

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|--|---|------------------------|
| CENTER FOR INDIVIDUAL<br>FREEDOM,  | ) |                        |
|  | ) |                        |
| Plaintiff,   | ) |                        |
|  | ) | Civil Action No. _____ |
| v.   | ) |                        |
|  | ) |                        |
| JOSEPH W. CARROLL, District Attorney of<br>the County of Chester;            | ) |                        |
|  | ) |                        |
| G. MICHAEL GREEN, District Attorney of<br>the County of Delaware;            | ) |                        |
|  | ) |                        |
| LYNNE ABRAHAM, District Attorney of<br>the City of Philadelphia;             | ) |                        |
|  | ) |                        |
| THOMAS CORBETT, Attorney General of<br>the Commonwealth of Pennsylvania; and | ) |                        |
|  | ) |                        |
| PEDRO A. CORTES, Secretary of the<br>Commonwealth of Pennsylvania;           | ) |                        |
|  | ) |                        |
| Defendants.  | ) |                        |

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**COMPLAINT**

**Nature of the Action**

1. This action seeks to vindicate free speech, free association, and due process rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. Plaintiff Center for Individual Freedom (“Center”) wants to address citizens of Pennsylvania on matters of public importance, and many Pennsylvania residents want to hear what the Center has to say. Yet, Pennsylvania’s campaign finance statutes make it impossible for the Center to speak, threatening criminal penalties for violation of vague, subjective, and overbroad provisions. The

Center's Counsel sought curative assurances from Pennsylvania enforcement authorities, but instead received confirmation of the unconstitutional sweep of the Commonwealth's campaign finance laws. As a result, the Center now is being deterred from planned speech on vital policy issues, inflicting irreparable injury upon it and its listeners. The Center recently vindicated very similar claims against a very similar state statute in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 938 (2007).

2. Proceeding under the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Constitution itself, the Center seeks injunctive, declaratory, and other appropriate relief. Because irreparable injury is being inflicted on the Center, its supporters, and its would-be listeners at this very moment and that injury threatens to continue through the next four months, the Complaint seeks expedited injunctive or declaratory relief.

### **Jurisdiction and Venue**

3. Because this action arises under the Constitution and laws of the United States, this Court has federal question jurisdiction under 28 U.S.C. § 1331. Because this action seeks to redress the deprivation of civil rights, this Court also has jurisdiction under 28 U.S.C. § 1343(a)(3). Supplemental jurisdiction exists under 28 U.S.C. § 1367. Because a Defendant resides in this District, a substantial part of the events or omissions underlying the claim occurred here, and publication would be sought here, venue is proper under 28 U.S.C. § 1391(b).

## Parties

4. Plaintiff Center for Individual Freedom is a non-partisan, non-profit organization whose mission is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

(a) The Center for Individual Freedom seeks to focus public, legislative, and judicial attention on the rule of law as embodied in the federal and state constitutions and structural protections that constrain and disperse governmental authority. It also seeks to foster intellectual discourse and to promote education that reaffirms imperatives of the U.S. Constitution as it relates to contemporary conflicts. Its goals, principles, and activities are more fully described at its Internet website at [www.cfif.org](http://www.cfif.org).

(b) The Center is a corporation organized under the laws of the Commonwealth of Virginia and operates under § 501(c)(4) of the Internal Revenue Code. Its headquarters address is 113 South Columbus Street, Suite 310, Alexandria, VA 22314.

(c) The Center has a history of speaking out on justice and other public issues and vigorously defending its right to do so. *See, e.g., Center for Individual Freedom*, 449 F.3d at 658.

(d) The Center wishes to speak about justice issues in Pennsylvania during the period prior to the upcoming November election when the public is most attentive to such issues, using candidates to illustrate its points.

5. Defendants are legally responsible for enforcing the laws of the Commonwealth of Pennsylvania that are challenged in this action. Each of them has sworn to enforce the laws of

the Commonwealth of Pennsylvania within their respective fields of responsibility, and each stands ready, willing, and able to do so. They are proper persons to defend the interest of the Commonwealth.

(a) Defendant Joseph W. Carroll is the District Attorney for the County of Chester. He is given concurrent power to prosecute violations of Pennsylvania's Election Code by 25 Pa. Stat. § 3260b(c). He resides in Kennett Square, Pennsylvania.

(b) Defendant G. Michael Green is the District Attorney for the County of Delaware. He is given concurrent power to prosecute violations of Pennsylvania's Election Code by 25 Pa. Stat. § 3260b(c). He resides in Drexel Hill, Pennsylvania.

