

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OHIO RIGHT TO LIFE SOCIETY, INC.,) Plaintiff,) -vs-) OHIO ELECTIONS COMMISSION, et al.,) Defendants.))))))))	CASE NO. 2:08-cv-00492-GCS-NMK JUDGE GEORGE C. SMITH Magistrate Judge Elizabeth Preston Deavers
---	---------------------------------	--

**PLAINTIFF'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Ohio Right to Life Society, Inc. ("ORTL") hereby moves for issuance of a temporary restraining order and preliminary injunction enjoining Defendants Ohio Elections Commission, (the "OEC"), the individual Members of the ORC ("OEC Members"), and Ohio Secretary of State, Jennifer Brunner ("Secretary of State") from enforcing R.C. § 3517.01(B)(6), R.C. § 3517.1011 and R.C. § 3599.03 pending further Order of this Court.

Respectfully submitted,

Of Counsel:

Stephen M. Hoersting, Esq. (0066915)
Center for Competitive Politics
124 West South Street
Alexandria, Virginia 22314
Telephone: (703) 894-6800
Facsimile: (703) 894-6811
Email: shoersting@campaignfreedom.org

/s/ William M. Todd
William M. Todd, *Trial Attorney* (0023061)
Benesch, Friedlander, Coplan
& Aronoff LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215-6197
Telephone: (614) 223-9348
Facsimile: (614) 223-9330
Email: wtodd@beneschlaw.com

*Counsel for Plaintiff
Ohio Right to Life Society, Inc.*

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STANDARD OF REVIEW

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, a court can grant a temporary restraining order in order to prevent immediate and irreparable injury, loss, or damage to a plaintiff. The order may be issued without prior notice to the adverse party or his attorney. Rule 65(a) further authorizes the granting of a preliminary injunction after notice to other parties in the action.

In determining whether a temporary restraining order or preliminary injunction should be issued, this Court must consider the following factors: (i) the likelihood of movant's success on the merits; (ii) whether the requested injunctive relief will save movant from irreparable harm; (iii) whether the injunction will harm others; and, (iv) whether the public interest would be served by the requested injunctive relief. See Six Clinics Holding Corp. II v. Cafcomp Sys., Inc., 119 F.3d 393, 403 (6th Cir. 1997); In Re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985); De Boer Structures (U.S.A.), Inc. v. Shaffer Tent and Awning Co., 187 F.Supp.2d 910, 919 (S.D. Ohio 2001). Significantly, the four factors are "not prerequisites which must be met." In Re DeLorean, 755 F.2d at 1229.

Thus, these four factors "do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." Frisch's Restaurant, Inc. v. Shoney, Inc., 759 F.2d 1261, 1263 (6th Cir. 1985). Rather, "[t]hese factors are meant to be balanced as they guide the Court in exercising its discretion" In Re Eagle-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1995). Significantly, the Sixth Circuit has stated: "[w]hile the Court need not consider any single factor as either indispensable or dispositive, neither is it required to conclude that all four support its decision. The Court's discretion is directed at the weight to be given each factor, and the effect to be accorded their mix." In Re Eagle-Picher, 963 F.2d at 859.

A. This Court should find that ORTL Is Likely To Be Successful On The Merits

As is set out more fully in subsequent sections of this Memorandum, ORTL's claims that the Ohio statutes restricting ORTL's ability to utilize treasury funds in connection with candidate elections are unconstitutional, are likely to be successful on the merits. In the recent case of *Citizens United v. FEC*, 558 U.S. _____ (2010), the U.S. Supreme Court held that the First Amendment bars the creation of a statutory scheme that prohibits corporations and labor unions from using treasury funds to disseminate independent communications in connection with candidate elections.

In this case, ORTL's Amended Verified Complaint sets forth Ohio's statutory scheme that prohibits these categories of entities from exercising their constitutionally protected, independent political speech. ORTL respectfully suggests that its claims in this case are completely consistent with the holding in *Citizens United*, and are, accordingly, likely to be successful on the merits.

