Nov 2004

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION, INC. and STEVEN BROWN, Individually and in his Capacity as Executive Director of Rhode Island Affiliate, American Civil Liberties Union, Inc., Plaintiffs	)	C.A. No.
v.	)	
ROGER N. BEGIN, in his Official Capacity as Chairman of the Rhode Island Board of Elections, and THOMAS V. IANNITTI, JUDITH H. BAILEY, JOHN A. DALUZ, FLORENCE G. JOHNSON, FRANK J. REGO RAYMOND A. XAVIER in their Capacities as Commissioners of the Rhode Island Board of Elections and GEORGE BOWEN, in his Official Capacity as Acting Executive Director Defendants	)	

COMPLAINT

PARTIES

1. Plaintiff Rhode Island Affiliate, American Civil Liberties Union, Inc. ("RIACLU"), is a non-profit corporation organized under Rhode Island law. Its principal activity is the protection and promotion of constitutional and statutory rights of individual citizens of the State of Rhode Island.

2. Plaintiff Steven Brown ("Mr. Brown") is a Rhode Island resident. Mr. Brown brings this suit in his capacity as Executive Director of the RIACLU and as a member of the RIACLU.

3. Defendant Roger N. Begin ("Begin") is the Chairman of the Rhode Island Board of Elections ("Board"). He is sued in his representative capacity, as the chief executive

officer, managing agent and commissioner of the Board.

4. Defendants Thomas V. Iannitti, Judith H. Bailey, John A. Daluz, Florence G. Johnson, Frank J. Rego and Raymond A. Xavier are all commissioners of the Board and are sued in their representative capacities. Defendant George Bowen is Acting Executive Director of the Board and is sued in his representative capacity.

5. The Board is charged with the responsibility of enforcing the campaign finance and election laws that are the subject of this action.

JURISDICTION

6. This is an action under 28 U.S.C. §§ 1331 and 1343(a), and 42 U.S.C. § 1983 for declaratory and injunctive relief against unconstitutional provisions of state law and unconstitutional enforcement of state law. This Court has supplemental jurisdiction over the plaintiffs' state law claims pursuant to 28 U.S.C. § 1367 as they form part of the same case or controversy.

FACTS

7. Mr. Brown has taken positions on and advocated for and against state and local ballot questions in conjunction with the RIACLU and made contributions to the RIACLU in support of all of its endeavors, including ballot question advocacy, and plans to do so in the future.

8. Recently, the RIACLU lobbied against a referendum question on the November 2004 state ballot and, in doing so, solicited and expended money to advocate its position and worked with other organizations on that question.

9. The RIACLU intends to take positions on, lobby, and solicit and expend funds for and against state and local ballot questions in the future.

10. All of the RIACLU's activities, including advocacy with respect to ballot questions, depend primarily on solicitations and contributions from its members and the public at large. Without such contributions, the RIACLU would be unable to expend money to effectively advocate its positions with respect to ballot questions.

11. The RIACLU has expended and solicited contributions, and intends in the future to expend and solicit contributions, to pay for such things as printing and distribution of pamphlets, papers, fact sheets and similar materials, and for purchasing advertising space and time in the print and broadcast media in order to disseminate its views with respect to ballot questions.

12. People have made, and will make, contributions to the RIACLU generally, and specifically for the purpose of ballot question advocacy, in order to effectively express their views on such issues and exercise their First Amendment rights of expression and association.

13. The Rhode Island General Assembly enacted the "Rhode Island Campaign Contributions and Expenditures Reporting Act," R.I. Gen. Laws chapter 25 of title 17, ("the Act"), which governs and restricts campaign contributions and expenditures.

14. Under § 17-25-13, a willful and knowing violation of the Act constitutes a criminal offense punishable by a fine of up to $1,000 per violation.

15. Section 17-25-10(a) provides:

> "No contribution shall be made or received, and no expenditure shall be directly made or incurred, to support or defeat a candidate or to advocate the approval or rejection of any question in any election except through:
>
> (1) The duly appointed campaign treasurer, or deputy campaign treasurers, of a political party committee;
> (2) The duly appointed campaign treasurer or deputy campaign treasurers of the candidates;
> (3) The duly appointed campaign treasurer, or deputy campaign treasurers, of a political action committee."

