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Court Cases of Interest: Campaign Finance and Election Law

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FEC Failure to Properly Implement the Bipartisan Campaign Reform Act (BCRA)

Shays and Meehan v. FEC (Shays III) (D.C. Cir.)

Case description: In July 2006, Representatives Shays and Meehan challenged regulations promulgated by the Federal Election Commission (FEC) in response to an earlier case litigated by the Congressmen (*Shays I*). On September 12, 2007, the U.S. District Court of the District of Columbia struck down multiple sections of two FEC regulations relating to coordination and the definition of “federal election activity.”

Status: Both the FEC and plaintiff Shays appealed the district court decision to the D.C. Circuit Court of Appeals. The FEC filed its merits brief with the Court of Appeals on January 15, 2008, and plaintiff filed its brief on February 15, 2008. Oral argument has been set for May 5, 2008.

CLC Position/Involvement: The Legal Center represented *amici curiae* Senators Feingold and McCain in the district court proceedings. Most recently, the Legal Center filed an *amicus* brief on behalf of Senator Feingold in the Court of Appeals on February 21, 2008. The *amicus* brief argued that FEC’s regulation relating to “coordinated communications” – which relied on an “express advocacy” standard for communications disseminated outside of specified pre-election time periods – contradicted both BCRA and the Federal Election Campaign Act (FECA), and violated the Administrative Procedures Act.

“Electioneering Communications” Provision

Citizens United v. FEC (D.D.C.)

Case Description: Citizens United filed this action in December 2007 in the U.S. District Court of the District of Columbia, challenging BCRA’s “electioneering communications” disclosure requirements as applied to its film entitled *Hillary: The Movie* and its advertisements promoting the film. Plaintiff argued that although the film and advertisements might meet the definition of “electioneering communications,” they should be exempted from disclosure pursuant to *FEC v. Wisconsin Right to Life (WRTL)*, which found that only communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” could be subject to BCRA’s “electioneering communications” funding prohibition. On January 15, 2008, a three-judge federal court rejected plaintiff’s motion for a preliminary injunction.

Status: Citizens United appealed the decision to the United States Supreme Court. On March 24, 2008, the Supreme Court dismissed Citizens United's appeal for want of jurisdiction. The case has been remanded to the district court for further proceedings. The FEC has moved to dismiss Counts 3 and 4 of the complaint relating to the application of the "electioneering communications" funding prohibition as applied to Citizens United's film and promotional advertisements.

CLC Position/Involvement: The Legal Center supports the FEC's position that neither plaintiff's film nor advertisements warrant an exemption from the disclosure requirements applicable to "electioneering communications" under federal law. The Legal Center has not participated in the litigation to date, but is considering *amicus* participation in support of the defendant.

Center for Freedom v. Ireland (S.D.W.Va.)

Case description: In June 2007, the Center for Freedom, a not-for-profit corporation organized under 501(c)(4), challenged multiple provisions of West Virginia's campaign finance law, requesting a preliminary injunction enjoining enforcement of these provisions. Plaintiff claimed that the state ban on corporate expenditures "for the purpose of influencing a voter or voters" or "in connection to election to any local or state office" was overbroad and vague, as were the reporting and disclosure requirements for "electioneering communications."

Status: The U.S. District Court for the Southern District of West Virginia granted in part plaintiff's motion for a preliminary injunction on April 22, 2008. The court limited the application of the corporate expenditure ban to only express advocacy containing "magic words," and limited the application of the electioneering communications disclosure requirements to broadcast media, not other communications such as mailings, phone banks and emails.

CLC Position/Involvement: The Legal Center has not yet taken any action in this case, but is considering *amicus* participation in support of the defendants.

Federal/State Campaign Contribution and Spending Limits

Committee on JOBS v. Herrera (N.D. Cal.)

Case description: In June 2007, two political committees filed a challenge in the U.S. District Court for the Northern District of California to the constitutionality of San Francisco's municipal limit on contributions to political committees that make only independent expenditures in City elections.