B. This Court Should Presume Irreparable Harm in This First Amendment Case

This case involves claims by ORTL that the regulatory scheme adopted by Ohio in Am. Sub. H.B. 1, which was adopted in a special session of the 125th General Assembly, violates its rights to freedom of speech. In addition, ORTL claims that R.C. § 3599.03, that contains an extraordinarily broad ban on the use of corporate treasury funds for political activities, similarly violates its right to freedom of speech. There is no doubt that abridgement of First Amendment rights, even for minimal time periods, constitutes the type of irreparable injury for which interlocutory relief is indicated. *Elrod v. Burns*, 427 U.S. 347 (1976); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998); *cert. denied*, 525 U.S. 1114 (1999); *Newson v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

In this case, ORTL respectfully submits that the infringement upon First Amendment rights is current, ongoing and its harmful effects can only be avoided through this Court's order restraining and enjoining Defendants from enforcing these unconstitutional Ohio statutes.

C. This Court Should Issue A Temporary Restraining Order And/Or Preliminary Injunction Because No Other Parties Will Be Injured By Granting Interlocutory Relief.

No other party will be harmed if this Court grants interlocutory relief by way of a restraining order and/or preliminary injunction. Frankly, it is hard to imagine that the Defendants can fashion a claim that the continuation of a regulatory scheme that impairs First Amendment rights can be justified under any circumstances. See Suster v. Marshall, 149 F.3d 523 (6th Cir. 1998), cert denied 525 U.S. 1114 (1999).

D. This Court Should Issue A Temporary Restraining Order And/Or A Preliminary Injunction Because The Public Interest Will Be Served By Granting Injunctive Relief.

The final factor that should be considered by this Court in determining whether interlocutory relief should be granted, is whether such relief would be in the public interest. The U.S. Supreme Court has held that "...there is no public interest in enforcing a law that 'curtail(s) debate and discussion' regarding issues of political import." Citizens v. Rent Control/Coalition for Fair Housing v. Berkley, 454 U.S. 290, 299 (1981).

Similarly, the Sixth Circuit has held that an injunction enjoining Ohio campaign finance regulations that violated First Amendment rights was in the public interest, and certainly it was not against the public interest to enjoin the enforcement of an unconstitutional law. Suster v. Marshall, 149 F.3d 523 (6th Cir. 1998), cert. denied, 525 U.S. 1114 (1999).

Clearly, the request by the ORTL for preliminary injunction relief meets all of the factors identified by the Sixth Circuit as important considerations in determining whether such equitable

relief is appropriate. Thus, ORTL respectfully suggests that this Court should order the requested injunctive relief.

II. FACTS AND PROCEDURAL HISTORY

ORTL originally filed this case in early 2008, seeking preliminary and permanent relief from Ohio's unconstitutional statutory limitations on the independent political speech of ORTL, an Ohio non-profit corporation, and its members.

The defendants in this case are the Ohio Elections Commission ("OEC"), the individual members of the OEC, and Jennifer Brunner, the Ohio Secretary of State. These individuals were, and remain, individually responsible for enforcing various aspects of Ohio's campaign finance laws. Significantly, the State of Ohio is not a defendant in this lawsuit.

The ORTL action consists of essentially two claims. First, ORTL has claimed that the Ohio campaign finance statutes in question effectively prohibit ORTL from running any independent broadcast ad, that mentions a candidate for election, during certain defined "blackout" periods set forth in R.C. §3517.01(B)(6), (and further explained in R.C. §3517.1011). In addition, ORTL claims that Ohio's campaign finance laws have generally prohibited ORTL from engaging in any advocacy either for or against a candidate for public office using "treasury" funds, solely because of its legal status as a corporation. R.C. §3599.03. Thus, ORTL claims that its First Amendment protected right to freedom of speech has been unconstitutionally limited by these statutes.

ORTL also claims that Ohio's campaign finance laws impose an egregious and unconstitutional burden of disclosure and regulation upon any labor organization or corporation that seeks to air broadcast ads, that even mention the names of politicians running for office in Ohio. *E.g.*, R.C. §3517.1011. Although, ORTL is not in any way waiving its pursuit of its constitutional claims related to the disclosure and disclaimer provisions in R.C. §3517.1011, of more immediate concern is the absolute bar of its right to speak regarding candidate elections, as

set forth above. Thus, in this Memorandum, ORTL will only address the disclosure and disclaimer claims in the context of a statutory construction argument, and not its constitutional claims. In the event this Court does not find ORTL's statutory construction claims to be persuasive and determinative, ORTL's additional claims can be severed and addressed at a later point in time.