16. Section 17-25-10(b) provides:

> "It shall be lawful for any person, not otherwise prohibited by law and not acting in concert with any other person or group, to expend personally from that person's own funds a sum which is not to be repaid to him or her for any purpose not prohibited by law to support or defeat a candidate or to advocate the approval or rejection of any question. * * * Whether a person is 'acting in concert with any person or group' for purposes of this subsection shall be determined by application of the standards set forth in § 17-25-23." (Emphasis added).

17. Section 17-25-23 refers only to candidates for general office and provides a test for determining whether an expenditure by a person, political party committee or political action committee ("PAC") will be considered to be a contribution received by, or expenditure made by, a candidate for general office.

18. All of the tests set forth under § 17-25-23 are based on the relationship between the candidate for general office or the candidate's committee or agent and the person, political party committee or PAC making the expenditure or contribution.

19. Section 17-25-10.1(a) imposes limitations on the amounts that a person, PAC or political party can contribute and/or accept for purposes of advocacy for or against ballot questions.

20. Sections 17-25-10.1(h)&(j) purport to prohibit all corporations, including non-profit corporations, from making contributions for purposes of advocacy for or against ballot questions.

21. In Vote Choice, Inc. v. DiStefano, 814 F. Supp. 186, 191, 193 (D. R.I. 1992), this Court held that non-profit corporations such as the RIACLU could not constitutionally be required to funnel their contributions and expenditures for ballot question advocacy through a PAC and permanently enjoined the Board from enforcing § 17-25-10(a) "to the extent it requires

non-profit corporations such as plaintiff [RI]ACLU to establish a [PAC] for the purposes of making contributions or expenditures with respect to ballot questions." Three months later, based on the Board's contention that § 17-25-10(a) "does not, and never has been interpreted to, require corporations to establish PACs for the purpose of making contributions or expenditures with respect to ballot questions," this Court vacated the permanent injunction because "§ 17-25-10(a) does not require corporations, profit or non-profit, to establish PACs." Vote Choice, Inc. v. DiStefano, 814 F. Supp. 195, 198-99 (D. R.I. 1993) (Vote Choice II).

22. In 1995, the Board issued advisory opinion # 95-01 ("1995 opinion," attached as Exhibit A), in which it concluded that the Providence Chamber of Commerce, a non-profit corporation, would be in violation of the prohibition on "in concert" expenditures contained in § 17-25-10(b) if it solicited its members for contributions to fund a campaign initiative with respect to a ballot question.

23. Recognizing that the "in concert" test set forth in § 17-25-23 applied only to candidate elections, the Board purported to craft its own test for determining whether a person was acting "in concert" for purposes of § 17-25-10(b) in the context of ballot question advocacy. (See Exhibit A, page 2).

24. In the 1995 opinion, the Board announced that it would deem a person to be acting "in concert" with another for purposes of § 17-25-10(b) if:

> "(a) there is any arrangement, coordination, or direction with respect to the expenditure between the person making the expenditure and any other person; (b) if, during the election cycle, the person making the expenditure is, or has been authorized to raise or expend funds on behalf of another person to be used to aid or defeat a ballot question, or if the person making the expense will be receiving any form of compensation or reimbursement from any other person; (c) the person making the expenditures communicated with, advised or counseled other persons on the plans, projects, and needs relating to the aiding or defeating of the

> election of the ballot question; (d) the person making the expenditures retains the professional services of any individual or other person also providing those services to others in connection with the aiding or defeating of the same ballot question; (e) the person making the expenditures communicated or consulted at ant [sic] time during the election cycle about the person's plans, projects, or needs with any other entity, or officer, director, or employer or any other entity that has made, or intends to make expenditures to aid or defeat the ballot question on the same side as the person making the expenditure or any person whose professional services had been retained by another entity that has made or intends to make expenditures to aid or defeat the same ballot question; and (f) the expenditure is based on information provided to the person making the expenditure, directly or indirectly by others making similar expenditures about the person's plans, projects, or needs provided that the other person is aware that the other person has made, or is planning to make expenditures expressly to advocate or defeat the ballot question on the same side as the person making the expenditure." (See Exhibit A, page 2).