Status: On September 20, 2007, the court granted plaintiffs' motion for a preliminary injunction, finding that plaintiffs had demonstrated a substantial likelihood of success on the merits of their challenge. On October 26, 2007, the court accepted the parties' stipulation to stay the case pending issuance of a decision from the Ninth Circuit in the case *COMPAC v. San Jose*.

CLC Position/Involvement: On August 27, 2007, the Legal Center filed an *amici* brief on behalf of itself and four other political reform organizations supporting the constitutionality of San Francisco's municipal contribution limit and urging the court to deny the plaintiffs' motion for a preliminary injunction.

Davis v. FEC (U.S. Sup. Ct.)

Case description: In June 2006, self-funded candidate Jack Davis filed to suit in the U.S. District Court of the District of Columbia challenging the "Millionaire's Amendment" in BCRA. This provision allows congressional candidates to accept up to six times the \$2,300

federal contribution limit if they face opponents who spend large amounts of personal funds in their campaigns. On August 9, 2007, the three-judge court held that the Millionaire's Amendment did not burden Davis' free speech rights, but rather serves merely to benefit those who choose not to use personal funds or loan such funds to their campaigns.

Status: Plaintiff appealed to the United States Supreme Court and the Court heard oral argument on April 22, 2008.

CLC Position/Involvement: **The Legal Center filed an *amici* brief in the Supreme Court, along with Democracy 21, the Brennan Center and Public Citizen, in support of the FEC.**

North Carolina Right to Life v. Leake (4th Cir.)

Case description: In November 1999, North Carolina Right to Life filed a constitutional challenge to various provisions of North Carolina's campaign finance law, including its \$4,000 limit on contributions as applied to committees making only independent expenditures. The district court in October 2001 struck down multiple provisions of the law and the state appealed to the Fourth Circuit Court of Appeals. In a decision preceding the Supreme Court's 2003 *McConnell* decision, the Fourth Circuit affirmed the lower court decision. The state appealed to the Supreme Court, which vacated the decision and remanded the case for "further consideration in light of *McConnell v. FEC*." Despite this instruction, upon remand, the district court again found the provisions unconstitutional, effectively reiterating its earlier decision.

Status: The state has again appealed the district court decision to the Fourth Circuit. Oral argument was held on December 4, 2007, and the parties are currently awaiting a decision.

CLC Position/Involvement: **The Legal Center filed an *amicus* brief on February 28, 2005 in the district court, arguing that the North Carolina law should be upheld and that the Supreme Court made clear in *McConnell* that contributions to committees making independent expenditures may be regulated.**

San Jose Silicon Valley Chamber of Commerce Political Action Committee (COMPAC) v. City of San Jose (9th Cir.)

Case description: In July 2006, the local chamber of commerce challenged San Jose's limits on contributions to political committees making only independent expenditures in municipal elections. The U.S. District Court of the Northern District of California struck down the limits on September 20, 2006. San Jose appealed the decision to the Ninth Circuit Court of Appeals.

Status: The appeal has been fully briefed, and oral argument has been scheduled for June 12, 2008.

CLC Position/Involvement: **On February 12, 2007, the Legal Center filed an *amicus* brief with the Court of Appeals to defend San Jose's municipal contribution limit. The brief argues that the Supreme Court's *McConnell* decision makes clear that contributions to committees making independent expenditures may be constitutionally regulated, and that restrictions on such contributions serve important governmental interests.**

Section "527" Groups and Political Committee Status

EMILY's List v. FEC (D.D.C.)

Case description: In January 2005, EMILY's List challenged an FEC regulation requiring organizations with both a federal political committees and an affiliated 527 organization to use federal hard money to pay at least 50 percent of its costs related to both

federal and non-federal elections (e.g. administrative expenses). In February 2005, the district court denied EMILY's List's request for a preliminary injunction. EMILY's List appealed and the D.C. Circuit Court of Appeals affirmed the lower court decision.

Status: The case remains pending before the district court.

CLC Position/Involvement: The Legal Center has filed multiple *amici* briefs defending the FEC allocation rule. Most recently, on October 9, 2007, the Legal Center, together with Democracy 21 and BCRA sponsors Senator McCain, Senator Feingold and Representative Shays, filed an *amici* brief responding to the request of Judge Kollar-Kotelly that the parties address the Supreme Court's *WRTL* decision. *Amici* argued that the *WRTL* decision is not relevant to the *EMILY's List* case because *WRTL* considered a ban on corporate and labor union expenditures for "electioneering communications," whereas *EMILY's List* considers contribution limits that apply to federal political committees.