(c) Defendant Lynne Abraham is the District Attorney for the City of Philadelphia. She is given concurrent power to prosecute violations of Pennsylvania's Election Code by 25 Pa. Stat. § 3260b(c). She resides in Philadelphia, Pennsylvania.

(d) Defendant Thomas Corbett is the Attorney General of the Commonwealth of Pennsylvania. He is given the power to prosecute violations of Pennsylvania's Election Code by 25 Pa. Stat. § 3260b(a). He resides in Glenshaw, Pennsylvania.

(e) Defendant Pedro A. Cortes is the Secretary of the Commonwealth of Pennsylvania. He is charged with investigating reports filed pursuant to Pennsylvania's Election Code, as well as alleged failures to so file by 25 Pa. Stat. § 3259(6). He also has the power to report violations "to the appropriate law enforcement authorities." 25 Pa. Stat. § 3259(7). He resides in Harrisburg, Pennsylvania.

(f) The Commonwealth of Pennsylvania cannot be named as a defendant without its consent due to the Eleventh Amendment to the United States Constitution. The individual Defendants are named pursuant to the doctrine of *Ex parte Young*. Plaintiff would consent to the substitution of the represented Commonwealth if it wishes to subject itself to suit directly, waiving the Eleventh Amendment, sovereign immunity, and related defenses.

### **The Challenged Laws**

6. Pennsylvania has adopted a complex statute regulating various aspects of the election process. This statute is referred to generally as the Pennsylvania Election Code, 25 Pa. Stat. § 3241, *et seq.* Certain provisions of the Pennsylvania Election Code unduly restrict the rights of Americans to discuss issues of public importance. As relevant here, the challenged provisions forbid corporations from engaging in public speech by making an “expenditure in connection with the election of any candidate or for any political purpose whatever.” 25 Pa. Stat. § 3253(a). Violations carry criminal penalties. 25 Pa. Stat. § 3543.

7. An “expenditure” includes any spending “for the purpose of influencing the outcome of an election.” 25 Pa. Stat. § 3241(d)(1) (emphasis added). In particular, the spending necessary to engage in television or radio speech is an expenditure if it is determined to have been made with the “purpose of influencing” an election.

8. Any corporation making any “expenditure” risks a fine of between \$1,000 and \$10,000. 25 Pa. Stat. § 3543. And any corporate director, officer, agent, or employee who makes an “expenditure” on behalf of the corporation risks a fine of up to \$10,000, or imprisonment of between one month and two years, or both. 25 Pa. Stat. § 3543. Moreover, Pennsylvania courts may grant highly disruptive injunctions, including *ex parte* injunctions,

against corporate speech deemed to involve such expenditures. *Bodack v. Law Enforcement Alliance of America, Inc.*, No. GD-01-0121066 (Pa. C.P. Allegheny County) (attached as Exhibit A), *aff'd* 790 A.2d 277 (Pa. 2001).

9. On behalf of another client and with assistance from Pennsylvania counsel, Counsel for the Center contacted Pennsylvania enforcement authorities to determine their understanding of Pennsylvania's law. The Office of Attorney General refused to substantively respond. The Office of the Secretary of the Commonwealth, however, was willing to discuss the issue. Citing the statutory provisions referenced above, the Office of the Secretary of the Commonwealth advised that a corporation is likely prohibited from creating and distributing advertisements addressing issues of public policy that refer to identified Pennsylvania candidates. The Office of the Secretary of the Commonwealth said corporate ads could be viewed as "promoting and/or supporting judicial candidates," and, hence, prohibited expenditures, even though the ads do not contain any words that expressly advocate the election or defeat of any candidate. ("Express advocacy" is a term of art described in ¶ 26 below.) Copies of correspondence confirming the discussion with the Office of the Secretary of the Commonwealth are attached as Exhibits B and C. Given these pronouncements from the Office of the Secretary of the Commonwealth, Counsel for the Center attempted to seek assurances from district attorneys for the counties in which the Center planned to spend money for and disseminate its ads that the ads would be permissible under Pennsylvania law. *See* Exs. D, E, and F. The Center has not received such assurances. Defendant Lynne Abraham did not respond to the letter at Exhibit D; Defendant Joseph W. Carroll left a voicemail message with Counsel stating that he could not provide the requested assurance; and Defendant G. Michael Green responded with the letter at Exhibit G.

10. The term “expenditure” is also used in defining “political committee” under Pennsylvania law. 25 Pa. Stat. § 3241(h). The Center will not and, as a matter of policy, cannot accept the burdens and intrusions associated with political committee status. *See* 25 Pa. Stat. §§ 3244, 3246. For this further reason, Pennsylvania’s vague, subjective, and overbroad definition of “expenditure” chills the Center’s speech.

