IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

CENTER FOR INDIVIDUAL FREEDOM, INC.,

Plaintiff,

v. **CIVIL ACTION NO. 1:08-00190**

BETTY IRELAND, et al.,

Defendants.

MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes Defendant Betty Ireland, the Secretary of State of West Virginia, by her counsel, Thomas W. Smith, and moves to dissolve the preliminary injunction granted by the Court on April 22, 2008. As grounds for said motion Defendant states as follows:

1. On March 21, 2008 the Plaintiff filed a complaint and motion for preliminary and permanent injunction, challenging the following sections of the West Virginia Code: 3-8-8 (a), 3-8-8 (b)(2)(H) (I) and (ii), 3-8-8(c) and 3-8-8(d).

2. On April 22, 2008 the Court granted Plaintiff's motion for preliminary injunction, prohibiting the West Virginia Secretary of State from enforcing the challenged sections of the statute.

3. Thereafter the West Virginia Legislature convened a Second Extraordinary Session and enacted House Bill 219 to address the injunction entered herein and to amend the offending statutes; House Bill 219 was approved by the legislature on June 28, 2008, effective October 1, 2008, and was signed by the Governor on July 14, 2008.

4. The sections of West Virginia Code that were challenged by the Plaintiff have been amended and reenacted in compliance with the ruling of this Court on April 22, 2008.

5. On July 29, 2008 Defendant Ireland filed a Notice of Amendments to Enjoined Statutory Provisions and Defendant Secretary's Obligation to Enforce the Amended Provisions Upon Their Effective Date.

6. That given the circumstances, the injunction is moot or currently not in force as to the amendments inasmuch as the newly enacted statute did not exist at the time the preliminary injunction was entered. Further, the statue that is the subject of the enforcement prohibition has; a) been amended to comply with the constitutional precepts underlying the injunction; and, b) the preliminary injunction cannot, as presently in place, control as to the subsequent amendments pursuant to the presumption of statutory constitutionality.

7. As noted by the Court of Appeals for the Eighth Circuit in *Rose v. Nebraska et al.,* 748 F.2d 1258, 1260 (1984), "Largely because of the enactment of this new law, the District Court, on remand from this Court's decision of the first appeal, dismissed the complaint as moot."

8. If this Court adopts the Plaintiff's reasoning that any statute that deals with an advocacy issue is embraced by the injunction, then there will be, as a practical matter, no regulation of campaign advertising, resulting in an absolute "free-for-all" of campaign advertising for the November election.

9. The newly-enacted statute as contained in House Bill 219 is presumptively constitutional, *Ogden v. Saunders*, 25 U.S. 213 (1827); *Woods-Bateman v. State of Hawaii*, Civ. Action 07-00119 HG LEK (D. HI. May 13, 2008); *IMS Health Corp. v. Rowe*, CV-07-127-B-W (D.C. Me, December 21, 2007), but to include the newly amended statute in the current injunction effectively reverses the presumption, and makes the section presumptively unconstitutional.

10. The West Virginia Legislature met in Extraordinary Session from June 24, 2008 through June 28, 2008. Among the legislation introduced by Governor Joe Manchin III was H.B. 219 which addressed specifically the provisions of W. Va. Code §§ 3-8-1, 3-8-1a, 3-8-4, 3-8-5, 3-8-8 and 3-9-14, preliminarily enjoined by this Court on April 22, 2008.

The Governor's proclamation as to election law reads:

> TWELFTH: Legislation relating generally to the regulation and control of elections; providing legislative findings regarding the regulation of nonbroadcast media; defining certain terms; clarifying that certain statutory prohibitions and criminal provisions relating to corporate election communications apply only to express advocacy; and clarifying offenses and penalties.

11. The bill as originally drafted and introduced in the House of Delegates was denominated House Bill 219 (Attachment 1) and referred to the House Judiciary Committee. (Please note underlining reflects new language, strike-throughs reflect language to be removed.)

12. The House Judiciary Committee amended the bill and reported it to the Floor of the House. (Attachment 2.) Concomitant with the House Judiciary Committee's consideration of the bill, the same legislation in the form of Senate Bill 2010 was considered by the Senate Judiciary Committee.[1] (Attachment 3.)

