

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Edmund Corsi, and Geauga Constitutional Council, | : | |
| | : | |
| Appellants-Appellants, | : | No. 11AP-1034 |
| | : | (C.P.C. No. 11CVF-06-7794) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Ohio Elections Commission, | : | |
| | : | |
| Appellee-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on October 18, 2012

Maurice A. Thompson and Ryan D. Walters, for appellants.

Michael DeWine, Attorney General, *Erick D. Gale*, *Michael J. Schuler* and *Erin Butcher-Lyden*, for appellee.

Wolfe & Russ LLC, and *Andrew E. Russ*, for amicus curiae
Ohio Liberty Council.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellants, Edmund Corsi and the Geauga Constitutional Council, appeal from a judgment of the Franklin County Court of Common Pleas affirming a decision of appellee, the Ohio Elections Commission ("OEC"). The OEC found that the Geauga Constitutional Council ("the Council") was a political action committee ("PAC") and that it failed to comply with requirements imposed on PACs by Ohio law. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In April 2010, the Geauga County Board of Elections ("the Board") referred Corsi and his group, the Council, to the OEC. The Board claimed that it had reason to believe that the Council was a PAC and that the Council failed to comply with requirements imposed on PACs. R.C. 3517.01(B)(8) defines a PAC as "a combination of two or more persons, the primary or major purpose of which is to support or oppose any candidate, political party, or issue, or to influence the result of any election through express advocacy, and that is not a political party, a campaign committee, a political contributing entity, or a legislative campaign fund." R.C. 3517.10 places certain reporting and disclosure requirements on PACs. These requirements include the designation of a treasurer and the filing of periodic financial statements.

{¶ 3} The OEC held a hearing regarding Corsi and the Council. At the hearing, Ed Ryder, a member of the Board, testified that he received a pamphlet authored by the Council that was being handed out at a county fair. The Council wrote the pamphlet and it appeared to endorse or support certain elected officials or candidates while attacking others. Ryder asked other Board members whether the Council was a registered PAC. It was not, so the Board asked Corsi to register the Council as a PAC. Corsi declined.

{¶ 4} Corsi testified at the hearing and also submitted an affidavit. Corsi stated that he believes that most elected officials ignore the constitution and, as a result, he is concerned that he will lose his freedoms in this country. (Tr. 48.) He created the Council and its website as a way to expose and criticize local government officials without fear of reprisals. He claimed that the opinions in the Council's pamphlet were his own and that he was solely responsible for the content on the Council's website. He also testified that the use of the terms "us" and "we" in the pamphlet, arguably indicating that the Council may be more than just himself, was just "loose terminology on my part." (Tr. 50.) Corsi also testified that he believed the Council's website and pamphlet were educational in nature and not endorsements of any particular candidate. He testified that he typed, prepared, and paid for the pamphlet by himself and guessed that it cost him a couple hundred dollars to publish the pamphlet. (Tr. 45.) Corsi also held various informational events for which people purchased seats to attend and for which Corsi paid for food and for speakers. He did not know how much the events cost him or how much he received as

a result. He also paid \$40 a month in order to support the Council's website. Corsi never disputed that he did not register the Council as a PAC, nor did the Council ever designate a treasurer or file periodic financial statements as required of PACs.

{¶ 5} The Board presented an affidavit from a woman who attended "meetings" of the Council and claimed to be a member of the Council. Corsi disputed her claim, arguing that those meetings were not Council meetings, but just a "discussion group," to which he invited people for the purpose of discussing politics. (Tr. 67.) Appellant filed two other affidavits from people who claimed they attended a number of those meetings. Those individuals denied that the Council had any members. However, both individuals also stated that they had produced and handed out political pamphlets on behalf of the Council, and each affidavit used the word "we" when referring to the Council.

{¶ 6} Corsi argued to the OEC that the Council was not a PAC, in part, because he was its only member. The OEC disagreed, noting the involvement of at least two other people in the Council and the use of plural terms in the Council's pamphlets. The OEC determined that the Council was a PAC under Ohio law. It further held that the Council failed to file a designation of treasurer as required by R.C. 3517.10(D)(1) and a statement of contributions and expenditures required by R.C. 3517.10(A). The OEC specifically indicated that it did not find any violations against Corsi as an individual. (Tr. 116-18.) The Franklin County Court of Common Pleas affirmed the OEC's decision.

