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NEWSLETTER

Supreme Court Passes on Judicial Review of Campaign Finance Reporting Laws

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In what could have been the most consequential campaign finance case to arise since the *2010 Citizens United* decision, the Supreme Court of the United States declined late last month to consider a challenge to the federal "electioneering communication" reporting requirements, which were enacted as part of the 2002 "McCain-Feingold" law. For many organizations burdened by the enormous challenge of complying with campaign finance and lobbying disclosure laws not only at the federal level, but in all 50 states and countless municipalities too, the Court's pass on articulating a clearer standard for judicial review of such laws was disappointing.

So-called "electioneering communication" laws exist in some form at the federal level and in more than half of the states (although they may not always use the term "electioneering communications"). These laws require sponsors of public communications that merely refer to candidates or elected officials, typically within a specified time period before an election, but that do not advocate for the candidates' election or defeat, to file campaign finance reports and/or include special disclaimers on the communications. Many ads that are commonly known as "issue" or "grassroots lobbying" ads may become entangled in these laws (in addition to the lobbying laws in some states).

The Supreme Court upheld the federal electioneering communication law in 2003 against a facial challenge. Nonetheless, the Independence Institute, a 501(c)(3) nonprofit think tank in Colorado, saw an opening in the Court's 2003 decision for an as-applied challenge based on the Institute's particular circumstances. Specifically, the Institute planned to run television ads in 2014 within 60 days before the November election asking Coloradans to urge their home state senators, Sen. Michael Bennett and then-Sen. Mark Udall, to support a criminal justice reform bill that was pending before the U.S. Senate.

Under the McCain-Feingold law, sponsors of electioneering communications are required to file a report with the Federal Election Commission (FEC) within 24 hours of the ads' dissemination any time more than $10,000 is spent on such ads. The reports must disclose not only how much was spent and to whom payments were made, but also the names and addresses of certain donors to the organization sponsoring the ad.

In other recent litigation, then-Congressman and now Sen. Chris Van Hollen of Maryland challenged the FEC's implementation of the electioneering communication law. Specifically, the FEC's regulations generally only require sponsors of electioneering communications to disclose the donors of funds earmarked "for the purpose of furthering electioneering communications." Van Hollen alleged this donor disclosure requirement was impermissibly narrow in not requiring more disclosure. After two groups, one of which was represented by Wiley Rein's Election Law & Government Ethics Practice, intervened to defend the FEC's donor privacy-favorable disclosure rule, the U.S. Court of Appeals for the D.C. Circuit upheld the FEC's rule last year. (*Election Law News*, Nov. 2016)

Nonetheless, the Independence Institute objected to filing these reports altogether. The Institute contended that its communications were genuine issue ads, for which the governmental interest in disclosure of election-related campaign spending did not justify the reporting burdens on the Institute.

Under the Supreme Court's long-standing jurisprudence dating back to the 1958 *NAACP v. Alabama* case (for disclosure requirements generally) and the 1976 *Buckley v. Valeo* case (for campaign finance disclosure requirements), disclosure laws are subject to the "exacting scrutiny" standard of judicial review. As the Court explained in the 2010 *Citizens United* decision, this standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."

However, according to the "jurisdictional statement" the Independence Institute filed with the Supreme Court, many of the lower courts—including the D.C. Circuit in the Institute's case—"routinely uphold[] virtually any disclosure regime" without properly applying this rigorous standard of review. Rather, courts have applied a standard akin to the far more permissive "rational basis" test. Thus, the significance of the Independence Institute's challenge concerned not only the federal electioneering communication law, but also potentially all campaign finance and lobbying disclosure laws across the nation, and even so-called "pay-to-play" laws that impose additional disclosure requirements for political contributions by government contractors and their covered directors, officers, personnel, and other related individuals.

In other words, had the Supreme Court agreed to hear the Independence Institute's challenge and given more teeth to the "exacting scrutiny" test, all of these other disclosure laws could have come under renewed scrutiny, and some may not have withstood the more rigorous standard of judicial review. Instead, the Supreme Court, without issuing any written opinion, summarily affirmed the D.C. Circuit's decision upholding the application of the electioneering communication law to the Independence Institute.

Wiley Rein's Election Law & Government Ethics Practice, which filed an *amicus* brief on behalf of the U.S. Chamber of Commerce in the Independence Institute case, counsels clients on all federal and state campaign finance, lobbying, and pay-to-play disclosure laws, and also represents clients in litigation challenging these laws.