IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas W. Corbett, Jr., Attorney General of Pennsylvania and Pedro A. Cortes, Secretary of the Commonwealth, Plaintiffs v.	:	No. 524 M.D. 2007
Center for Individual Freedom, Defendant	:	HEARD: November 2, 2007

BEFORE: HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FEUDALE FILED: November 2, 2007

Before the Court is a petition for special injunction filed by Thomas W. Corbett, Jr., Attorney General of Pennsylvania, and Pedro Cortes, Secretary of the Commonwealth (collectively, "The Commonwealth"). At issue is a 30-second message (ad) presently being aired on television stations in the Philadelphia and Lehigh Valley areas of Pennsylvania, which the Commonwealth alleges violates Pennsylvania Law.[1] The ad, paid for and presumably produced by the Center for Individual Freedom (CFIF), began running on Monday, October 29, 2007, eight days prior to the Municipal Election set for November 6, 2007 at

[1] The alleged violation is of Section 1633 of the Election Code, Act of June 3, 1937, P.L. 1333, as amended. Section 1633 was added by the Act of Oct. 4, 1978, P.L. 1313.

which two seats on the Pennsylvania Supreme Court are to be filled by election. Four candidates will appear on the ballot for those positions, including Superior Court Judge Maureen Lally-Green.

As of today, the ad has been aired for five days, and only four days remain until the election (including Election Day itself). Prior to airing (and perhaps producing) the ad, CFIF and the Attorney General of Pennsylvania were engaged in litigation before Judge Anita Brody in the United States Federal Court for the Eastern District of Pennsylvania in August of 2007.[2] That litigation resulted in a consent decree on August 18, 2007, in which the parties agreed that Section 1333 of the Election Code could only constitutionally be applied to spending for "express advocacy" as defined by the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976).[3]

United States Supreme Court precedent has made clear that the First Amendment Guarantee of Free Speech applies in the political arena and that its regulation is subject to strict scrutiny by the Courts. States may regulate

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[2] Civil Action No. 07-2792, United States District Court for the Eastern District of Pennsylvania. The stipulated judgment was entered on August 18, 2007 and approved by District Judge Brody. At the hearing on the preliminary injunction, defendant requested that the Court stay its hearing because an enforcement action had been filed in the Federal Court, and a hearing scheduled before Judge Brody on Monday, November 5, 2007. The Court declined to stay today's hearing. While certainly related, we do not view the federal action in declaratory judgment as limiting this Court's equitable jurisdiction where the Commonwealth asserts an immediate need for preliminary injunctive relief. Additionally, the timing of this action shortly before the election is such that the federal court will be unable to furnish any meaningful relief prior to the election in light of the federal court scheduling its hearing for the afternoon of November 5, 2007.

[3] Section 1633 by its express terms prohibits certain entities from making a contribution or expenditure "in connection with the election of any candidate or for any political purpose whatever" except for certain ballot questions. The parties agreed in the federal court action that, pursuant to U.S. Supreme Court precedent, the statute is overbroad and be considered constitutional only if limited to "express advocacy," meaning language that advocates "in express terms" "the election or defeat of a clearly identified candidate."

"third-party speech," i.e., messages by groups other than the candidates themselves, only where the speech "expressly advocates" the election or defeat of particular candidates. Buckley. On the other hand, such groups may freely air "issue" statements, which the government may not prohibit under the guise of campaign finance laws. Put simply, if a group says "vote for Jones" or "defeat Smith," it is subject to governmental regulation and must register and report its activities. Where a group merely advocates an issue, such as "support pro-life (or pro-choice) candidates," "protect the Second Amendment," or "support reasonable gun regulation," such activities are protected and cannot be regulated.

The ad at issue is a thirty-second televised message, urging listeners to "Thank" Judge Maureen Lally-Green for her work "supporting Pennsylvania families."[4] The ad does not mention the election for Pennsylvania Supreme Court, nor does it mention that Lally-Green is a candidate for election to that office. Near the end of the ad, viewers are urged to "thank" Judge Lally-Green by visiting "www/thanklally-green.com" That site contains an "online petition" which visitors are invited to sign, which will be "sent directly to Judge Lally-Green."[5] By running the ad a week before the Municipal Election,

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[4] As of the date of the hearing, the ad could be viewed on youtube.com at http://www.youtube.com/watch?v=bnifj2A7Has or by placing the query "Lally-Green" in the search box.

[5] The text of the online petition appears as of today's date at www.thanklally-green.com." Apparently, the "petition" can only be validly signed by completing a form that requires a minimum of first and last name, e-mail, city and zip code. The "petition," while expressing "thanks," also contains other laudatory expressions similar to those found in the ad itself, such as

Whereas, you have taken tough stands, including cracking down on violent criminals and protecting children who are victims of abuse by putting their interests first; and

one might reasonably assume that the timing was intended to influence the election.

Recently, however, the United States Supreme Court concluded that the intent of the message is not determinative. Federal Election Comm'n v. Wisconsin Right to Life, Inc., ___ U.S. ___, 127 S.Ct. 2652 (decided June 25, 2007, slip op. at 15). Rather, a court may find that an ad is the "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Id. Notably, the ad at issue in Wisconsin Right to Life "did not mention an election, candidacy, political party or challenger, and did not take a position on a candidate's character, qualifications, or fitness for office. As described above, the ad at issue here does not mention the election for Pennsylvania Supreme Court, does not mention that Judge Lally-Green is a candidate for the office of Supreme Court Justice, does not mention any opponent or political affiliation of Lally-Green or any other candidate. The ad does, however, clearly discuss Lally-Green's character and qualifications.[6]

Whereas, state law enforcement has praised your stands as being "trustworthy" and having "integrity;" and

Whereas the legal community has called your decisions "outstanding;" and

Whereas, one state newspaper said your judgments show "unshakable impartiality and a commitment to the constitution."