{¶ 7} Appellants appeal to this court and assign the following errors:

First Assignment of Error: The trial court erred by not declaring R.C. 3517.01(B)(8), R.C. 3517.10(D)(1) and (4), R.C. 3517.10(A), and OAC 3517-1-14(B) unconstitutional, whether on their face or as applied to the parties and/or communications at issue in this case.

Second Assignment of Error: The trial court erred by not narrowly construing R.C. 3517.01(B)(8), R.C. 3517.10(D)(1) and (4), R.C. 3517.10(A), and OAC 3517-1-14(B), so as to find them inapplicable to the communications at issue in this case, thereby saving their constitutionality.

II. Standards of Review

{¶ 8} Pursuant to R.C. 3517.157(D), a party adversely affected by a final determination of the OEC may appeal pursuant to R.C. 119.12. *The Team Working for*

You v. Ohio Elections Comm., 142 Ohio App.3d 114, 119 (10th Dist.2001). In an administrative appeal pursuant to R.C. 119.12, the court of common pleas reviews an order to determine whether it is supported by reliable, probative, and substantial evidence, and is in accordance with the law. *Levine v. State Med. Bd. of Ohio*, 10th Dist. No. 10AP-962, 2011-Ohio-3653, ¶ 12.

{¶ 9} The standard of review is more limited on appeal to this court. Unlike the lower court, this court does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that the commission's order is supported by reliable, probative, and substantial evidence, this court's role is confined to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.*, 80 Ohio App.3d 675, 680 (10th Dist.1992). The term abuse of discretion connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, on the question of whether the commission's order is in accordance with the law, this court's review is plenary. *Dann v. Ohio Elections Comm.*, 10th Dist. No. 11AP-598, 2012-Ohio-2219, ¶ 9, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992). Because this case concerns constitutional issues such as political speech and the freedom of association, we apply the de novo, plenary review of the OEC's decision without deference to the agency's decision. *Lesiak v. Ohio Elections Comm.*, 128 Ohio App.3d 743, 746 (10th Dist.1998), citing *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964).

{¶ 10} This case involves the Council's assertions that Ohio's laws defining and regulating PACs are unconstitutional and violate its First Amendment rights to freedom of speech and association. The First Amendment to the United States Constitution provides that "[c]ongress shall make no law * * * abridging the freedom of speech." When a law burdens core political speech, it must survive strict scrutiny. *Fed. Election Comm. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464-65 (2007). Under that review, the state must prove that the law is narrowly tailored to further a compelling government interest. *Id.* Other burdens, such as reporting, disclaimer and disclosure requirements, may burden the ability to speak, but they impose no ceiling on campaign-related

activities and do not prevent anyone from speaking. *Citizens United v. Fed. Election Comm.*, 130 S.Ct. 876, 914 (2010). For this reason, such burdens are only subjected to an "exacting scrutiny," which requires a substantial relation between the requirement and a sufficiently important governmental interest. *Id.*; *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010). To withstand this scrutiny, " 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id.*, quoting *Davis v. Fed. Election Comm.*, 554 U.S. 724 (2008).

{¶ 11} In determining the constitutionality of a legislative act, this court must first determine whether the party is challenging the act on its face or as applied to a particular set of facts. *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 14. An "as applied" challenge asserts that a statute is unconstitutional as applied to the challenger's particular conduct. *Columbus v. Meyer*, 152 Ohio App.3d 46, 2003-Ohio-1270, ¶ 31. In contrast, a facial challenge asserts that a law is unconstitutional as applied to the hypothetical conduct of a third party and without regard to the challenger's specific conduct. *Id.* To succeed in a typical facial attack, the Council would have to establish "that no set of circumstances exists under which [the definition] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, the United States Supreme Court has recently recognized, in the First Amendment context, "a second type of facial challenge," whereby a law may be invalidated as overbroad if " 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010), citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, fn. 6 (2008).

{¶ 12} Here, although the Council claims both facial and as applied constitutional challenges, it is clear that the Council's argument is more properly analyzed as an applied challenge, as the Council argues that Ohio's PAC laws are unconstitutional when applied to an entity such as itself with small contributions and expenditures.

