

Duo of federal court rulings deal blow to dark money disclosure laws

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Two federal judicial decisions handed down recently—one in the Southern District of New York and the other in the District of New Jersey—dealt significant blows to state disclosure laws designed to shine a light on “dark money” donors to nonprofit organizations engaged in educational and social welfare activities. On September 30, the US District Court for the Southern District of New York issued a ruling in *Citizens Union of the City of New York v. Attorney General of the State of New York* (Case 1:16-cv-09592-DLC-KHP) striking down provisions of the state’s 2016 ethics law on grounds that it violated the First Amendment. In an opinion by District Judge Denise Cote, the court ruled that the provisions of the New York 2016 ethics law that required nonprofit organizations to disclose donor information impose overly broad restrictions on the nonprofits’ First Amendment rights of free speech and burden donors’ rights to free association and privacy.

Under the 2016 ethics law, 501(c)(3) and 501(c)(4) nonprofit organizations were required to disclose certain personal information about donors that meet certain expenditure thresholds. For 501(c)(3) entities, the identity of any donor contributing more than \$2,500 in a calendar year to the entity had to be disclosed if the organization made an in-kind contribution to any 501(c)(4) that engages in lobbying activity. Judge Cote struck down this provision on grounds that that the state failed to prove a substantial relation between requiring disclosure of donor identities and any important government interest.

The New York law similarly required 501(c)(4) organizations to disclose the identity of any donor contributing more than \$1,000 upon the entity spending \$10,000 or more on “covered communications” in a calendar year. The law defined “covered communications” as any communication made to at least 500 members of the public that advocates for or against a clearly identified elected official. The definition of “covered communications” also extended to any communication that reaches 500 members of the public and advocates for or against a position, pending action or potential action of any elected official or any administrative or legislative body. In her ruling, Judge Cote noted that the law cast too wide a net in attempting to institute donor disclosure requirements, reasoning that under the law any issue of public importance could be considered the subject of proposed or potential legislation. This overly broad definition of “covered communications” stretched the donor disclosure requirements of the New York ethics law beyond other donor disclosure laws, which pertain only to election activities or direct lobbying contact with elected officials, she noted.

A similar ruling was handed down by the US District Court for the District of New Jersey on October 2 in *Americans for Prosperity v. Gurbir Grewal* (Case 3:19-cv-14228-BRM-LHG). The ruling, issued by District Judge Brian Martinotti, granted a preliminary injunction to prevent the donor-disclosure elements of New Jersey’s nonprofit disclosure law (New Jersey Senate Bill 150) from taking effect while litigation continues. Judge Martinotti’s opinion granted the injunction on the ground that the law’s provisions triggering donor disclosure requirements were overly broad by mandating reporting if an entity’s communications were determined to “influence or attempting to influence” political activity.

New Jersey’s law would require state independent expenditure committees (which under the applicable definition

would cover 501(c)(4) and 527 organizations) that raise or spend \$3,000 in a calendar year for the purpose of influencing or attempting to influence elections and legislation to disclose the identities of any donors who annually contribute more than \$10,000. Additionally, the law also contains a provision triggering donor disclosure requirements if the entity provides “political information” to the public. The law defines “political information” as any statement made through a publicly available medium that reflects the organization’s opinions or contains facts on a candidate, public question, legislation or regulation.

Judge Martinotti sided with the plaintiffs, holding that the law as currently written violates free speech protections and donors’ rights to advocate anonymously, both of which are protected under the First Amendment. By forcing organizations to publicly disclose donor information, the judge wrote, the law could subject donors to a range of negative repercussions, up to and including violence and other threats, and therefore chill the exercise of First Amendment rights to association and political speech. Another issue for Judge Martinotti, and one in keeping with the trend seen in the New York ruling, was the proposed law’s overly broad definition of a term—in this case “political information”—that could trigger disclosure. Judge Martinotti, like his counterpart in the Southern District of New York, feared that the manner in which the state law was drafted by the New Jersey legislature could potentially result in purely factual information being considered partisan language attempting to influence political activity, thus subjecting an exorbitant amount of speech to state regulation.

New Jersey Governor Phil Murphy (D) issued a veto threat for an earlier version of the disclosure law citing concerns that the bill language was likely unconstitutional. While the court ruled in favor of the plaintiffs, it did note that New Jersey lawmakers could take action to correct the law’s weaknesses, or the state’s Election Law Enforcement Commission could take action to provide regulatory clarity. Meanwhile in New York, the ruling dealt a blow to Governor Andrew Cuomo (D) and other watchdog and political transparency groups that have been working in tandem with his administration to promote increased public disclosure in the nonprofit policy-engagement arena. Both rulings could serve as blueprints for other courts to strike down disclosure laws, which are proliferating around the country in high-regulation jurisdictions.

Dentons Political Law team will continue to monitor the legal issues and developments surrounding disclosure rules for nonprofit organizations and other politically-attuned entities.

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