[6] The Supreme Court of Washington recently decided that ads entitled "Better" which stated in part that the former State Insurance Commission had "let us down" constituted direct advocacy in urging voters to vote against her in a campaign for state Attorney General. Voters Education Committee v. The Public Disclosure Commission, 2007 Wash. LEXIS 701, filed September 13, 2007. The Court found that by running the ad during the campaign for Attorney General, it could only be viewed as the functional equivalent of direct advocacy opposing her candidacy.

A preliminary injunction may properly issue where necessary to prevent immediate and irreparable harm which cannot be compensated by damages; where a greater injury would result from refusing the injunction than from granting it; where the injunction properly restores the parties to their positions *status quo ante*, and where petitioners' right to relief is clear. Philadelphia v. District Council 33, 528 Pa. 355, 598 A.2d 256 (1991).

The Court believes that the ad at issue may well cross the line and ultimately could be found to constitute "express advocacy" similar to that found by the U.S. Supreme Court. Given the most recent pronouncement in Wisconsin Right to Life, however, it cannot be said with certainty that the ad constitutes "express advocacy," as it lacks many of the criteria discussed in Wisconsin Right to Life, while including some of the others. Moreover, the law in the area appears to be evolving, making it more difficult to conclude that plaintiffs have a "clear right to relief." In the present case, the ad is skillfully written and never mentions the election for Supreme Court Justice. It does not "expressly advocate" the election of Judge Lally-Green. Nevertheless, the overall impression of the ad would appear to the average viewer to be at minimum an endorsement of Judge Lally-Green, and, despite the exhortation to sign an online petition, would also give the impression that CFIF is asking viewers to vote for Judge Lally-Green. While the online petition would appear to be merely a ruse to justify the airing of an add that otherwise would constitute "express advocacy," I cannot dismiss it, as the ad could be "susceptible of [a] reasonable interpretation other than as an appeal to vote for" Lally-Green.

The Court must also consider and balance the harms that may arise from the grant or denial of an injunction. The Secretary correctly argues that allowing an unlawful ad to continue contrary to state law constitutes manifest harm. Respondent, however, also correctly argues that courts should be loathe to enjoin First Amendment speech. I am constrained to find that the harms favor the defendant. The Commonwealth asserts that violation of law constitutes harm *per se*. The asserted violation is of Section 1633(a) of the Election Code (cite), 25 P.S. §3253(a), which prohibits corporations from making "any expenditure in connection with the election of any candidate . . . ." It would appear, however, that Section 1843 of the Election Code, 25 P.S. §3543, provides the penalty for violation of Section 1633(a), providing that any corporation or unincorporated association that is convicted of violating Section 1633(a) "shall be sentenced to pay a fine of not less than one thousand dollars nor more than ten thousand dollars." Additionally, any director, officer, agent or employe of any such corporation or association who is convicted of violating Section 1633(a) shall be guilty of a misdemeanor and sentenced to pay a fine not exceeding ten thousand dollars or undergo imprisonment of not less than one month nor more than two years. Having thus provided this penalty, the Commonwealth is not without recourse. Defendant and its directors, agents and employees may be also well-advised to consider the potential penalties outlined above in deciding whether to continue airing this message or when producing any future televised messages. They do so at their own peril, subjecting themselves to possible fines and/or imprisonment.

Curtailment of the arguably constitutional right to air the ad would amount to severe and irreparable harm to defendant, as the message is clearly timed to coincide with next week's election.[7] As the 10th Circuit Court of Appeals recently stated: "Deprivations of speech rights presumptively constitute **irreparable harm** for purposes of a preliminary **injunction**: 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Summum v. Pleasant Grove City, 483 f.3d 1044 (10th Cir. 2007)(filed April 17, 2007)(citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), *quoted in Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221,1235 (10th Cir. 2005), *and Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003).

Finally, this jurist cannot help but comment that characterizations of judges as "conservative," "liberal" "strict constructionist" or "activist" have become so commonplace that much of the voting public repeats them as a sort of mantra. Moreover, the rhetoric has become exceedingly shrill in recent years, and ads such as that at issue here serve to increase that shrillness. An examination of judges' records, at least in this State, however, would reveal that, with few exceptions, the vast majority of judges, while perhaps susceptible to one of the labels set forth above, strive to follow the law even when it takes them to conclusions that they would not have reached if left to their own devices or ideologies. Such is the conclusion here today. The experience, education, philosophy and logic of this judge could reasonable lead to a result other than

[7] As stated earlier, intent of the group airing the ad cannot be considered as a factor.

that which is reached here. Nonetheless, an objective examination of the facts and law within the limited time available leads me to the conclusion that the request for preliminary injunctive relief must be denied.

Accordingly, I enter the following ORDER.

Barry F. Feudale, Senior Judge

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v.	:	
Center for Individual Freedom, Defendant	:	

ORDER

AND NOW, this 2nd day of November, 2007, Plaintiffs' request for special injunction in the above-captioned matter is DENIED.

Barry F. Feudale, Senior Judge

Certified from the Record

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