

Miller Canfield Secures Court Order Stopping Enforcement of Law Barring Objectively Neutral Speech by Public Officials

February 5, 2016

On February 5, 2016, United States District Court Judge John Corbett O'Meara issued an Opinion and Order granting a preliminary injunction and blocking enforcement of §57(3) of the Michigan Campaign Finance Act, which barred public officials from referencing any information about local ballot proposals 60 days prior to an election.

For years, the Campaign Finance Act prohibited the use of public funds and resources to engage in express advocacy. Despite this, on the evening of the last day of the legislative calendar for 2015, a major amendment was added to a bill to limit the ability of public officials to speak about local ballot proposals. The Legislature passed the bill, and on January 6, 2016, the Governor signed it into law as Act 269, with immediate effect. The statute provides:

Except for an election official in the performance of his or her duties under the Michigan election law ... a public body, or a person acting for a public body, shall not, during the period 60 days before an election in which a local ballot question appears on a ballot, use public funds or resources for a communication by means of radio, television, mass mailing, or prerecorded telephone message if that communication references a local ballot question and is targeted to the relevant electorate where the local ballot question appears on the ballot.

On January 26, 2016, Miller Canfield filed a complaint on behalf of various public officials and citizens alleging that §57(3) was unconstitutional because it violated the plaintiffs' First Amendment and substantive due process rights and requesting that the court immediately enjoin the enforcement of §57(3).

On February 5, Judge O'Meara granted the requested relief and issued an order preventing the Secretary of State from enforcing §57(3). Addressing the due process challenge, the court found that the plaintiffs established a likelihood of success on the merits that §57(3) is unconstitutionally vague and agreed that it would cause irreparable harm. Judge O'Meara explained that "§57(3)'s broad language appears inconsistent with the stated purpose of prohibiting 'electioneering' conduct with taxpayer funds." He added:

"One could arguably find a communication that 'references' a ballot question to be any communication that merely 'mentions' a ballot question. This result appears absurd; it is difficult to imagine that regulators would attempt to sanction or prosecute a public official for merely mentioning a ballot question in a city newsletter, explaining the difference between a millage renewal and millage increase, or explaining what "non-homestead" means, for example... Allowing regulators this type of unrestricted judgment call provides no check against arbitrary or discriminatory enforcement and is what the vagueness doctrine is meant to avoid."

Due to the impending March 8 elections, Judge O'Meara noted that "time is of the essence and the court must act."

What does this mean for public officials? The Secretary of State may not enforce the broad language of §57(3) until further order from the court. Therefore, public officials may convey objectively neutral, factual information about local ballot proposals, as permitted by the Campaign Finance Act existing prior to the adoption of Act 269. Public officials should consult counsel with any questions about specific communications. Additionally, because there are several pending bills in the legislature that would modify or repeal §57(3), Miller Canfield will provide updates on any further

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developments.