### **The Irreparable Injury**

11. The Center has been planning and desires to speak to the public in the communities located in the Eastern District of Pennsylvania, including Philadelphia and the foregoing counties, on significant matters of litigation reform and related justice issues. The issues it intends to address include criminal law enforcement and sentencing, legal reform, and judicial decision-making. These are issues that are important for Pennsylvanians to consider as a general matter, whether or not an election is occurring.

12. The Center’s plan is to spend its funds to prepare and broadcast such speech through issue ads to be run on radio and television stations such as KYW-AM, WPVI-TV, WTXF-TV, KYW-TV, and others carried by Comcast cable services. The ads would run during the months of September and October because during that period leading up to the election of Pennsylvania’s Supreme Court Justices, citizens are attuned to such policy issues. The Center’s planned ads will refer to Pennsylvania candidates to illustrate its points. The necessary funds are available. The Center has identified and initiated work with vendors to create and disseminate the ads. Substantial resources already have been spent, although the precise content and format of the Center’s speech will depend on an assessment of circumstances at the moment the speech is to be disseminated.

13. However, concerned that spending for its ads would be deemed a prohibited “expenditure,” and unwilling to expose itself and its staff to potential criminal charges, the Center has been forced to suspend further activities pending judicial relief. The chill the Center presently is experiencing is actual and existing irreparable constitutional injury. The chill and enforced silence the Center faces in the future is continuing and immediately threatened irreparable constitutional injury. This action is being filed now to allow orderly judicial consideration and meaningful relief.

14. Citizens of Pennsylvania are particularly interested in and attuned to discussion of litigation reform and justice issues during the period that elections to the Pennsylvania Supreme Court are being contested. The Pennsylvania Supreme Court often has responsibility for many of the issues that the Center plans to address. In the judgment of the Center, those issues can be framed clearly, and the views of the Center can be communicated and illustrated most effectively, by reference to the role of the Court and views of candidates in that election.

15. The Center has already missed one opportunity to address litigation reform and justice issues with the citizens of Pennsylvania now that the May 15, 2007, primary election has passed. Its remaining opportunity to do so at a time when the public is primed to think about and debate these issues will be in the months leading up to the general election on November 6, 2007.

16. The opportunity to place the Center’s views regarding the foregoing issues into the public debate in the context of the 2007 judicial election, when two Justices will be elected to the Pennsylvania Supreme Court, will only occur over the next few months. Indeed, if judicial



relief is to be meaningful, it must be obtained not later than September 7, 2007, so as to permit the finalization, production, and dissemination of the Center's issue advertising.

17. The speech the Center wishes to protect will not "expressly advocate" the election or defeat of any candidate for public office in Pennsylvania as that term is defined in *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976). None of the Center's contemplated advertisements would contain such express advocacy. Similarly, the speech the Center seeks to protect will be independent and not coordinated with any candidate, campaign, or political party.

18. There are residents of the Eastern District of Pennsylvania who are interested in the Center's views on justice issues and who desire to receive the intended speech of the Center. The challenged laws defeat their right to receive such speech.

19. But for the threat posed by the challenged laws, the Center would be actively creating – and soon delivering – its planned public speech for this District.

20. The existing and threatened injuries to the rights of the Center and its willing listeners will become greater and more acute as the election approaches, and there is no adequate remedy at law. Thus, prompt judicial injunctive and declaratory relief is essential.

21. The Center also intends to address justice issues during Pennsylvania's pre-election periods over the coming years. Thus, permanent relief is necessary to prevent ongoing irreparable injury.

22. The injury to the Center and its intended Pennsylvania audience is irreparable. Monetary relief is not realistically available and, in any event, could not fully and fairly compensate for the loss of core First Amendment rights.

## Violations of Law

23. The core objective of the First Amendment is to protect and encourage free public speech about political and public issues. It protects both the Center's right to speak out, and also the right of its listeners to receive such speech. Accordingly, the Center may assert not only its own First Amendment rights, but also those of the persons to whom it wishes to speak and who wish to receive its message.

24. Money must be spent to address the public effectively. Television and radio have become essential means of public discourse. Thus, the First Amendment protections extend to spending for speech.