SpeechNow.org v. FEC (D.D.C.)

Case description: In February 2008, the 527 organization SpeechNow.org challenged the constitutionality of federal contribution limits and disclosure requirements as applied to so-called "independent expenditure committees" that seek to influence federal elections. Plaintiffs requested a preliminary injunction, arguing that because SpeechNow.org is independent of candidates and political parties, the state interest in preventing actual and apparent corruption does not justify the regulation of SpeechNow.org as a political committee.

Status: The U.S. District Court of the District of Columbia heard oral argument on plaintiffs' preliminary injunction on April 11, 2008.

CLC Position/Involvement: On March 5, 2008, the Legal Center submitted an *amici* brief with Democracy 21, defending the contribution limits and urging the court to deny SpeechNow.org's motion for preliminary injunction.

Unity08 v. FEC (D.D.C.)

Case description: Unity08, a "nascent political party" seeking to elect a Unity Ticket in 2008, requested a FEC advisory opinion stating that it was exempt from the requirements under federal law that apply to political committees until it nominated its presidential and vice-presidential candidates. The FEC disagreed and issued an advisory opinion confirming that Unity08 was a "political committee" subject to FECA. In January 2007, Unity08 filed suit in the U.S. District Court of the District of Columbia, claiming that this opinion violated the Administrative Procedures Act and the First Amendment.

Status: The parties have fully briefed their cross-motions for summary judgment and are awaiting a decision. On January 22, 2008, plaintiffs filed a motion to expedite consideration, but the court has taken no action.

CLC Position/Involvement: On December 19, 2007, the Legal Center and Democracy 21 filed an *amici* brief arguing that the FEC correctly advised Unity08 that its proposed activities would render it a federal political committee because Unity08 meets the statutory definition of "political committee," and has as its major purpose the "nomination or election of a candidate."

Voters Education Committee v. Washington State Public Disclosure Comm'n (Wash. Sup. Ct.)

Case description: In September 2004, the Washington State Public Disclosure Commission (PDC) filed an enforcement action in Washington state court against a 527 group, Voter Education Committee (VEC), for the organization's failure to register as a state political

committee and comply with state disclosure requirements. VEC filed a counter-suit challenging the state disclosure laws. In August 2005, the state court ruled in favor of the State, and VEC appealed the decision. On September 13, 2007, the Washington State Supreme Court affirmed the lower court decision that a 527 organization could constitutionally be regulated as a “political committee” subject to state campaign finance disclosure laws. The Washington Supreme Court rejected VEC’s claim that the state definition of “political committee” – which was virtually identical to BCRA’s “promote, attack, support, oppose” or “PASO” test – was unconstitutionally vague.

Status: VEC is appealing this decision, and petitioned the United States Supreme Court for *certiorari* on March 10, 2008.

CLC Position/Involvement: The Legal Center filed an *amicus* brief on May 3, 2006 with the Washington State Supreme Court supporting the defendant PDC and defending constitutionality of the state disclosure laws.

“Clean Elections”—Public Financing

Association of American Physicians and Surgeons v. Brewer (D. Ariz.)

Case description: In January 2004, the Association of American Physicians and Surgeons (AAPS) and others filed a constitutional challenge to several aspects of Arizona’s public campaign financing system. The district court dismissed the challenge, and plaintiffs appealed. The Ninth Circuit Court of Appeals originally affirmed the lower court, dismissing the entire case as moot on May 10, 2007. Upon plaintiffs’ petition for rehearing, however, the Court of Appeals, sitting *en banc*, determined that some of the claims were not moot, and remanded the case to the district court to permit further development of these claims.

Status: Upon remand to the district court, plaintiff Dean Martin filed an amended complaint, adding two new plaintiffs to the case, the Taxpayer Action Committee and Freedom Club PAC. The case remains pending in the trial court.

