

Political Law Playbook – February 2024

DENTONS

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Introduction

Welcome to the February edition of the Political Law Playbook. In this month's newsletter, the 2024 Presidential election takes center stage as the results of the initial primary contests roll out and former President Trump's legal battle to qualify for the Colorado ballot reaches the country's highest court. As in several of our recent editions, this month's newsletter spotlights how both the federal government and various states are grappling with the use of artificial intelligence (AI) in political settings. Additionally, a former Philadelphia mayoral candidate has sued the city's Ethics Board for personally targeting him during his failed election bid, and a federal judge has enjoined part of a new election law in North Carolina.

Federal Elections & Campaign Finance

Supreme Court Appears Skeptical of Colorado's Decision to Exclude Former President Trump from the Ballot

– Earlier this month, the US Supreme Court heard oral arguments in former President Donald Trump's appeal of a December 19 ruling by the Colorado Supreme Court removing Trump from the state's presidential primary ballot under Section 3 of the 14th Amendment for his role in conjunction with the January 6 attack on the US Capitol. Over the course of more than two hours of debate, the Court's conservative and liberal justices alike questioned the wisdom of allowing a state to make its own decisions about whether a candidate should appear on the ballot, both because of the effect that such decisions would have on the rest of the country and because of the challenges that courts would face in reviewing those decisions. It is unclear when the Supreme Court will issue its decision. However, the Court will likely act quickly given the significance for other states where challenges to Trump's eligibility are pending.

“President Biden” Wins the New Hampshire Democrat Primary Despite Not Being on the Ballot – President Joe Biden declined to appear on the presidential preference primary ballot in New Hampshire earlier this month because of a dispute between the state and the Democratic National Committee (DNC) over the date of the state's election. The DNC ordered the state to move its election to a later date to allow the South Carolina primary to kick off the party's 2024 presidential nomination process. This was done despite the requirement under New Hampshire state law that it hold the first-in-the-nation primary. Despite President Biden not formally appearing on the ballot, outside groups successfully campaigned New Hampshire voters to write-in the President's name, as he received 63.9% of total votes cast.

AI-Linked Robocall in NH Primary Foreshadows Basis for New FCC Declaratory Ruling on Artificial Calls –

The New Hampshire Attorney General's office recently announced that it is investigating reports of an apparent robocall that allegedly used artificial intelligence to mimic President Joe Biden's voice and discourage voters in the

state from coming to the polls during the primary election. The call urged voters to save their votes for the November election and that voting in the Primary would only “[enable] the Republicans in their quest to elect Donald Trump again...” It is unclear how many total voters received the call, but the NH Attorney General characterized the robocalls as an illegal attempt to disrupt the primary election. In **the wake** of the problematic robocall, the Federal Communications Commission **issued a Declaratory Ruling** outlawing unwanted robocalls that contain voices generated by AI. The new Ruling classifies calls made with AI-generated voices as “artificial” for FCC regulatory purposes and thus places them squarely within the purview of consumer protection laws regulating automated dialers and artificial and prerecorded voice messages.

FEC Approves Advisory Opinion Regarding Nonfederal Committees for Federal Candidates & Officeholders –

Last month the Federal Election Commission (FEC) approved an advisory opinion to allow federal candidates and officeholders to establish a nonfederal committee to raise and spend funds exclusively in connection with nonfederal elections, subject to the contribution limits and source prohibitions of the Federal Election Campaign Act. The **final opinion** approved by the Commission responded to a request on behalf of Senator Catherine Cortez Masto (D-NV) regarding her desire to establish a Nevada political committee to raise and spend funds only in connection with nonfederal elections in Nevada without having to aggregate donors’ contributions with any state PAC or the Senator’s federal leadership PAC for contribution limits purposes. The opinion concluded that federal candidates and officeholders may establish nonfederal committees as proposed and that such committees will not share a contribution limit with the officeholders’ federal leadership PAC.