On the 5th day of September, 2008, this Court partially granted the preliminary injunctive relief originally sought by ORTL to prevent Defendants from using the provisions of Ohio's unconstitutional regulatory scheme against ORTL in the 2008 election cycle. However, this Court limited the preliminary injunctive relief granted to an, "as applied," determination, that the Defendants could not enforce the provisions of R.C. Title 35 to punish ORTL for running a proposed independent broadcast ad during the "blackout" period set forth in R.C. §3517.1011, before the November, 2008 general election.

At the time this Court granted the preliminary relief in this case, the controlling law governing this type of independent political speech, by corporations and labor organizations, was set forth in *Wisconsin Right to Life v. FEC* ("WRTL"), 551 U.S. 449 (2007). In the Opinion granting preliminary relief, this Court observed appropriate due deference to the Supreme Court's analysis in *WRTL*, and only granted "as applied" relief, similar in nature and effect to the relief that was granted from the applicability of 2 U.S.C. §441b in *WRTL*.

Essentially, under the *WRTL* analysis, a Court was required to examine, on a case-by-case basis, whether a proposed broadcast ad would constitute the "functional equivalent of express advocacy," and thereby be potentially regulated under 2 U.S.C. §441b's "electioneering" provisions. In *WRTL*, the Supreme Court did not address the threshold issue of whether the overall purpose of 2 U.S.C. §441b, to suppress independent political speech by labor unions or corporations using their treasury funds, met constitutional muster.

In this case, the Court closely followed the *WRTL* analysis, and denied relief to ORTL on its claims that the political speech suppression provisions in R.C. Title 35 were facially unconstitutional under the First Amendment.

However, even though this Court did not grant preliminary injunctive relief as to ORTL's claims related to the facial invalidity of these statutes, those claims are now of paramount importance in this case. Indeed, in light of recent legal developments in this area, it is respectfully submitted that this Court should proceed to consider granting injunctive and declaratory relief on all of ORTL's facial invalidity claims.

III. THE RECENT DECISION IN CITIZENS UNITED PROVIDES THE FIRST AMENDMENT LAW APPLICABLE TO THIS CASE

Like ORTL, Citizens United is a non-profit corporation that is tax-exempt under §501(c)(4) of the Internal Revenue Code. In January 2008, Citizens United released a documentary film about then Sen. Hillary Clinton. The film was an unflattering portrayal of her, and it was intended to circulate during the 2008 primary elections, while she was a candidate for the Presidency.

On this set of facts, Citizens United was concerned that the circulation of this documentary film would violate 2 U.S.C. §441b, as amended in BCRA. Specifically, Citizens United was concerned about potential prosecution, because the circulation of the documentary film if treated as an "electioneering" communication under the BCRA amendments, could be punished criminally.

Accordingly, Citizen United filed an action for declaratory and injunctive relief seeking an order barring the FEC from enforcing the provisions of 2 U.S.C. §441b against the organization and the dissemination of the documentary film. The three judge trial court denied the requested relief. Thereafter, Citizens United appealed the decision to the U.S. Supreme Court, which initially accepted jurisdiction on November 14, 2008.

On January 21, 2010 the Supreme Court released the landmark decision in *Citizens United v. FEC*, 558 U.S. _____ (2010), determining *inter alia*, that the provisions in 2 U.S.C. §441b that restricted the ability of corporations and labor unions from using treasury funds to engage in either “electioneering” communications, or express advocacy in connection with the election of a federal candidate are facially unconstitutional. In addition, the Supreme Court held that no narrowing construction of this statute could save these provisions, because these provisions would still “chill” political speech, the type of speech that is central to the First Amendment’s meaning and purpose.

A. *The Citizens United Decision Expressly Overruled The Long Standing Precedent Of The Austin Case Permitting Restrictions Upon Corporate And Labor Organization Political Speech*

In the *Citizens United* opinion, the Supreme Court specifically addressed its earlier decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that had determined that independent corporate political speech could be banned in connection with a candidate election, based upon the speaker’s corporate identity. In *Citizens United*, the Supreme Court expressly overruled the earlier holding in *Austin*.