CLC Position/Involvement: The Legal Center filed an *amicus* brief with the Court of Appeals on September 13, 2005 urging the Court of Appeals to affirm the trial court’s decision dismissing the case.

Duke v. Leake (4th Cir.)

Case description: In August 2005, a constitutional challenge was filed against various provisions of North Carolina’s public financing system for judicial elections, including (1) the provision of “rescue funds” to participating candidates if a nonparticipating candidate or an independent spender makes expenditures above certain thresholds, (2) reporting requirements for non-participating candidates and independent spenders for expenditures above these thresholds, and (3) the 21-day pre-election contribution restriction. The district court dismissed the lawsuit.

Status: Plaintiffs appealed to the Fourth Circuit Court of Appeals. Oral argument was held on December 7, 2007.

CLC Position/Involvement: On August 14, 2007, the Legal Center, on behalf of itself and nine public interest organizations, filed an *amici* brief supporting the appellee State and urging the Court of Appeals to affirm the district court decision dismissing the lawsuit. *Amici* argue that North Carolina’s judicial public financing system directly advances the state interest in deterring actual and apparent corruption while encouraging open and robust campaigns.

Green Party of Connecticut v. Garfield & Association of CT Lobbyists v. Garfield (D. Conn.)

Case description: In July 2006, the Connecticut Green Party and others filed a challenge to the constitutionality of Connecticut's recently-enacted campaign finance and public financing law. Plaintiffs' primary claims relate to the public financing program's differential treatment of major and minor parties; the additional distributions of public funds to participating candidates triggered by the expenditures of non-participating candidates and independent spenders; and restrictions on contributions from lobbyists and state contractors. Defendants have moved to dismiss plaintiffs' challenge to the public financing provisions of Connecticut's law; both plaintiffs and defendants have cross-moved for partial summary judgment on the claims relating to the lobbyist and state contractor contribution restrictions. Oral argument was held on June 6, 2007 regarding the motion to dismiss, and on March 4, 2008 regarding the cross-motions for summary judgment.

Status: On March 20, 2008, the district court dismissed in part plaintiffs' challenge to Connecticut's public financing program. The court found that plaintiffs had stated an equal protection claim relating to the differential treatment of major and minor party candidates in the program, but dismissed plaintiffs' First Amendment challenge to the law's "trigger provisions" that provide additional public funds in certain circumstances. No decision has yet been issued on the parties' summary judgment motion which remains pending.

CLC Position/Involvement: **The Legal Center serves as co-counsel for the intervening defendants, Connecticut Citizen Action Group and Common Cause of Connecticut, and several former and future candidates for state office.**

Ognibene v. Schwarz (S.D.N.Y)

Case description: In February 2008, candidates, lobbyists and others filed a challenge to numerous provisions of New York City's campaign finance and lobbying laws in the U.S. District Court of the Southern District of New York. Plaintiffs challenge the constitutionality of the City's public financing system, arguing that it burdens non-participating candidates' speech and associational rights and represents unlawful viewpoint discrimination. Plaintiffs also challenge the City's lower contribution limits for lobbyists and other persons doing business with the City, as well as the municipal ban on contributions from LLP and LLC entities.

Status: The City's responsive pleading is due in mid-May.

CLC Position/Involvement: **The Legal Center has not yet taken any action in this case, but is considering *amicus* participation in support of the City.**

Voting Rights

Bartlett v. Strickland (U.S. Sup. Ct.)

Case description: This case concerns whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act. The Supreme Court of North Carolina held that a minority group must be numerically greater than 50% of the population to be entitled to protection under Section 2.

Status: The state of North Carolina petitioned for *certiorari* in November 2007. The United States Supreme Court granted *certiorari* on March 17, 2008. Oral argument has not yet been scheduled.

CLC Position/Involvement: **The Legal Center has not yet taken any action in this case, but is considering the filing of an *amicus* brief in support of the State.**

Crawford v. Marion County Election Board and Indiana Democratic Party v. Rokita (U.S. Sup. Ct.)