FEC Issues Advisory Opinion Regarding Whether Hybrid PACs May Solicit Earmarked Contributions –

The FEC also recently approved an advisory opinion involving the solicitation of earmarked contributions by federal hybrid PACs. The **final opinion** responded to a request on behalf of VoteDown PAC, a hybrid PAC that proposed serving as a conduit for contributions made to candidates that it identifies as the leading opponents to officeholders. The Commission concluded that donations received and forwarded by VoteDown PAC, based upon preselected criteria to identify leading opponents to incumbent officeholders, would be considered earmarked contributions attributable only to the original contributor, and that the PAC could forward the earmarked funds to a national party committee if the designated candidate is unable or unwilling to accept them.

No Labels Sued by New York Donors Claiming “Bait and Switch” – Two donors recently sued the self-professed centrist political group No Labels, accusing it of a “bait and switch” by seeking donations for a bipartisan governing group and then moving to fund a potential third-party presidential candidacy. Filed in New York, the suit seeks damages and reimbursements for the Plaintiff contributors who donated \$145,000 on the promise that No Labels would find governing solutions. Instead, the donors argued that No Labels’ work on presidential ballot access for a third-party candidate will discourage bipartisan reform because it will take votes away from one of the major political candidates. In a statement responding to the suit, No Labels claims that the donors mischaracterize the group’s mission, asserting that its ballot access effort is in line with the group’s mission to give a voice to America’s common-sense majority.

Coalition Calls on Presidential Candidates to Reveal their Campaign “Bundlers” – In collaboration with 14 other groups, the bipartisan election reform organization Issue One has **renewed** its call for the 2024 presidential candidates to release information about their fundraising “bundlers.” The term “bundler” is used to describe an individual who solicits contributions from their friends, social contacts, and business associates and is credited by the campaign for the money they raise. Bundlers often raise significant sums of money for presidential candidates which, the coalition suggests, enables these individuals to curry favor with candidates. Under both Democratic and Republican administrations, bundlers have received highly coveted postings such as ambassadorships, political appointments, and advisory commission roles. The coalition has requested that information about these individuals be made publicly available to demonstrate a commitment to transparency in campaign finance. Federal law requires that committees disclose those bundlers that are registered as lobbyists at the federal level, but no other applicable

disclosure obligations exist.

FEC Increases Lobbyist Bundling Disclosure Threshold – Federal law requires certain political committees to disclose information about lobbyists/registrants and lobbyist/registrant PACs whose bundled contributions within a covered period exceed a specified threshold. Each year the FEC must adjust this threshold amount, and the threshold announced for 2024 is \$22,700.

Senators Kelly and Ossoff Reintroduce the Ban Corporate PACs Act – Last month, Senator Mark Kelly (D-AZ) and Senator Jon Ossoff (D-GA) reintroduced their Ban Corporate PACs Act. First introduced in 2022, **the Act**– if passed–would: (1) eliminate the ability of for-profit corporations to establish and manage a PAC; (2) eliminate the ability of for-profit corporations or PACs to solicit contributions from corporate stockholders; and (3) require that existing corporate PACs be terminated and funds be fully disbursed within one year after the Act’s enactment. The bill is awaiting committee referral, but unlikely to gain much traction.

Rep. Matt Cartwright Reintroduces Bill to Make Corporate and 501(c)(4) Political Activity Subject to Increased Reporting Obligation – In recent weeks, Congressman Matt Cartwright (D-PA) also reintroduced **the Openness in Political Expenditures Now (OPEN) Act**. The OPEN Act would require corporations to disclose political spending in their regular reports to shareholders and would also cap political spending by tax-exempt 501(c)(4) organizations that are not generally required to disclose their donors to the public. The bill was referred to the House Administration Committee and is currently awaiting review.

