

NEW FED COURT RULING SHOULD ENCOURAGE NJ LAWMAKERS SEEKING MORE DISCLOSURE

BY JEFF BRINDLE | 01/18/17 11:41am

On November 4, 2016, the United States District Court for the District of Columbia struck another blow on behalf of disclosure.

In *Independence Institute v. FEC*, the Court rejected the organization's claim that disclosure requirements under the Bipartisan Campaign Reform Act (BCRA) should not apply to its planned advertising campaign.

The Institute, a 501(c)(3) charitable organization, planned to run radio advertisements urging Colorado Citizens to contact two federal lawmakers to support a particular piece of legislation.

Arguing that the ads are issue ads, the Institute maintained that they should be exempt from BCRA's electioneering communication disclosure provisions.

The federal rules, as well as similar rules in about two dozen states (not including New Jersey), require groups that run such ads to fully disclose their campaign contributions and expenditures. Voters are better informed because they get to see who is behind the ads and exactly how they are spending their money.

An electioneering communication is any broadcast, cable or satellite communication that mentions a "clearly identified federal candidate," is made within 30 days of a primary or 60 days of a general election, and is broadcast to the relevant voting public.

The Institute claimed that by applying BCRA's provision to issue advocacy, the Federal Election Commission (FEC) would be violating the First Amendment.

As the plaintiff, the Institute held that in regards to its planned radio advertisements, BCRA's requirements were overbroad. It argued that the Act's large-donor disclosure requirements were unconstitutional as applied to a 501(c)(3) tax exempt organization.

Initially, on October 6, 2014, the D.C. District Court refused to call a three-judge panel and dismissed the case.

It found that U.S. Supreme Court precedent prevailed.

Upon appeal to the U.S. Court of Appeals for the District of Columbia, the district court's decision to not convene a three-judge panel was reversed.

The Appellate Court remanded the case back to the district court, ordered a three-judge panel, and instructed the Court to consider the merits of the case.

In considering the Institute's argument, the three-judge panel acknowledged that the electioneering provision does not directly regulate issue advocacy.

However, it maintained that the provision does cover communications within a certain time frame before a federal election that "clearly identify federal candidates."

The District Court panel noted that in *McConnell v. FEC*, the Supreme Court rejected an apparent challenge to the constitutionality of BCRA's provision and did not distinguish between express advocacy and issue advocacy for purposes of disclosure.

Further, the Court concluded that the electioneering communication provision advances an important governmental interest and that tax-exempt status is no guarantee against compliance with disclosure requirements.

Thus, the District Court, citing the fact that the Supreme Court on two occasions upheld the electioneering communication provision in BCRA and made no exceptions for issue advocacy, rejected Independence Institute's challenge and once again upheld disclosure.

This decision should strengthen those who advocate for disclosure by independent groups in New Jersey.

Recently, Assembly Minority Leader John Bramnick and Democratic Assemblyman Troy Singleton each introduced bills that would require registration and disclosure by independent groups such as Super PACs and 501(c) groups.

The recent ruling in *Independence Institute v. FEC*, which again strongly endorses disclosure, will hopefully embolden the Legislature to pass this legislation and enhance transparency in the State's electoral process.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.