Case description: In September 2005, two different cases were initiated in the U.S. District Court of the Southern District of Indiana challenging as unconstitutional a newly-enacted Indiana statute that required citizens to present government-issued, photo identification in order to vote in person. The district court consolidated the cases and rejected both challenges in April 2006. On January 4, 2007, the Seventh Circuit Court of Appeals also upheld Indiana's statutory photo I.D. requirement. Both sets of plaintiffs appealed, and the United States Supreme Court granted *certiorari* on September 25, 2007. Oral argument was held on January 9, 2007.

Status: On April 28, 2008, in a split 3-3-3 decision, the Supreme Court upheld the Indiana photo I.D. law, finding that petitioners had failed to demonstrate that the law was unconstitutional in all its applications, as is necessary in a facial challenge. The Court left open the possibility of as-applied challenges, however, acknowledging that the law's "burden may not be justified as to a few voters," such as the indigent or religious objectors.

CLC Position/Involvement: On November 13, 2007, The Legal Center and law professor Charles Ogletree filed an *amici* brief on behalf of more than two dozens scholars in support of petitioners. The brief traces the history of disfranchisement efforts in the U.S. since Reconstruction, and draws a comparison between some of the earlier disfranchisement techniques rendered unconstitutional – for example, the poll tax – and the Indiana photo ID law.

Miller v. George (Dist. Ct. Dallas, Tx.)

Case description: In October 2007, Harriet Miller, a former candidate for the Texas State House of Representatives, filed suit in Texas state court, alleging that the defendants, a Republican County Chair, her Republican opponent and the County's Republican Party, "knowingly and intentionally falsely accused [Miller] of being involved in voter fraud activities, and published said false accusations to others." The complaint also alleges that shortly after being falsely accused of voter fraud activities, a mailer was sent to voters in her district advising them that Ms. Miller was caught up in a vote fraud scandal. Almost simultaneously, an anonymous mailer went out to African-American voters warning them that in light of the alleged Miller vote fraud scandal, African American voters would be arrested if they showed up at the polls on Election Day.

Status: The case is pending in Texas state court

CLC Position/Involvement: J. Gerald Hebert, Legal Center Executive Director and Director of Litigation, serves as one of plaintiff Miller's legal counsel.

New York State Board of Elections v. Lopez Torres (U.S. Sup. Ct.)

Case description: Margarita Lopez Torres, a former state judicial candidate, and others challenged New York's statutorily-mandated system of nominating candidates for judicial office by party convention. The district court and the Second Circuit Court of Appeals held that this system violated the constitutional rights of party members and judicial candidates because it was designed to ensure that political party leaders – not the voters – controlled the outcome of judicial nominations.

Status: On January 16, 2008, the United States Supreme Court upheld New York's judicial nominating convention system, holding that the First Amendment does not require the state to establish a party primary system wherein individual party members or insurgent candidates have a "fair chance of prevailing in their parties' candidate-selection process."

CLC Position/Involvement: The Legal Center, along with law professor Dan Ortiz, filed an *amici* brief on behalf of the Legal Center, political scientists Thomas Mann and Norman Ornstein, and the Reform Institute, supporting the respondents Lopez Torres *et al.* and urged the United States Supreme Court to affirm the decision of the Second Circuit.

Willie Ray v. State of Texas (E.D. Tex.)

Case description: In September 2006, plaintiffs challenged several provisions of Texas law that impose criminal penalties on individuals and organizations who aid voters who vote by mail, in violation of the constitutional and statutory rights of voters and political parties. Plaintiffs also allege racially selective law enforcement of Texas election laws by the Texas Attorney General Greg Abbott. The district court granted a limited preliminary injunction which enjoined the State from prosecuting a narrow class of persons who merely possess, consensually, the absentee ballot of another voter. That injunction was stayed by the Fifth Circuit Court of Appeals just before the November 2006 general election. Earlier this year, the Fifth Circuit then vacated the injunction and remanded the case to the trial court for further proceedings. The trial court has set the case down for trial on May 29-30, 2008.

Status: On February 1, 2008, the court, with the consent of the parties, ordered two counts alleging racial discrimination by defendants severed from the case, with those claims to proceed sometime after the November 2008 elections. As noted above, trial on all remaining counts is set for May 29-30.