III. R.C. Chapter 3517—Ohio's Political Action Committee Laws

{¶ 13} Before we address the questions presented by the Council's appeal, we must first clarify what is not at issue. First, the OEC did not take any action or find any violations against Corsi as an individual. The OEC's decision impacts the Council and the

Council alone. Nothing in the OEC's decision prevents him, as an individual, from speaking on the issues he considers important. For this reason, Corsi cannot claim that the OEC violated his individual constitutional rights. Second, appellants do not challenge the OEC's factual findings that the Council is a PAC or that the Council did not comply with the requirements imposed on PACs by R.C. 3517.10. Lastly, this case does not involve monetary limits on PACs' contributions or expenditures or the amounts that must be disclosed. Instead, appellants clarified at oral argument that they are challenging Ohio's definition of a PAC in R.C. 3517.01(B)(8) and the requirements imposed as a result of that designation. We, therefore, consider the Council's two assignments of error together.

A. PACs and their Registration, Reporting and Disclosure Requirements

{¶ 14} As already noted, R.C. 3517.01(B)(8) defines a PAC as "a combination of two or more persons, the primary or major purpose of which is to support or oppose any candidate, political party, or issue, or to influence the result of any election through express advocacy, and that is not a political party, a campaign committee, a political contributing entity, or a legislative campaign fund." The Council argues that Ohio's definition of a PAC burdens its core political speech and, therefore, the state must show that the definition is narrowly tailored to serve an overriding state interest.

{¶ 15} We reject the Council's premise that Ohio's definition of a PAC, by itself, burdens political speech. "It is not the designation as a PAC but rather the obligations that attend PAC designation that matter for purposes of First Amendment review." *Natl. Organization for Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir.2011) ("NOM I"). Therefore, we turn to R.C. 3517.10 to determine whether the obligations imposed on the Council as a PAC survive exacting scrutiny. *Id.*; *Natl. Organization for Marriage, Inc. v. McKee*, 669 F.3d 34, 39-40 (1st Cir.2012) ("NOM II"); *Doe* at 2818 (noting that Supreme Court has consistently reviewed disclosure requirements under "exacting scrutiny").

{¶ 16} As relevant here, R.C. 3517.10(D)(1) requires PACs to file a form designating a treasurer for the organization. The name and address of that person must appear on certain political publications the PAC issues. *See, e.g.*, R.C. 3517.20(A)(3). R.C. 3517.10(D) requires PACs to file periodic financial statements of its contributions and expenditures. Those statements must include the amount and date of the contribution or

expenditure along with the name and address of the person or entity from whom contributions are received or to whom expenditures are made. R.C. 3517.10(B)(4) and (5). These requirements do not prohibit the Council from expressing its views. *Citizens United* at 914. They only require disclosure of certain information. The Council, however, argues that these requirements (and the administrative costs they entail), when imposed on a small entity with only "*de minimis* forays into express advocacy" discourages its speech and, therefore, burdens its First Amendment rights. We disagree.

{¶ 17} The United States Supreme Court has recognized the possibility that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see also Fed. Election Comm. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986) ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear."). Nevertheless, the United States Supreme Court upheld the reporting and disclosure requirements on PACs at issue in *Buckley*. The reporting and disclosure requirements upheld in *Buckley* are similar to the requirements in R.C. 3517.10. They included forced registration and record keeping of contributions and expenditures, as well as periodic financial statements. *Buckley* at 63-64. Although the Supreme Court noted the potential infringements on First Amendment right that compelled disclosure entailed, it concluded in *Buckley* that the government presented sufficiently important interest to outweigh the possibility of those infringements. *Id.* at 65. Those interests included providing the electorate with information about campaign money, deterring corruption and avoiding the appearance of corruption by exposing large contributions to the public, and gathering information to detect violations of contribution limitations. *Id.* at 67-68; *In re Evans*, 10th Dist. No. 06AP-539, 2006-Ohio-4690, ¶ 42 (noting interests).