In the initial portions of its opinion, the Supreme Court addressed, and disposed of, a variety of “narrowing” approaches to the provisions of 2 U.S.C. §441b. Ultimately, the Court concluded that it could not resolve the case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. *E.g. Morse v. Frederick*, 551 U.S. 393, 403 (2007) (Opinion, Kennedy J. at 12).

The Supreme Court also noted, in response to the Government’s arguments that the case had been improperly pled and that Citizens United had waived a facial invalidity claim, that even if such a waiver had occurred, it would not prevent a reconsideration of *Austin*. Significantly, the Supreme Court stated that:

. . . throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech.. All concede that this Claim is properly before us. (Opinion, Kennedy J. at 13-14).

Before addressing the “electioneering” concepts that were added to 2 U.S.C. 441b by BCRA, the Court noted that prior federal law prohibited corporations and labor unions from making direct contributions to candidates, or independent expenditures that expressly advocated the election or defeat of a candidate, through any form of media, in connection with federal elections.

The Supreme Court noted these provisions constituted an outright ban on political speech by corporations and labor unions, backed by criminal sanctions. (Opinion, Kennedy J. at 20). After giving short shrift to the argument that political action committees (“PACs”) are an equivalent substitute for corporate and labor union speech, the Court held that:

Section 441b’s prohibition on corporate independent expenditures is thus a ban on speech Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. (Opinion, Kennedy J. at 22).

The Supreme Court continued:

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to “strict scrutiny,” which requires the Government to prove the “restriction” furthers a compelling interest and is narrowly tailored to achieve that interest.” *WRTL*, 551 U.S. at 464 (opinion of Roberts, C.J.)

(Opinion, Kennedy J. at 23).

The Court next turned to the specific question of whether any ban on the use of corporate or union treasury funds for political speech was constitutional. The Court first reaffirmed that a narrowly tailored ban on direct contributions to candidates, of corporate or labor union treasury funds, could be justified on the basis of a concern of *quid pro quo* corruption. *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

Thereafter, the Supreme Court turned to the issue of whether independent expenditures of corporate or union treasury funds could be banned by the Government. In *Austin*, the Court had held that a prohibition in Michigan law on independent expenditures for a candidate, by a corporation or a labor union, was constitutionally permissible, on the basis of an “antidistortion interest.”

In *Citizens United*, the Supreme Court flatly rejected the validity of the “antidistortion interest,” rationale which it stated had been erroneously relied upon in *Austin*, and indicated:

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.

* * *

Political speech is “indispensible to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.

(Opinion, Kennedy J. at 33).

B. In Citizens United The Supreme Court Determined That Corporations And Labor Unions Could Engage In Independent Political Speech, Even If Characterized as "Electioneering".

Having disposed of the various arguments made by the Government to support the 2 U.S.C. §441b restrictions upon independent, express advocacy by corporations and labor unions, the Court had little trouble in disposing of the various arguments made by the Government to support the constitutionality of the “electioneering” restrictions added to 2 U.S.C. §441b by BCRA. The Court recognized that Congress perceived that there may be potential problems with independent expenditures, as reflected in the extensive factual record made to support BCRA.

However, the Court expressly rejected this record as an insufficient basis to restrict political speech. Accordingly, the Court stated:

We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted into law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.

(Opinion, Kennedy J. at 45)

It is clear from the foregoing discussion of the *Citizens United* case, that the law on independent, corporate political speech has changed considerably since the initial filing of this case. Prior to *Citizens United*, it was possible for the Defendants to argue that a ban on independent, corporate and labor union expenditures could be sustained, (at least as to “express advocacy”) if the ban met the two part test of fulfilling a “compelling state interest” and, it was “narrowly tailored.” After *Citizens United*, that argument is no longer valid, and simply cannot be made in good faith.

By overruling the decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court has left no doubt that the First Amendment prohibits government, at the state or federal level, from banning independent political speech by corporations or labor organizations, even if the speech is paid for from treasury funds. Thus, the fundamental basis for Ohio’s scheme in R.C. Title 35 regulating political speech by corporations and labor organizations has been removed. Accordingly, this Court should determine that the statutory provisions of R.C. Title 35 of the Revised Code that establish these prohibitions are facially unconstitutional.

