman**

The U.S. Supreme Court is considering petitions for certiorari in three cases challenging California's compulsory donor disclosure rule. California's attorney general requires all nonprofit organizations to disclose their donor lists as a condition of registering to solicit donations from California citizens. Three nonprofit organizations challenged the compulsory donor disclosure rule as a violation of the First Amendment right of associational privacy. The results were mixed in the federal district courts, but the U.S. Court of Appeals for the Ninth Circuit upheld the rule in all three cases. Each plaintiff nonprofit has petitioned for certiorari. **Election Law News** previously has **discussed** the Ninth Circuit's rulings and has identified issues that could benefit from judicial clarity.

On February 21, the Court conferenced on two of the petitions, *Thomas More Law Center v. Xavier Becerra* and *Americans for Prosperity Foundation v. Xavier Becerra.* In both cases the Court issued formal invitations to the U.S. Solicitor General, Noel Francisco, to file a brief expressing the view of the United States. In the third case, *Institute for Free Speech v. Xavier Becerra*, the Court previously requested the California attorney general to file a brief in response. Thus, all three petitions remain open on the Court's docket. Briefing is likely to carry into late March, so action on the cert petitions is not anticipated until April. The Court's request for additional briefing has encouraged some observers who view the California cases as excellent opportunities for the Court to refine and clarify associational privacy jurisprudence outside the context of campaign finance.

In a related development, on February 7, the Internal Revenue Service (IRS) held a public hearing on its proposed rulemaking to relieve 501(c)(4) and 501(c)(6) organizations from disclosing the names and addresses of donors on Schedule B of their annual tax information returns, or Form 990s. The IRS previously had relaxed donor disclosure for certain tax-exempt organizations, but a federal court in Montana ruled the IRS had followed proper administrative procedures. The IRS is proposing to implement the policy through a formal rulemaking. The IRS's rulemaking would affect California and other states that require tax-exempt organizations to disclose their donors by filing their Schedule Bs with the states.

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# Court of Appeals Uphold's FEC's Action in LLC Contribution Cases, But...

**By Lee E. Goodman**

On March 13, the U.S. Court of Appeals for the District of Columbia Circuit **ruled** that the FEC acted reasonably when it dismissed five cases involving contributions by corporate LLCs. The cases were **dismissed** by a vote of 3 to 3, with the Republican commissioners voting to dismiss on the grounds that contributions by corporate LLCs to Super PACs presented an issue of first impression and it would be unfair to punish citizens where the law is unclear and failed to provide citizens fair notice. Unable to entreat their Democratic colleagues to address the novel issue via rulemaking, the Republican commissioners articulated their legal approach to LLC contributions going forward – that the focus would be on "whether funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." If so, the Republican commissioners reasoned, a citizen's funding of a corporate LLC for the purpose of making a contribution in the name of the LLC would violate the FECA's prohibition against making contributions in the name of another person.

Two reform organizations that had filed complaints initiating the administrative matters, Campaign Legal Center and Democracy 21, sued the FEC asserting that the dismissals were arbitrary and capricious or otherwise contrary to law. As **previously explained** in Election Law News, the U.S. District Court dismissed the lawsuit on the basis that the controlling commissioners exercised "prosecutorial discretion" which is non-reviewable under the Appeals Court's recent precedent of *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC,* 892 F.3d 434 (D.C. Cir. 2018), a decision authored by then-Circuit Judge Kavanaugh. The reform organizations appealed. The Appeals Court ruled that the dismissal was reasonable in light of the novelty of contributions by corporate LLCs and conflicting or confusing precedents. The Appeals Court afforded the agency's controlling statement of reasons a high level of deference in interpreting its own regulations and precedents. The Court further seemed impressed by the absence of clear notice to citizens. Accordingly, the Court upheld the agency's dismissal.

While upholding an agency dismissal under a deferential standard, the Appeals Court's decision does send signals about active judicial review of FEC actions in the future. Significantly, the Appeals Court disregarded Judge Kavanaugh's opinion on the non-reviewability of agency prosecutorial discretion in *CREW v. FEC.* Senior Circuit Judge Edwards issued a concurring opinion expressly disagreeing with *CREW v. FEC.* The panel cited Judge Edwards' concurring opinion and proceeded to review the reasonableness of the agency's exercise of discretion. This creates a split within the Circuit and signals to the district judges they can actively review all exercises of enforcement discretion – at least by the FEC. The Appeals Court also articulated a broad concept of specifically tailored for campaign finance reform advocacy organizations which might invite a broader range of court challenges.

Meanwhile, the Appeals Court conscientiously avoided any endorsement of the FEC's substantive rule on LLC contributions, saying that would be left an open issue for perhaps a future court challenge. Thus, the decision avoided making any substantive law and appears to have been focused on setting procedures for a more robust role for the courts in reviewing FEC enforcement actions.

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# 2020 Lobbying and Gift Law Guide

## 50 States Plus the District of Columbia

Wiley's ***State Lobbying & Gift Law Guide*** provides a comprehensive summary of lobbying, gift, and relevant ethics laws in all 50 states plus the District of Columbia.

Revised in full each year, our Guide provides an invaluable reference for corporate counsel and others in determining whether your organization's contemplated state-level activities are permissible and what registration and reporting requirements might apply, in addition to pertinent gift rules. Unlike many other products on the market, our in-depth Guide includes citations to relevant authority as well as analysis based on advisory opinions and relevant interpretations of law issued on a state-by-state basis.

The Guide is written in a narrative format for legal practitioners and non-practitioners alike. Its focus is on clarity, organization, and comprehension. Among other information, each individual state includes a discussion of the following:

- The definition(s) of legislative and executive branch lobbying and how the administrative agencies have interpreted the definition(s), including exemptions;
- The threshold for registration and reporting as a lobbyist and as a lobbyist employer as well as the details of the process;
- The lobbying laws covering government contracting and procurement;
- The registration, reporting, and disclaimer requirements applicable to grassroots lobbying;
- The general gift rules applicable to legislative and executive branch officials and employees; and
- Special gift and campaign finance rules applicable to lobbyists, lobbyist employers, and vendors (such as gift bans, contribution bans, and the like).

The Guide is available for purchase either as a subscription service by jurisdiction or as a complete set. Both options include access to our web portal with timely updates to state laws throughout the year.

For more information on the ***2020 State Lobbying & Gift Law Guide***, or to pre-order, please contact **Carol A. Laham** at 202.719.7301 or claham@wiley.law.

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