{¶ 18} In the present case, the OEC similarly argues that the reporting and disclosure requirements serve its important interest in providing the electorate with information regarding where political campaign money comes from and how it is spent. The United States Supreme Court recognized this interest as one "sufficiently important" to support campaign finance laws. *Buckley*. The Supreme Court has also recognized an

"informational interest" the public has in "knowing who is speaking about a candidate shortly before an election" that justifies disclosure requirements. *Citizens United* at 915-16; see also *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005-6 (9th Cir.2010) ("This vital provision of information repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest."). We agree. Given the ever-changing technological advances that allow the public to be inundated with political views from a multitude of different persons, platforms, and viewpoints, this "informational interest" that Ohio asserts becomes more important every day. The public should be able to gather as much information as possible in order to judge the merits of different positions, and that information includes " 'the source and credibility of the advocate.' " *Brumsickle* at 1008, quoting *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

{¶ 19} The Council argues, however, that this interest is not substantially served when the disclosures are required by an entity, such as itself, that spends small amounts of money and engages, if at all, in only limited express advocacy. In support of this argument, the Council mainly relies on two cases from the federal court of appeals. *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir.2009); *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir.2010). In addition to not being controlling case law in this district, the Council's reliance on those cases is misplaced because they are both factually distinguishable, and because both cases expressly limited their holdings to the specific facts in front of them. *Canyon Ferry* at 1033-34; *Sampson* at 1261.

{¶ 20} In *Canyon Ferry*, the state of Montana concluded that a church was an "incidental political committee" because the church allowed the use of its facilities to gather signatures on petitions in support of a ballot issue and the church's pastor encouraged people to sign the petition. Under Montana law, an incidental political committee was formed, in part, by making a contribution or expenditure to support or oppose a candidate or issue. *Id.* at 1026. The terms "expenditures" and "contributions" were defined to include the church's in-kind expenditures (use of its facilities). As a result of the church's actions, the state sought to impose disclosure and reporting requirements for an incidental political committees on the church. As it related to the church's First Amendment argument, the court concluded that these de minimis in-kind expenditures

did not justify the burdens imposed on the church. The court expressly limited its holding to the facts of that case and stated that it was not concerned with the legality of imposing disclosure requirements as applied to monetary contributions of any size. *Id.* at 1033-34 (rejecting requirements as applied, while noting that similar requirements have ordinarily been justified in other cases).

{¶ 21} The court in *Sampson* was also faced with disclosure and reporting requirements imposed on a group concerned with a ballot issue and not one seeking to elect or defeat a candidate. The court noted the significance of that difference, that "the justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative" because "there is no need for concern that contributors can change a law enacted through a ballot initiative as they can influence a person elected to office." *Id.* at 1249. The group at issue in *Sampson* was a ballot initiative committee that opposed the annexation of their neighborhood into a nearby town. The group raised less than \$1,000 in contributions, but the state of Colorado sought to have them register as an "issue committee." The court concluded that the requirements were unconstitutional, but did so based largely on the fact that the group was a ballot issue committee. It concluded that the state's asserted legitimate interest was "significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." *Id.* at 1259. While the court did note the small size of the group's contributions and expenditures, the focus of the court's opinion was on the nature of the group's interest—a single ballot issue.

{¶ 22} Here, the Council is not concerned with a single ballot initiative or issue. The Council's writings show a concern for candidates and locally-elected officials in a wide range of offices, and the OEC concluded that the Council's "primary or major purpose" was to support or oppose candidates or issues. Additionally, the organization in *Canyon Ferry* spent no money, but rather performed acts that constituted "in-kind expenditures" under state law. Here, Corsi conceded that he spent money on the Council and its website and that he received money from holding informational events. Because of these significant factual differences, we find the cases cited by the Council unpersuasive. *See also ProtectMarriage.com v. Bowen*, 830 F.Supp.2d 914, 943-44, 949-50 (E.D. Cal.2011) (rejecting plaintiff's reliance on same cases).

{¶ 23} We are also unpersuaded by the argument that the PAC disclosure and reporting requirements are unconstitutional as applied to the Council simply because the Council raises and spends a small amount of money on political activities. We conclude that these requirements, even when imposed on small PACs, are substantially related to the government's sufficiently important governmental interests in providing the electorate with information about money in political campaigns. This transparency "enables the electorate to make informed decisions and give proper weight to different speakers and messages," *Citizens United* at 916, and provides " 'the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.' " *Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir.2012), quoting *Brumsickle* at 1008.