Accordingly, ORTL respectfully suggests to the Court, following the *Citizens United* decision that its First Amendment claims are far more compelling, and the defendants’ defenses in this case are completely invalid.

As in *Citizens United*, this case was brought seeking protection from an unconstitutional government scheme designed to drastically limit independent corporate and labor union speech

during the calendar year 2008 election cycle. Moreover, as in *Citizens United*, although preliminary relief was considered in 2008, no final decision on the merits of the *Citizens United* or ORTL's First Amendment claims was made prior to the conclusion of the 2008 elections.

Indeed, ORTL has continually pressed its First Amendment claims in this litigation, because defendants remain poised to deny ORTL those rights in reliance upon an invalid and unconstitutional statutory scheme in R.C. Title 35. Certainly, these claims remain before this Court, because of potential application of Ohio's statutes this fall, and into the future. (Opinion, Kennedy J. at 13).

Plainly, the fact this Court did not find Ohio's scheme facially invalid at an earlier point in this litigation, does not mean that ORTL's claims regarding the facial invalidity of Ohio's scheme do not retain their vitality. (Opinion, Kennedy J. at 13). As Justice Kennedy specifically notes in the Court's opinion in *Citizens United*, the distinction between "as applied" and "facial" challenges to the constitutionality of a statute does not affect what must be plead in a complaint, but rather relates to the scope of the required remedy.

For these reasons, ORTL respectfully states that it has preserved its First Amendment challenge to Ohio's unconstitutional scheme in R.C. Title 35, purporting to ban all independent corporate and labor express advocacy, as well as, "electioneering" communications. Thus, ORTL urges this Court to proceed immediately to consider the merits of ORTL's First Amendment claims, including the claims of facial invalidity of the applicable statutes, as set forth in the Amended Verified Complaint.

IV. OHIO'S STATUTORY SCHEME BANNING POLITICAL SPEECH BY CORPORATIONS AND LABOR ORGANIZATIONS VIOLATES THE FIRST AMENDMENT.

As set forth in the Amended Verified Complaint, there are two fundamental aspects of Ohio's scheme to prohibit protected political speech that are particularly egregious. The first clearly unconstitutional component of Ohio's scheme is the "blackout" period set forth in R.C.

§ 3517.01(B)(6) and § 3517.011. These provisions prohibit corporations, such as ORTL, from airing any broadcast ad, (meeting the statutory definition of "electioneering.") during the 30 day time period before an Ohio election.

On its face, Ohio's 30 day blackout period provision is unconstitutional under the standards established in *Citizens United v. FEC*, 558 U.S. _____ (2010). Thus, this Court should prohibit Defendants from enforcing this statute under any circumstances.

The second plainly unconstitutional aspect of Ohio's laws prohibiting independent political speech by corporations and labor organizations is set forth in R.C. § 3599.03. That statute provides an extremely broad prohibition on the use of the "treasury" funds of these categories of organizations to utter independent, political pronouncements, under any circumstances.

In fact, the broad-reaching provisions in R.C. § 3599.03 make it a criminal offense for a corporation (profit or non-profit) or labor organization to use its funds in connection with virtually any aspect of a candidate election R.C. § 3599.03(A)(2); R.C. § 3599.39-.40.

A. *The Blackout Period in R.C. § 3517.01(B)(6) and R.C. § 3517.1011 Is Facially Unconstitutional.*

On its face, the language of O.R.C. § 3517.01(B)(6) provides that any disbursement for a "broadcast" ad that "... refers to a clearly identified candidate shall be considered to be made for the purpose of influencing the results of that election ..."

The phrase "clearly identified candidate," as defined in O.R.C. § 3517.1011(A)(13) means essentially any mention of an individual, or of an individual's political office, once the individual is a declared candidate under O.R.C. § 3501.01. The phrase "influencing the results of that election" is a deliberate sleight of hand that purports to convert any broadcast ad that merely refers to a candidate into "express" political advocacy.

In addition, O.R.C. § 3517.1011(H) states that:

No person shall make, during the thirty days preceding a primary election or during the thirty days preceding a general election, any broadcast, cable or satellite communication that refers to a clearly identified candidate using any contributions received from a corporation or labor organization.