25. After receiving inquiries and objections concerning the 1995 opinion, the Board agreed to reconsider its position.

26. On May 29, 1996, the Board issued Advisory Opinion # 96-01 ("1996 opinion," attached as Exhibit B), in which it reversed the 1995 opinion. The 1996 opinion concluded that the Chamber and its members were a single "person" and, as such, would not be acting "in concert" if the Chamber solicited its members for money to support a ballot question campaign initiative.

27. On or before August 11, 2004, the Board's legal counsel, Raymond A. Marcaccio, Esq., sent the commissioners of the Board a legal memorandum entitled "Review of Advisory Opinions Pertaining to Expenditures for the Advocacy of Ballot Questions," ("2004 Memo," attached as Exhibit C).

28. The 2004 Memo suggested that a corporation or other entity soliciting contributions from its members to fund a campaign initiative for a ballot question should be

deemed to be "acting in concert" and "subject to PAC reporting requirements to disclose both contributions and expenditures." The 2004 Memo concluded by recommending that the Board "subject corporations, associations, or other entities receiving funds from multiple sources, to be expended for the purpose of advocating the passage or defeat of a ballot question, to the disclosure and reporting requirements of the Act * * *. The foregoing analysis would require the Board to reinstate [the 1995 opinion] and rescind [the 1996 opinion] and any opinion previously issued relying on [the 1996 opinion]."

29. At a meeting on August 11, 2004, the Board accepted the recommendations outlined in the 2004 Memo, reinstating the 1995 opinion and rescinding the 1996 opinion.

30. Based on the reinstitution of the 1995 opinion, Mr. Brown and the RIACLU would be deemed to be acting "in concert," in violation of § 17-25-10(b) if, among other things, either of them communicates with another person, or potentially one another or other RIACLU members or employees, about "the plans, projects, and needs relating to the aiding or defeating of the election of [a] ballot question" or makes an expenditure having obtained, directly or indirectly, information from another person about potentially similar expenditures. (See Exhibit A, page 2).

31. The analysis in the 1995 opinion and the 2004 memo is contrary to the Board's argument in Vote Choice II that induced this Court to hold that corporations are not required to form PACs to make contributions or expenditures with respect to ballot questions. See 814 F. Supp. At 198.

32. Mr. Brown was in attendance at the August 11, 2004, meeting and objected to the Board's decision with respect to the 2004 Memo and the 1995 and 1996 opinions.

33. On September 13, 2004 the Board again considered its decision to reinstate

the 1995 opinion and, in particular, whether to delay implementation of the reinstitution of the 1995 opinion until after January 1, 2005.

34. At the September 13, 2004 meeting, Mr. Brown "asked that the Board revise its decision of August 11, 2004 and to postpone the date of implementation of [the 1995 opinion] until after this election cycle." (See Board Meeting Minutes attached as Exhibit D.)

35. At the September 13, 2004 meeting, the Board voted "to put on hold the implementation of [the 1995 opinion] until after January 1, 2005...." (See Exhibit D.)

36. The RIACLU plans to solicit its members and the public at large for contributions and also to make expenditures for the support or defeat of ballot questions in future elections, as it has done in prior elections.

37. The Board's re-adoption of the 1995 opinion has made clear that it would deem such activity to be in violation of the "in concert" expenditure prohibition contained in § 17-25-10(b).

38. Without such contributions and expenditures, the RIACLU will be unable to effectively advocate its position with respect to ballot questions.

39. The RIACLU would be unable to comply with PAC reporting requirements as described in the 2004 Memo because it would be impossible to identify and segregate contributions for ballot question advocacy from contributions for the RIACLU's other activities. Even if compliance were possible in practice, the expenses and administrative burden necessary for compliance would be prohibitively high.

40. At all times relevant to the matters set forth in the Complaint, the defendants were acting under color of state law.

41. A present and actual controversy exists between the parties in light of the

Board's re-adoption of its unconstitutional interpretation of state election laws.

42. The plaintiffs have no adequate remedy at law.

COUNT I
THE PROHIBITION ON CORPORATE CONTRIBUTIONS SET FORTH IN §§ 10-25-10.1(h)&(j) VIOLATES THE FIRST AMENDMENT

43. Paragraphs 1 through 42 are incorporated as if set forth fully herein.

44. Sections 17-25-10.1(h)&(j)s' purported prohibitions on corporate contributions impairs the RIACLU's, and all other corporations', freedoms of expression and association.