13. The House Judiciary Committee amendment was passed by the full House of Delegates (Attachment 4). Some seven amendments to the bill were defeated.

14. The bill passed the House on June 26, 2008 and was introduced in the Senate the same day. (Attachment 4.) The Senate dispensed with committee reference and took the bill up for immediate consideration. (Attachment 4.)

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[1]West Virginia legislative protocol has bills introduced at the Governor's request introduced in identical form with different numbers in both Houses simultaneously. Legislative practice dictates that the version of the bill passed by one House first is then the vehicle which is considered.

15. The bill passed the Senate, as amended, on June 28, 2008. (Attachment 5.) The House of Delegates considered the Senate amendments and passed the bill on June 28, 2008. (Attachment 4.)

16. The bill was sent to the Governor on July 8, 2008 and he approved it on July 14, 2008. (Attachment 4.) The bill is effective ninety days from passage. (Attachment 4.)

17. The final, or enrolled version of the bill (Attachment 5) is contained in House Bill 219. West Virginia Code Section 3-8-1 contains some nineteen findings related to state size, population, and the need for disclosure to properly regulate election conduct. Additional findings point out differences in West Virginia circumstance and federal circumstance vis a vis election regulation.

18. West Virginia Code Section 3-8-1a, as amended, creates a definition for "billboard" and removes "leaflets," "pamphlets," "flyers" and "outdoor advertising" from the definition of "electioneering communication." The amendment defines "expressly advocating." The definition therefore is:

> (A) Uses phrases such as "vote for the Governor," "re-elect your Senator," "support the Democratic nominee for Supreme Court," "cast your ballot for the Republican challenger for House of Delegates," "Smith for House," "Bob Smith in '04," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidates, "reject the incumbent," or communications of campaign slogans or individual words, that in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, advertisements, etc. which say "Smith's the One," "Jones '06," "Baker"; or (B) When considered in its entirety, the communication can only be interpreted by a reasonable person as advocating the election or defeat of one or more clearly identified candidates because: (I) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (ii) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates.

The amendment also redefines "independent expenditure" to read as follows:

> Independent expenditure means an expenditure by a person (A) Expressly advocating the election or defeat of a clearly identified candidate; and (B) That is not made in concert or cooperation with or at the request or suggestion of such candidate, his or her agents, the candidate's authorized political committee or a political party committee or its agents. Supporting or opposing the election of a clearly identified candidate includes supporting or opposing the candidates of a political party. An expenditure which does not meet the criteria for an independent expenditure is considered a contribution. ~~(15)~~(17) "Mass mailing" means a mailing by United States mail, facsimile or electronic mail of more than five hundred pieces of mail matter of an identical or substantially similar nature within any thirty-day period. For purposes of this subdivision, substantially similar includes communications that contain substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

West Virginia Code Section 3-8-5 (Detailed accounts and verified financial statements required) was amended to remove language deemed unclear by this Court and substitute the term ". . . expressly advocating the election or defeat of a clearly identified candidate for State district, county or municipal office."

19. West Virginia Code Section 3-8-8 (Corporate contributions forbidden; exceptions; penalties; promulgation of rules; additional powers of State Election Commission) was amended to clarify that corporate contributions are forbidden for express advocacy (expressly advocating) only. The amendment also adds a "safe harbor" provision expressly setting forth conduct which does not constitute express advocacy.

20. West Virginia Code Section 3-9-14 (Unlawful acts by corporations; penalties) was amended to apply only to express advocacy.

21. Additionally, while the effective date of the bill is 90 days from passage, the internal effective date is October 1, 2008 for purposes of the November 4, 2008 general election.

22. Defendant would respectfully submit that the statutory changes enacted by the provisions of H.B. 219 are a good faith and constitutionally correct attempt to rectify the provisions this Court deemed unconstitutional.

