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

OHIO RIGHT TO LIFE SOCIETY, INC.	:	
	:	
Plaintiff,	:	
	:	**Case No. 2:08 CV 492**
v.	:	
	:	**Judge Smith**
OHIO ELECTIONS COMMISSION, et al.	:	
	:	**Magistrate Judge King**
Defendants.	:	

PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF INTERLOCUTORY RELIEF

In their Memorandum Contra Plaintiff Ohio Right to Life Society, Inc.'s (hereinafter "ORTL") Motion neither the Defendant nor *Amici Curiae* have raised arguments that preclude ORTL from securing the interlocutory relief sought in this case. Indeed, the weakness of their arguments reinforces that the relief sought by ORTL is constitutionally required and seriously overdue. Here, through the enactment of certain provisions of Am. Sub. H.B. 1 ("H.B. 1") the State of Ohio grossly overreached in its effort to control and restrict core political speech in Ohio. Plainly this conduct occurred with little or no analysis, and in total disregard of the First Amendment of the United States Constitution.

In this Reply Memorandum ORTL will simply address some of the glaring deficiencies of the opposing arguments.

I. STANDARD OF REVIEW

Not surprisingly, the Defendant and *Amici* gave short shrift to the standard of review that should be utilized by this Court in reviewing the specific campaign finance laws enacted in H.B. 1 that are under consideration in this case. However, it is crystal clear that the standard of review for the types of restrictions on core political speech that are contained in O.R.C. § 3517.01(B)(6) and

O.R.C. § 3517.1011 is "strict scrutiny."

As noted by Chief Justice Roberts in FEC v. Wisconsin Right to Life, 551 U.S. _____, 127 S. Ct. 2652 (2007) ("WRTL"), whenever confronted with a challenge to a statute regulating First Amendment political speech, that statute is subject to "strict scrutiny." Under a strict scrutiny analysis the government is required to prove that the statute serves a compelling state interest and is narrowly tailored to achieve that interest. 127 S. Ct. at 2664.

Of course, in articulating that conclusion, Chief Justice Roberts was simply restating a long, unbroken line of relevant cases that include Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), that delineate the standard of review for statutes of this type.

Here, the Defendants offer no proof that any of the provisions of H.B. 1 serve a compelling state interest or that they were narrowly tailored to achieve the stated objective(s). The Defendants offer no such proof – because there is no evidence available to make such an offer of proof.

In fact, H.B. 1 was introduced to the Ohio House of Representatives on December 13, 2004. Four days later, with no evidentiary hearings, all work on H.B. 1 was completed by the General Assembly, and it was sent to Governor Bob Taft on December 17, 2004. In other words, the extraordinary restrictions on First Amendment rights that are set forth in O.R.C. § 3517.01(B)(6) and O.R.C. § 3517.1011 were imposed upon Ohioans, such as ORTL and its members, with essentially no public input, and little or no analysis. Indeed, it begs credulity to imagine that, in four days, the Ohio General Assembly gave serious consideration as to whether a compelling state interest existed, or whether the chosen statutes were the least restrictive alternatives.

Accordingly, for the reasons above, Plaintiff ORTL should be granted the requested interlocutory relief in this case.

II. THE BLACKOUT STATUTE IS UNCONSTITUTIONAL

In O.R.C. § 3517.06(B)(6) the General Assembly created an overbroad and vague statute that was clearly designed to disrupt political speech protected under the First Amendment. On its face, the Ohio 30 day blackout provision is unconstitutional when reviewed under clear, cogent standard articulated in FEC v. Wisconsin Right to Life, 551 U.S. _____ 127 S. Ct. 2652 (2007). O.R.C. § 3517.01(B)(6) cannot meet that standard.

The provisions of O.R.C. § 3517.01(B)(6) flatly prohibit any groups such as ORTL, from even mentioning the name of a politician who happens to be a candidate in any broadcast ad that is aired during the blackout period. The provisions of this statute are plainly overbroad and, on their face, prohibit protected political speech for no legitimate reason.