45. The state has no compelling interest in prohibiting corporate contributions to support or oppose ballot questions.

46. A prohibition on corporate contributions for purposes of supporting or defeating ballot questions is unconstitutional under the First Amendment.

47. The RIACLU intends to make contributions to support or defeat ballot questions in the future; there is a credible threat of prosecution under § 17-25-10.1(h)&(j); and §§ 17-25-10.1(h)&(j) chill the RIACLU's First Amendment freedoms of expression and association.

COUNT II
CONTRIBUTION LIMITATIONS SET FORTH IN § 17-25-10.1(a) VIOLATE THE FIRST AMENDMENT

48. Paragraphs 1 through 47 are incorporated as if set forth fully herein.

49. The state has no compelling interest in limiting contributions to support or oppose ballot questions.

50. Section 17-25-10.1(a)'s purported limitations on the amounts of contributions that a person, PAC and political party committee can make and/or accept from a single source

with respect to ballot questions impairs freedoms of expression and association and are unconstitutional.

51. The imposition of contribution limitations for purposes of supporting or defeating ballot questions is unconstitutional under the First Amendment.

52. The plaintiffs intend to make contributions in excess of the limits set forth in § 17-25-10.1(a) in the future for the purpose of supporting or defeating ballot questions; there is a credible threat of prosecution under § 17-25-10.1(a); and § 17-25-10.1(a) chills plaintiffs' First Amendment freedoms of expression and association.

COUNT III
THE BOARD'S 1995 OPINION
IS UNCONSTITUTIONALLY OVERBROAD

53. Paragraphs 1 through 52 are incorporated as if set forth fully herein.

54. The Board's definition of "in concert" criminal activity under § 17-25-10(b) for purposes of ballot question advocacy as set forth in the 1995 opinion reaches and impinges upon a substantial amount of constitutionally protected activity.

55. The 1995 opinion is unconstitutionally overbroad because it either prohibits, or leaves open the possibility of punishment for, protected conduct.

COUNT IV
SECTION 17-25-10(b) IS UNCONSTITUTIONALLY
VAGUE AND OVERBROAD IF APPLIED
TO BALLOT QUESTIONS

56. Paragraphs 1 through 55 are incorporated as if set forth fully herein.

57. To the extent that § 17-25-10(b), by incorporating the test for "in concert" set forth in § 17-25-23, is interpreted or applied so as to prohibit individuals and non-profit corporations such as the RIACLU from making "in concert" expenditures for ballot question

advocacy, the law reaches and impinges upon a substantial amount of constitutionally protected activity.

58. To the extent that § 17-25-10(b) criminalizes "in concert" expenditures for ballot question advocacy, the law is unconstitutionally vague on its face because neither § 17-25-10(b), nor § 17-25-23 specify a standard of conduct for determining whether a person is acting "in concert" for ballot question advocacy.

59. To the extent that § 17-25-10(b) criminalizes "in concert" expenditures for ballot question advocacy, the law is unconstitutionally vague as applied because § 17-25-10(b) and § 17-25-23 fail to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fail to give explicit standards for those who apply them.

60. Section 17-25-10(b) is unconstitutionally overbroad because it either prohibits, or leaves open the possibility of punishment for, protected conduct ("in concert" expenditures for ballot question advocacy).

COUNT V
THE 1995 OPINION AND § 17-25-10(b)
VIOLATE THE PLAINTIFFS' FIRST AMENDMENT RIGHTS

61. Paragraphs 1 through 60 are incorporated as if set forth fully herein.

62. Even if the 1995 opinion is consistent with § 17-25-10(b), a prohibition on "in concert" solicitations, contributions and expenditures with respect to ballot questions imposes a substantial burden on the plaintiffs' First Amendment rights of expression and association.

63. The state has no compelling reason to prohibit the RIACLU or Mr. Brown from acting "in concert" to solicit or make contributions and expend money, or to comply with PAC reporting and disclosure requirements with respect to ballot questions.