B. The PAC Definition—"Primary or Major Purpose"

{¶ 24} In Ohio, to qualify as a PAC, the organization must, as its "primary or major purpose," support or oppose any candidate, political party, or issue, or influence the result of any election through express advocacy.¹ R.C. 3517.01(B)(8). The Council argues that its "major or primary purpose" cannot be express advocacy because it spends such an insignificant amount of money for that purpose. While we agree that the amount of money involved may be a factor in determining an entity's "primary or major purpose," it is not the sine que non of that analysis. The determination of an organization's "primary or major purpose" is a fact intensive analysis and such a determination must weigh a number of considerations. *See The Real Truth About Abortion, Inc. v. Fed. Election Comm.*, 681 F.3d 544, 555-58 (4th Cir.2012) (rejecting claim that only method to determine PAC status is to examine expenditures and concluding that the analysis requires more comprehensive consideration and weighing of multiple factors).

{¶ 25} Here, in concluding that the Council was a PAC, the OEC found that the Council's major or primary purpose was express advocacy. The OEC made this finding based on a number of facts, none of which involved how much money was spent or received. First, the Council's own mission statement stated that its purpose was, in part,

¹ Express advocacy includes communications that in express terms advocate the election or defeat of a clearly identified candidate for office. *Buckley* at 44; *Community Advocate Inc. v. Ohio Elections Comm.*, 124 Ohio App.3d 70, (10th Dist.1997).

to support and help elect certain people. Second, the Council's voter guide that it produced and disseminated, as well as its web site, supported and recommended certain officials. The Council does not challenge these facts or the OEC's factual finding. Even if the Council did spend a small amount of money on express advocacy, the OEC could still have found that its "primary or major purpose" was express advocacy given the other facts in the record, facts which the Council does not dispute.

{¶ 26} The Council also claims that its major or primary purpose is not express advocacy because Corsi used the Council's website to blog nearly every day for three years but the OEC could only point to a few isolated examples of express advocacy. Implicit in this claim is that the other three years of blogging and web posts did not contain express advocacy. However, the content of those posts were not in the record before the OEC and are not before this court. While the Council admitted various screen shots from its web site which included headings of various posts, those screen shots do not include the content of those posts. We cannot speculate regarding the context of those posts.

C. The PAC Definition—The Absence of a Monetary Threshold

{¶ 27} The Council also contends that the definition of a PAC is against the law because it applies regardless of the amount of money involved. Specifically, the Council argues that there must be a monetary threshold of an organization's contributions and/or expenditures (although the Council does not identify a specific amount) only above which the PAC definition may apply. We disagree.

{¶ 28} The Council is correct that some state laws, as well as federal laws, contain monetary thresholds for PAC status or registration. *See, e.g., NOM I* (Maine PAC registration law applies if organization receives or has expenditures over \$1,500 and has as its major purpose the influencing of an election or ballot question); *The Real Truth About Abortion* at 555 (federal law defining PAC contains \$1,000 threshold). However, the absence of a monetary trigger in the PAC definition is not determinative of their legality. Our research reveals at least two other states, Washington and North Carolina, that do not include a monetary threshold in their definitions of a PAC. *Brumsickle* at 997 (affirming state's definition of PAC); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 286 (4th Cir.2008) fn. 4 (noting that state legislature had recently eliminated monetary trigger of definition). In fact, Washington defines a PAC as any

person "having the expectation of receiving contributions or making expenditures." Thus, absent any contributions or expenditures, but only based on an expectation of receiving same, an organization in Washington may be defined as a PAC, provided that the organization meets the other requirements of the definition.

{¶ 29} Ohio has decided to forgo a monetary threshold and simply define a PAC by its major or primary purpose. In a similar context, when reviewing threshold amounts above which require disclosure of contributors, the Supreme Court of the United States concluded that the establishment of such a threshold is best left for the legislature to decide and will not be rejected unless it is "wholly without rationality." *Buckley* at 82-84 (concluding that low threshold amounts of \$10 or \$100 leading to record keeping and reporting provisions were "best left in the context of this complex legislation to congressional discretion" and were not "wholly without rationality."); Cf. *NOM I* at 60-61 (1st Cir.2011) (affirming \$100 threshold for reporting and recordkeeping requirements); *Family PAC* at 811. Applying that reasoning to the present case, we cannot say that the absence of a monetary trigger for PAC designation is wholly without rationally in this context.

IV. Conclusion

{¶ 30} For all of these reasons, we reject the Council's constitutional challenges to Ohio's laws regarding PACs. Accordingly, we overrule the Council's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