Federal Lobbying & Ethics

Lobbying Expenditures by Big Spenders Dipped in 2023 – According to *Roll Calls* review of federal lobbying during the 2023 calendar year, the US’ largest industry groups substantially reduced their spending on lobbying Congress and the federal executive branch last year as compared to 2022, with total expenditures falling from \$326.6 million to \$283.1 million. This is about a 13 percent decrease from 2022 to 2023. According to *Roll Calls* analysis, top issue areas for lobbyists in 2023 included tax policy, artificial intelligence, and China issues, along with perennial issues like health care and defense.

Department of Justice Investigating Representative Cori Bush for Alleged Impermissible Campaign Spending – Representative Cori Bush (D-MO) recently confirmed that the US Department of Justice is investigating possible improprieties involving her personal use of campaign funds and her committee’s hiring of her husband to provide security services. The Representative also confirmed that the FEC and the House Ethics Committee are similarly investigating her for potential violations of campaign finance and ethics rules. Bush claims that the alleged use of campaign funds to pay for her husband’s services was permissible under applicable FEC rules, but could nevertheless face serious ramifications if any of the three inquiries find illegal or improper behavior.

Non-Federal Elections and Campaign Finance

Former Philly Mayoral Candidate and Super PAC Sue City’s Ethics Board – Former Philadelphia Mayoral Candidate Jeff Brown and an aligned Super PAC – For a Better Philadelphia – recently filed suit against the Philadelphia Board of Ethics and its Executive Director alleging that they maliciously attacked him and harmed his reputation during his mayoral campaign. In spring 2023, the Board investigated For a Better Philadelphia and concluded that the PAC had improperly coordinated its fundraising activities with Brown. The Board ordered the PAC to stop buying ads and making other expenditures in support of Brown. The PAC agreed to stop, but continued paying for election mailers that did not name Brown. A day before the first televised mayoral debate, the Board asked the Pennsylvania Court of Common Pleas to issue an injunction to halt the PAC’s activities. The Court temporarily

ordered the PAC to stop spending on behalf of Brown's campaign, but ultimately ruled against the Board, finding that the state's coordination rule did not apply to the pre-candidacy period. The suit seeks financial damages for the PAC, a declaration that Brown's rights were violated, and a "name-clearing hearing" that would seek to uncover whether the Executive Director or someone else leaked information about the Board's investigation to the media.

5th Circuit to Rehear Case Over Louisiana Supreme Court Districts – The US Court of Appeals for the Fifth Circuit has granted a request for a rehearing *en banc* in *Chisom v. State of Louisiana*, a gerrymandering lawsuit stemming from the 1980s. In the original suit, Black voters argued that Louisiana gerrymandered the Louisiana Supreme Court districts by packing African American neighborhoods into majority-white districts. Although the case ultimately reached the US Supreme Court, the state agreed to a consent decree in 1992 that created Louisiana's only Black majority Supreme Court district. In 2021, then-Attorney General (now Governor) Jeff Landry moved to dissolve the consent decree ahead of the legislature's 2022 redistricting special session. The US District Court initially denied the state's request to dissolve the consent judgment, as did a three-judge panel of the Fifth Circuit. Oral arguments in front of the *en banc* panel are tentatively scheduled for May.

Part of North Carolina's New Election Law Enjoined in Advance of 2024 Election – Last month, a federal district court judge issued an injunction temporarily prohibiting North Carolina from enforcing a portion of the state's new election integrity law related to same-day voter registration processing matters. Under the questioned provision of the new law, the state would have sent out a postcard to verify the address of each voter who registers or changes their address at early voting sites. If the card was found to be undeliverable, the relevant voter's ballot would be canceled and not tallied. In issuing his temporary injunction, the judge found that it was likely the provision violated voters' due process rights by throwing out potentially legitimate ballots without giving voters a chance to fight the decision or remedy the address error. The injunction decision means that the same-day registration protections will likely not be used in this year's elections. Democrat challenges to other parts of the new election law are ongoing, including claims that the law's mail-in voting restrictions and poll observation access provisions are improper.