III. OHIO'S ELECTIONEERING STATUTE IS UNCONSTITUTIONAL

In the very recent case of Davis v. Federal Elections Commission, 554 U.S. _____, 128 S. Ct. 2759 (2008), the U.S. Supreme Court addressed another provision of the federal Bipartisan Campaign Reform Act ("BCRA"). Although the specific substantive provision addressed in Davis is not relevant herein (the so-called "Millionaire's Amendment") the U.S. Supreme Court's treatment of a collateral reporting requirement, 2 U.S.C. § 319(b), is extremely important to the issues presented in this case.

In order to invoke the Millionaire's Amendment created in BCRA, the candidate, proposing to spend in excess of $350,000 in personal funds, was required to disclose this fact to the opponent pursuant to 2 U.S.C. § 319(b). In turn, this report allowed the opponent to ignore certain otherwise applicable contribution limits.

In the U.S. Supreme Court's opinion, Justice Alito first addressed the reasons that the asymmetrical contribution limits involved in the case, when strictly scrutinized, failed to meet constitutional muster. Thereafter, Justice Alito addressed the failure of Congress to provide an adequate basis for 2 U.S.C. § 319(b).

Importantly, Justice Alito reasoned as follows:

> The remaining issue that we must consider is the constitutionality of § 319(b)'s disclosure requirements. "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. As a result, we have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech. *Id.*, at 75. To survive this scrutiny, significant encroachments "cannot be justified by a mere showing of some legitimate governmental interest." *Id*, at 64. Instead, there must be "a relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the governmental interest "must survive exacting scrutiny." *Ibid.* (footnotes omitted). That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. *Id.*, at 68, 71.

554 U.S. at _____; 128 S. Ct. at 2774-2775.

This reasoning has direct applicability to the issues arising under O.R.C. § 3517.1011, in this case. Structurally, O.R.C. § 3517.1011 is a disclosure statute, that requires frequent and intrusive disclosures to be made by a group solely to engage in "issue advocacy" in Ohio. Clearly, the only purpose of such an intrusive regulatory scheme is to chill the desire of any group speaking out on important public policy issues by forcing disclosure of their internal, private financial and organizational structure.[1]

As noted by Justice Alito in Davis, supra, " ... compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Certainly, the power of government to compel disclosure of private information is highly disfavored, as a bedrock principle of our U.S. Constitution, and requires that any such government disclosure scheme meet the rigorous test of strict scrutiny.

For example, in Davis v. FEC, 554 U.S. at _____, 128 S. Ct. at 2775, Justice Alito concluded his analysis of the disclosure scheme in 2 U.S.C. § 319(b), as follows:

[1] A review of the deposition of Michael Gonidakis, the Executive Director of ORTL, that has been taken and filed in this case highlights the type of disclosure issues that arise with this type of vague and overbroad statutory disclosure scheme.

> The § 319(b), disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified, and it follows that they too are unconstitutional. (footnote omitted)

Similarly, the provisions of O.R.C. § 3517.01(B)(6) are plainly unconstitutional in violation of the First Amendment. Here, the disclosure scheme in O.R.C. § 3517.1011 is intertwined with the unconstitutional provision of O.R.C. § 3517.01(B)(6). As in Davis, this disclosure statute insofar as it is linked to an unconstitutional purpose, is also unconstitutional.

CONCLUSION

For the foregoing reasons, ORTL respectfully submits that its request for interlocutory injunction relief is well-taken. Accordingly, ORTL respectfully requests this Court to preliminary enjoin the enforcement of O.R.C. § 3517.01(B)(6) and O.R.C. § 3517.1011, immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Plaintiff's Reply Memorandum in Support of Interlocutory Relief was served upon the following, by regular U.S. mail, postage prepaid, on this 28th day of July, 2008:

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