23. The legislation also opts to regulate certain non-broadcast media, i.e., mass mailings, telephone banks, billboards and newspapers. While doing so the Legislature adopted findings supportive of the action. Review of the various findings shows that the issues were debated and discussed at length in the Judiciary Committees and on the floors of both Houses. There will be evidence submitted supportive of the effective use of such media in state campaigns, particularly those involving smaller rural geographical areas.

MEMORANDUM OF LAW

The purpose and effect of H.B. 219 was to bring West Virginia election law into compliance with federal constitutional standards in the area of electioneering communications. The changes effected track these provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) and the rules promulgated thereunder by the Federal Elections Commission as modified by decisions of the United States Supreme Court. The intent of the legislation was to address the deficiencies in state law addressed by this Court in this action.

The BCRA, after which the West Virginia amendments were modeled, was designed to deal with "sham issue" advertisements, ads which avoided the "magic words" referred to in a footnote in *Buckley v. Valeo,* 421 U.S.1 (1976) but are clearly intended to influence campaigns for office. The BCRA, like the West Virginia Law as presently enacted, bans the use of corporate treasury funds for express advocacy. Further, it requires disclosure of funding for "electioneering communications."

The disclosure requirements of the BCRA were upheld by an 8-1 majority in *McConnell v. FEC*, 540 U.S. 93 (2003).

Where the West Virginia law varies from the BCRA is its regulation of non-broadcast media, specifically, mass mailing, telephone banks, billboards and newspapers. A significant number of legislative findings in support of the inclusion of media are made. It is well settled that even in First Amendment cases courts give substantial deference to legislative findings of the sort made by the Legislature in this case. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). While courts may exercise their independent judgment on facts involving issues of constitutional law, ". . . it is not a license to re-weigh the evidence *de novo* or to replace Congress' factual predictions with [the court's] own." *Id*. at 666. The federal courts grant the same deference to the findings of a state legislation. *McCrerey v. Allen*, 118 F. 3d. 242 (1997; *Akers v. Caperton*, 998 F. 2d 220 (1993).

CONCLUSION

In conclusion, Defendant Ireland respectfully submits that the amendments to state election law, made via the provisions of H.B. 219, bring West Virginia election law into compliance with federal constitutional standards. Consequently, the preliminary injunction should be dissolved.

Respectfully submitted,

BETTY IRELAND, SECRETARY OF
STATE OF WEST VIRGINIA

By Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

/s/ *Thomas W. Smith*

Thomas W. Smith
Managing Deputy Attorney General

Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305-0220
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: tws@wvago.gov

CERTIFICATE OF SERVICE

I, Thomas W. Smith, Managing Deputy Attorney General, do hereby certify that on the 5th day of September 2008, I electronically filed the foregoing "Motion to Dissolve Preliminary Injunction and Memorandum of Law in Support Thereof" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Anthony J. Majestro, Esq.
Powell & Majestro
405 Capitol Street, Suite P-1200
Charleston, West Virginia 25301

William C. Porth, Esq.
Wiley Rein
1776 K Street, NW
Washington, DC 20006

Kathy A. Brown, Esq.
Wexler, Toriseva & Wallace
1446 National Road
Wheeling, West Virginia 26003

Patrick K. Maroney, Esq.
Maroney, Williams, Weaver & Pancake
608 Virginia Street, East
Charleston, West Virginia 25301

Robert L. Bailey, Esq.
Steptoe & Johnson, PLLC
Post Office Box 1588
Charleston, West Virginia 25326-1588

Nicholas S. Preservati, Esq.
Preservati Law Offices
Post Office Box 1431
Charleston, West Virginia 25325

Thomas W. Kirby, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006

Teresa C. Toriseva, Esq.
Wexler, Toriseva & Wallace
1446 National Road
Wheeling, West Virginia 26003

Stephen B. Pershing, Esq.
Center for Constitutional Litigation
777 6th Street, NW, Suite 520
Washington, DC 20001-3723

I hereby certify that I have mailed by United States Postal Service the document to the following non CM/CEF participants:

Jan Witold Baran, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006

Kevin J. Plummer, Esq.
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006

/s/ *Thomas W. Smith*

Thomas W. Smith
Managing Deputy Attorney General

Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305-0220
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: tws@wvago.gov