25. To the extent that the First Amendment permits any limits on such core speech, those limits must be particularly precise, objective, and narrow. *Buckley*, 424 U.S. at 41-44, 78-80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 245-50 (1986) (“*MCFL*”); *McConnell v. FEC*, 540 U.S. 93, 194 (2003). This is doubly true where, as here, criminal penalties may be imposed. *Buckley*, 424 U.S. at 41-42. The reason such a uniquely demanding standard applies is that imprecise, subjective, or overbroad standards unconstitutionally induce self-censorship as speakers “hedge and trim” and “steer far wider of the [forbidden] zone ... than if the ... forbidden areas were clearly marked.” *Id.* at 43, 41 n.48 (collecting authority; internal quotation marks omitted). This constitutes constitutional injury both to the speakers whose speech is limited, and to the listeners who are deprived of the opportunity to hear such speech, thereby defeating the core purpose of the First Amendment.

26. The Supreme Court of the United States repeatedly has held that language similar to that which Pennsylvania uses to define prohibited expenditures is impermissibly vague,

subjective, and overbroad in violation of the First Amendment. *Buckley*, 424 U.S. at 43-44, n.52, 78-80 (the federal definition of “expenditure” using “for the purpose of ... influencing” is facially vague and overbroad); *see also MCFL*, 479 U.S. at 248-250 (the federal statutory prohibition on corporate expenditures “in connection with any election” is vague and overbroad); *McConnell*, 540 U.S. at 192 (reaffirming *Buckley* and *MCFL*). The Court has held, however, that the First Amendment is satisfied where similar language is narrowly construed to apply only to speech that contains explicit language such as “vote for” or “elect” to expressly advocate the election or defeat of a clearly identified candidate. *See Buckley*, 424 U.S. at 43-44; *MCFL*, 475 U.S. at 248-50. The Center acknowledges that it is capable of applying this “express advocacy” standard to guide its speech activities.

27. Indeed, the Pennsylvania Election Code is even less precise, objective, and narrow than the foregoing. Its provisions fail to give sufficient advance notice as to what is subject to regulation and punishment, in violation of the First and Fourteenth Amendments to the United States Constitution.

(a) The challenged laws are vague. The statutory definition of “expenditure,” which turns on the phrase “for the purpose of influencing the outcome of an election” and the prohibition on any corporate “expenditure in connection with the election of any candidate or for any political purpose” have no clear and definite meaning that can be ascertained with confidence before speaking.

(b) The challenged laws are subjective. The statutory definition of “expenditure” requires a subjective assessment by government authorities as to the “purpose” of speakers. Intent often is misconstrued. Moreover, because organizational speakers consist of

various persons and entities acting through other persons and entities, determining how regulators will construct such an organization's intent is very difficult. Furthermore, the vagueness of the phrases "influencing the outcome of an election," "in connection with the election," and "any political purpose" requires that they be applied subjectively.

(c) The challenged laws are overbroad and not narrowly tailored. The vagueness of the phrases "influencing the outcome of an election," "in connection with the election," and "any political purpose," coupled with their subjective application, results in regulation of spending for any activity even where it is not connected to a compelling government interest.

28. The challenged laws burden the rights of the Center to engage in political speech, thus violating the First and Fourteenth Amendments to the United States Constitution. Moreover, they burden the right of the Center's supporters to associate to engage in such speech, as well as listeners in Pennsylvania who wish to receive the Center's speech.

29. The challenged laws are facially invalid for the reasons set out above. Moreover, they are invalid as applied to the Center and to other similarly situated organizations and to speech of the type intended by the Center.

30. The challenged laws were enacted and are maintained, and Defendants' enforcement responsibilities were established and are exercised, under color of law of the Commonwealth of Pennsylvania. The violations of First and Fourteenth Amendment rights caused by those laws, the threat that Defendants will participate in the enforcement of those laws, and the existing and threatened injuries that result, violate 42 U.S.C. § 1983.

31. There is, accordingly, a substantial probability that the Center will succeed on the merits of its legal position.

#### **Actual Case or Controversy**

32. The Center has a well-founded fear that, if it speaks as it wishes, Defendants will enforce the challenged laws against it. For that reason, the Center is refraining and will refrain from core speech until and unless judicial relief is obtained. Irreparable injury has been and is being imposed on – and continues to threaten – the Center, its supporters, and its intended audience.

#### **Balance of Harm**

33. In light of the gravity of unconstitutional chilling of speech and the irreparable injury that it is causing, substantially greater harm will be caused by the failure to grant the requested relief than would be caused by the granting of such relief.

#### **Prayer**

WHEREFORE, Plaintiff Center for Individual Freedom requests preliminary and permanent injunctive relief from the enforcement of the challenged laws, an expedited declaration that the laws are vague, inadequately tailored, and void, an expedited declaration of the legal standards that will apply to the Center's conduct, an award of legal fees and expenses pursuant to 42 U.S.C. § 1988, and such other relief as may be just.

Respectfully Submitted,

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