CLC Position/Involvement: J. Gerald Hebert, Legal Center Executive Director and Director of Litigation, serves as co-counsel to the plaintiffs.

Home Rule Cases

Fenichel v. City of Ocean City (App. Div. N.J.)

Case description: Plaintiffs brought the case in September 2006 to obtain a declaratory judgment confirming that the City of Ocean City has the home rule authority to adopt an ordinance that would provide for public financing in municipal elections. Their lawsuit was prompted by the refusal of the Ocean City Council to consider the proposed public financing ordinance on the advice of the City attorney, who claimed that the proposed ordinance was beyond City's legislative power to enact. The state court ruled against plaintiffs on June 7, 2007, finding that Ocean City was preempted by the state in matters of public financing.

Status: Plaintiffs appealed to Appellate Division of the Superior Court of New Jersey. The parties have fully briefed the appeal, but the Appellate Division has not yet scheduled oral argument.

CLC Position/Involvement: The Legal Center represents plaintiffs-appellants in their appeal.

Nutter v. Dougherty (Pa. Sup. Ct.)

Case description: In April 2006, now-Mayor Michael Nutter filed suit to enforce Philadelphia's newly-enacted contribution limits in connection to several individuals who allegedly were exploring mayoral candidacies but not abiding by those limits. These individuals counter-claimed, arguing that the City's campaign finance law was beyond Philadelphia's home rule authority and preempted by state law, which places no limits on political contributions. The state trial court ruled in favor of the defendants, but the appellate court reversed, holding that the City ordinance was not preempted by state law.

Status: On December 28, 2007, the Supreme Court of Pennsylvania affirmed the appellate court decision, and upheld the City campaign finance law as a permissible exercise of the City's home rule authority.

CLC Position/Involvement: On July 11, 2007, the Legal Center filed an *amicus* brief with the Supreme Court of Pennsylvania to defend Philadelphia's campaign finance ordinance. The brief argued that state courts across the country have recognized that the regulation of campaign finance is of central importance to local governments, and poses no threat or cost to the state or any neighboring localities.

Other Federal & State Cases

***California Pro-Life Council v. Randolph* (9th Cir.)**

Case description: In August 2000, California Pro-Life Council (CPLC) filed a constitutional challenge to California's reporting and disclosure requirements applicable to groups advocating for or against state ballot measures. The district court dismissed the CPLC's claims and upheld the challenged state law provisions, and CPLC appealed the decision.

Status: On November 14, 2007, the Ninth Circuit Court of Appeals reversed the lower court in part, holding that "mixed purpose" organizations that only occasionally support or oppose ballot measures do not have to register as political committees and comply with statutory record-keeping and reporting requirements. However, the court found that such organizations could be required to report contributions exceeding \$1,000 which were used for ballot measure advocacy.

CLC Position/Involvement: The Legal Center filed an *amicus* brief with the Court of Appeals on September 16, 2005 arguing that the challenged state laws are constitutional.

***National Association of Manufacturers v. Taylor* (D.D.C.)**

Case description: On February 6, 2008, the National Association of Manufacturers (NAM) filed suit in the U.S. District Court for the District of Columbia to challenge a provision of the recently-enacted Honest Leadership and Open Government Act (HLOGA). The challenged provision requires a lobbying coalition, like NAM, to disclose its member organizations that fund and actively participate in the coalition's lobbying efforts. The Court has converted NAM's motion for a preliminary injunction into a decision on the merits.

Status: On April 11, 2008, the district court dismissed the case on the merits. Applying strict scrutiny, the court found that the challenged provision served compelling governmental interests, and was not unconstitutionally overbroad or vague. NAM has appealed the decision, and has asked the Court of Appeals to expedite the appeal. It was unsuccessful in obtaining an injunction pending appeal in three federal courts (including the United States Supreme Court). No briefing schedule has been announced on the appeal as of this date.

CLC Position/Involvement: On February 29, 2008, the Legal Center, along with Democracy 21 and Public Citizen, filed an *amici* brief urging the trial court to reject NAM's challenge to the provision, arguing that Supreme Court precedent makes clear that HLOGA serves the governmental interest in providing full disclosure of lobbying activity and in protecting the integrity of the legislative process.