New Mexico Lawmakers Propose Legislation to Disclose AI Used in Campaign Ads – A bill introduced in the New Mexico House of Representatives will require disclosure of the use of AI in political advertisements. If enacted, an ad created using AI will need to include a disclaimer that it has been manipulated or generated by AI. On **February 8**, the House Judiciary Committee recommended that its version of the bill be passed. If the bill becomes law, it will be effective immediately.

Non-Federal Lobbying & Ethics

RI Ethics Commission Dismisses Complaint Against Governor McKee – The Rhode Island Ethics Commission recently dismissed a complaint that claimed Governor Daniel J. McKee violated the state's ethics code by accepting a free lunch with a lobbyist. The **complaint**, filed by the Rhode Island Republican Party, accused the Democrat Governor of participating in "pay-to-play" culture by accepting lunch with a lobbyist and executives at a consulting firm contracting with the state on a redevelopment project. Under the Rhode Island state ethics law, officials may not accept items worth \$25 or more from those seeking to do business with the government. Although the lobbyist paid for the lunch, the Governor was told that his campaign would be paying and his campaign treasurer had requested the lobbyist send an invoice for the meal. With these facts, the Commission found no probable cause to believe that Governor McKee committed a knowing and willful violation of the state's ethics code.

Former Los Angeles Councilman Sentenced to 13 Years in Prison in Corruption Case – Former Los Angeles City Councilmember Jose Huizar was recently sentenced to 13 years in prison for his role in a series of criminal bribery schemes. According to his plea agreement, Huizar repeatedly accepted bribes from downtown developers eager to win city approval for their projects. The described bribes purportedly came in the form of campaign donations

and other personal benefits provided to the Councilman. Commenting on the length of the sentence, the District Court asserted it was needed, in part, to “engender respect” for the nation’s anti-corruption laws.

Arizona House Ethics Committee Finds that Representative’s Inappropriate Behavior Violated Arizona House Rules – Rule 1 of the **Rules of the Arizona House of Representatives** states that the House may punish its members for disorderly behavior. In its report released at the end of January, the Arizona House Ethics Committee found that Representative Leezah Sun committed a “pattern of disorderly behavior” that culminated in a death threat against a lobbyist. The Committee referred its report to the House to determine what disciplinary measures should be taken. Legislators who violate the rules of their governing body typically face censure or expulsion, both of which require a majority vote.

Practice Pointers

In anticipation of the slew of political advertisements that you will no doubt find yourself in front of over the next nine months, this month’s Practice Pointers highlight the role that Super PACs and Hybrid PACs play during an election year. As our readership is well aware, Super PACs, or those political committees that only make independent expenditures, may accept and solicit unlimited contributions from individuals, corporations, labor organizations, and other political committees. Hybrid PACs, also known as *Carey* PACs, are political committees with two separate accounts: a non-contribution account that functions like a Super PAC, and a contribution account, which is subject to the statutory contribution limits and may make contributions to federal candidates. Super PACs and Hybrid PACs have played an increasingly outsized role in federal elections recently, and the 2024 election cycle is shaping up to be no different.

In 2020, Super PACs collectively spent more than **\$2 billion** on federal elections. In January, the main Super PAC supporting President Biden’s re-election bid began to reserve **\$250 million** in advertising space across the most important battleground states including Arizona, Georgia, Pennsylvania, and Wisconsin. The main Super PAC backing Nikki Haley raised **\$50.1 million** in the second half of 2023, while a Trump-aligned Super PAC raised more than \$46 million.

Given the significant impact of these entities, companies and nonprofits considering financial support for such PACs will need to weigh the disclosure obligations associated with such giving against the potential electoral and policy impact of their independent expenditure support. Donors to Super PACs and Hybrid PACs’ non-contribution accounts are disclosed in FEC filings, and when a donor’s name becomes public can figure heavily into the calculus of whether contributing to a Hybrid or Super PAC will be advantageous. The Dentons Political Law Team regularly advises organizations and businesses on FEC compliance and other issues related to campaign finance and election-related activities, so please do not hesitate to reach out as you strategize your political spending for what will be a busy election year.

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