In other words, the Ohio scheme absolutely precludes anyone from running a broadcast ad during 30 days prior to an election, if: (i) the broadcast ad is paid for with treasury funds that are corporate (including for profit or non-profit corporations) or from a labor organization; and, (ii) the broadcast ad simply "refers to" a candidate, even if nothing is said about the impending election in the broadcast ad.

Although the time periods are somewhat different than the time period in 2 U.S.C. § 441b, that was addressed in the *Citizens United* litigation, the Ohio statutes are otherwise "mirror images" of the unconstitutional limitations upon political speech that were found in federal law. Ohio's statutory scheme closely follows the now discredited federal scheme both in form, and in substance, and should be determined to be unconstitutional by this Court.

Here, Defendants can offer no factual record in support of the provisions of H.B. 1 that became O.R.C. § 3517.01(B)(6) and O.R.C. § 3517.1011. Similarly, Defendants can offer no factual record substantiating the need for R.C. § 3599.03 at all. Accordingly, they cannot satisfy the government's burden in this "strict scrutiny" case.

Thus, these provisions of Ohio law are unconstitutional, on their face, because the Defendants cannot summon a scintilla of evidence to meet their burden that there was a "compelling governmental interest" supporting the need for this legislation. Similarly, there is no evidence in existence that these statutes presented the "least restrictive alternative" to address these perceived issues.

B. The Broad Prohibitions On The Use of Corporate and Labor Organization Funds in R.C. § Section 3599.03 Are Unconstitutional, Insofar As They Restrict Independent Expenditures.

R.C. § 3599.03 sets forth an extremely broad prohibition on the use of corporation or labor organization treasury funds in connection with political activities. The provisions of R.C. § 3599.03(A)(1) prohibit the use of corporate or labor organization funds for the aid of, or in opposition to: a political party; a candidate for political office; a political action committee; a legislative campaign fund; any organization that supports or opposes candidates; or for any other partisan political purpose. Importantly these restrictions contain no exceptions for independent political speech by corporations and labor organizations.

The provisions of R.C. § 3599.03 appear to be modeled upon the similar broad statutory prohibition upon the use of corporate and labor organization treasury funds set forth in 2 U.S.C. § 441b. As described in the preceding sections of this Memorandum, the parallel federal provisions in 2 U.S.C. § 4441b were recently held to be in violation of the First Amendment in the *Citizens United* case, insofar as they restricted independent expenditures in connection with candidate elections, and other similar activities.

There appears to be no distinguishing feature of R.C. § 3599.03 that should save this statute from a similar fate.

C. By The Express Terms Of H.B. 1, Of The 125th General Assembly All Provisions In That Legislation Relating To “Electioneering” Must Be Deemed To Be Invalid.

As set forth above, ORTL respectfully submits that the provisions of Title 35 of the Revised Code that relate to “electioneering” are unconstitutional on their face, because of their unconstitutional restrictions upon the political rights of corporations and labor organizations. Specifically, the provisions of R.C. § 3517.01(B)(6) and § 3517.1011, that create “blackout” periods for “electioneering” communications in connection with Ohio candidate elections are plainly violations of the First Amendment.

Moreover, as described at length by the Supreme Court in *Citizens United v. FEC*, 558 U.S. _____ (2010), it is not possible to “save” this type of restriction upon political speech because, even a “narrowed” interpretation would chill protected political speech.

In short, the “blackout” periods created in H.B. 1 of the 125th Ohio General Assembly cannot be salvaged. A collateral effect of a declaration that these statutes violate the First Amendment, is caused by the language of Section 7 of H.B. 1.

Section 7 provides, in its entirety:

Section 7. Notwithstanding any contrary provision of section 1.50 of the Revised Code:

(A) If a court of competent jurisdiction holds the application to any person or circumstance of any provision of division (B)(6) of section 3517.01 of the Revised Code, as amended by this act, or of division (H) of section 3517.1011 of the Revised Code, as enacted by this act, pertaining to a broadcast, cable, or satellite communication that refers to a clearly identified candidate and that is made during the thirty days preceding a primary election or during the thirty days preceding a general election to be unconstitutional, then all provisions of this act pertaining to that subject matter are hereby deemed to be invalid and are severable from the remaining provisions of this act. As used in this division, “broadcast, cable, or satellite communication” and “refers to a clearly identified candidate” have the same meanings as in section 3517.1011 of the Revised Code.