64. Compliance with PAC reporting and disclosure requirements to avoid

criminal prosecution under § 17-25-10(b) for acting "in concert" to support or defeat a ballot question imposes an impermissible burden on plaintiffs.

65. By reinstating the 1995 opinion, the Board has established that it would deem non-profit organizations such as the RIACLU to be in violation of the "in concert" prohibition on expenditures set forth in § 17-25-10(b) by soliciting its members for contributions and making expenditures for the purpose of funding a campaign initiative for or against a ballot question. Any interpretation of § 17-25-10(b) that would prohibit the RIACLU from soliciting contributions or making expenditures for ballot question advocacy violates the RIACLU's and would-be contributors' First Amendment rights of association and expression.

66. By reinstating the 1995 opinion, the Board definitively has established that it would deem Mr. Brown and/or the RIACLU to be in violation of the "in concert" prohibition set forth in § 17-25-10(b) by exercising their constitutionally protected rights, including but not limited to making or accepting contributions; coordinating or arranging expenditures with any other person, or advising or counseling "other persons on the plans, projects, and needs relating to the aiding or defeating of the election of the ballot question" without forming a PAC. All of the restrictions and requirements for ballot question advocacy set forth in the 1995 opinion violate the plaintiffs' First Amendment rights of association and expression.

67. The plaintiffs intend to make expenditures with other entities, and otherwise act "in concert" as defined in the 1995 opinion, for the purpose of supporting or defeating ballot questions in the future without forming a PAC; there is a credible threat of prosecution under the 1995 opinion and § 17-25-10(b); and the 1995 opinion and § 17-25-10(b) chill plaintiffs' and their would-be contributors' and/or like-minded advocates' First Amendment freedoms of expression and association.

COUNT VI
THE BOARD'S 1995 OPINION MISINTERPRETS STATE STATUTES

68. Paragraphs 1 through 67 are incorporated as if set forth fully herein.

69. Section 17-25-10(b) incorporates a test for "in concert" that is set forth in § 17-25-23.

70. On its face, § 17-25-23 refers expressly and only to candidate elections.

71. Section 17-25-23 does not contain the words "question" or "ballot question" at all.

72. By incorporating a test for "in concert" that refers expressly and only to candidate elections, and does not reference ballot questions, the General Assembly gave evidence of its intention to limit the "in concert" expenditure prohibition to candidate elections only, and that the prohibition should not apply to ballot question advocacy.

73. The Board's 1995 opinion that § 17-25-10(b) prohibits any "in concert" expenditure with respect to ballot questions is improper as a matter of statutory interpretation.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

a. declare that the prohibition on corporate contributions set forth in §§ 10-25-10.1(h)&(j) is unconstitutional under the First Amendment.

b. declare that the contribution limitations set forth in § 17-25-10.1(a) are unconstitutional under the First Amendment to the extent the law limits contributions for the purpose of supporting or defeating ballot questions;

c. declare the Board's 1995 opinion unconstitutionally overbroad;

d. declare that the definition of "in concert" activity set forth in § 17-25-23 and incorporated into § 17-25-10(b) is unconstitutionally vague and overbroad as

applied to the solicitation or expenditure of funds to advocate the approval or rejection of ballot questions;

e. declare that § 17-25-10(b) and the Board's 1995 opinion are unconstitutional under the First Amendment to the extent that they prohibit the RIACLU, Mr. Brown, and any other entity from: 1) soliciting or making "in concert" contributions or expenditures with respect to ballot questions; and 2) otherwise acting together with another entity to advocate for or against ballot questions without complying with PAC reporting requirements.

f. declare the Board's interpretation of § 17-25-10(b) as reflected in the 1995 opinion and the 2004 Memo to be in conflict with state law as a matter of statutory interpretation;

g. permanently enjoin the Board from taking any enforcement action against the RIACLU or Mr. Brown individually pursuant to the 1995 opinion or § 17-25-10(b) for making "in concert" expenditures to advocate for or against a ballot question without forming a PAC; or pursuant to §§ 17-25-10.1(a),(h)&(j) for making contributions to advocate for or against ballot questions;

h. award attorneys fees pursuant to 42 U.S.C. § 1988; and

i. grant plaintiffs their costs and such other further and equitable relief as may be deemed just and proper.

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