(B) If a court of competent jurisdiction holds the application to any person or circumstance of any provision of section 3517.1011 of the Revised Code pertaining to electioneering communications that occur at least 30 days prior to a primary election or to a general election to be unconstitutional, then all of the provisions of that section and all related references to that section or to electioneering communications throughout the Revised Code are hereby declared to be invalid and severable from the remaining provisions of this act. As used in this division, “electioneering communication” has the same meaning as in section 3517.1011 of the Revised Code.

According to the express language of Section 7, set forth above, in the event any provisions in H.B. 1 relating to “electioneering” are struck down, all provisions of H.B. 1 that pertain to “electioneering” are “deemed to be invalid,” and are severable from the remaining provisions of H.B. 1 addressing other campaign finance issues. Of particular interest in this case

are the provisions in R.C. § 3517.1011 that create a “disclosure and disclaimer” scheme for broadcast ads, that are characterized by Ohio as “electioneering” advertisements.

The statutory provisions for Ohio’s disclosure and disclaimer scheme relating to “electioneering” communications, is set forth in R.C. § 3517.1011(A)-(F).

In light of the foregoing language of Section 7 of H.B. 1, this Court should find that all of these provisions are invalid because of the express language of this legislation. In reaching this conclusion, this Court need not reach ORTL’s substantive claims regarding the unconstitutional nature of these provisions. Indeed, in determining that all of the other provisions of R.C. § 33517.1011 are “invalid,” this Court would simply be reflecting the express intent of the Ohio General Assembly.

V. CONCLUSION

As the foregoing sections of this Memorandum have amply demonstrated, any law prohibiting independent political speech by corporations and labor organizations constitutes a restriction on their First Amendment protected freedom of speech. Moreover, because any such statute must be subjected to “strict scrutiny” the State of Ohio clearly has the burden of demonstrating that R.C. § 33517.01 (B)(6) and § 3517.1011 were enacted to address a “compelling state interest and these provisions were the “least restrictive” means of accomplishing that regulatory objective.

In this situation, ORTL respectfully submits that the State of Ohio cannot demonstrate the elements necessary to survive a “strict scrutiny” of these statutes. Accordingly, the Court should determine that R.C. § 3517.01 (B)(6) and R.C. § 3517.1011 are facially unconstitutional, and restrain and enjoin Defendants from enforcing these statutes.

In addition, ORTL respectfully submits that the provisions of R.C. § 3599.03, to the extent that they broadly ban corporations and legal organizations from making any independent

expenditures of treasury funds, in connection with a candidate election, are also unconstitutional. Accordingly, Defendants should be enjoined from enforcing R.C. § 3599.03.

Plaintiff Ohio Right to Life Society, Inc. respectfully requests that the Court grant this Motion and issue an appropriate Temporary Restraining Order and Preliminary Injunction to prevent irreparable injury to ORTL, and its members.

Respectfully submitted,

/s/ William M. Todd

William M. Todd, Trial Attorney

(0023061)

Benesch Friedlander Coplan & Aronoff LLP

2600 Huntington Center

41 South High Street

Columbus, Ohio 43215-6197

Tel: (614) 223-9348

Fax: (614) 223-3300

Email: wtodd@bfca.com

Counsel for Plaintiff

Ohio Right to Life Society, Inc.

Of Counsel:

Stephen M. Hoersting, Esq. (0066915)

Center for Competitive Politics

124 West South Street

Alexandria, Virginia 22314

Tel: (202) 747-4952

Fax: (703) 682-9321

Email: shoersting@campaignfreedom.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction was filed electronically and served upon the following, by regular U.S. mail, postage prepaid, on this 26th day of August, 2010:

Pearl M. Chin, Trial Counsel (0078810)
Assistant Attorney General
Ohio Attorney General's Office
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-2872
(614) 728-7592 (facsimile)
***Counsel for Ohio Elections Commission and
its Members***

Richard N. Coglianese (0066830)
Damian W. Sikora (0075224)
Assistant Attorneys General
Ohio Attorney General's Office
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
(614) 466-2872
(614) 728-7592 (fax)
rcoglianese@ag.state.oh.us
dsikora@ag.state.oh.us
***Counsel for Defendant
Secretary of State Jennifer Brunner***