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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

EDMUND CORSI, GEAUGA CONSTITUTIONAL COUNCIL,	**APPELLATE NO. 11-AP-001034**
	TRIAL COURT CASE NO: 11CVF-06-7794
Appellants,	**OEC. Case No. 2010R-275**
-VS-	**REGULAR CALENDAR**
OHIO ELECTIONS COMMISSION	**REPLY BRIEF OF APPELLANT(S) EDMUND CORSI, GEAUGA CONSTITUTIONAL COUNCIL**
Appellee.	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ASSIGNMENTS OF ERROR

First Assignment of Error

The trial court erred by not declaring R.C. R.C. 3517.01(B)(8), R.C. 3517.10(D)(1) and (4), R.C. 3517.10(A), and OAC 3517-1-14(B) unconstitutional, whether on their face or as applied to the parties and/or communications at issue in this case.

Second Assignment of Error

The trial court erred by not narrowly construing R.C. 3517.01(B)(8), R.C. 3517.10(D)(1) and (4), R.C. 3517.10(A), and OAC 3517-1-14(B), so as to find them inapplicable to the communications at issue in this case, thereby saving their constitutionality.

ISSUES PRESENTED FOR REVIEW

1. **Whether constitutional guarantees of the freedom to engage in anonymous political speech, engage in political speech without prior restraint, and associate when engaging in political speech may be inhibited due to occasional interaction with others where minimal funds are spent.**

2. **Whether Ohio's Political Action Committee definition, on account of its plain language or freedom of speech principles, must be interpreted to limit its burden on protected speech.**

Despite OEC's suggestions otherwise, the legal deficiency here stretches beyond a mere faulty set of factual findings in misapplication of the statute to Mr. Corsi and/or GCC. It is the law itself and the standards OEC uses to apply it that are in error. First, the OEC's application of the "primary or major purpose" test is not narrowly-tailored to effectuate the state's informational interest "knowing who is speaking about a candidate and who is funding that speech" because (1) it entirely ignores the issue of whether a regulated person or association is funding speech for or against a candidate at all; and (2) it invites regulation of Ohioans' core political speech through speculation upon whether Ohioans *might* fund political speech for or against candidates in the future.

This first infirmity can be rectified through a narrowing construction; however it is in large part a result of the second infirmity, which appears to be inextricably linked to the R.C. 3517.10(D) mandate that Ohioans be forced to endure PAC burdens *before* they speak or fund speech - - this prompts OEC to essentially guess at the association's primary or major purpose by relying on ill-considered statement in blogs or pamphlets. Consequently, the latter statute is unconstitutional as applied to Ohioans who do not spend a significant amount of funds expressly advocating for or against a candidate, unless it can be saved by narrowing the "primary or major purpose" test to one that measures an organization's primary or major purpose based upon its expenditures on express advocacy, both in total and as a percentage of its overall expenditures.

In addressing these issues, the Ohio Supreme Court adheres to the "well-settled principle of statutory construction that where constitutional questions are raised, *courts will liberally construe a statute to save it from constitutional infirmities.*"[1] It may be the case that R.C. 3517.10(D) need not be declared unconstitutional, either facially or as-applied, if Ohioans who have not committed expenditures to expressly advocating for or against a candidate as their primary or major purpose are not exposed to the burdens of that statute in the first place, i.e. if this Court limits the OEC to judging "primary or major purpose" by spending on politics, rather than by something else. Without such a narrowing construction, R.C. 3517.10(D) is an impermissible burden on the political speech of those who do not spend extensively on politics: it forces the surrender of their anonymity before they may speak, restrains their speech pending registration. Likewise, the rigors of reporting requirements in R.C. 3517.20 and elsewhere would serve as impermissible and unwarranted burdens on the speech of those who do not spend extensively on express advocacy for or against candidates.

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[1] *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896.

This brief will address why (1) the standard of scrutiny is higher than what OEC represents; (2) the PAC designation's burden on speech is greater, in general and in this case, than OEC represents; (3) OEC's "informational interest" is insufficient to justify regulation of Ohioans that do not spend political money on campaigns, such as Mr. Corsi and/or GCC; (4) OEC's policy of measuring an organization's primary purpose without reference to the spending of funds on political campaigns in flagrantly unconstitutional; and (5) if this policy can be restrained through a narrowing construction, it must be; and if it is pursuant to the letter of the law, then the statute must be found unconstitutional, facially or as applied.

A. The State must prove that its burdens on speech are narrowly tailored to serve an overriding state interest.

First, OEC is entirely wrong on the the relevant standard of scrutiny that applies, asserting that "GCC must overcome the presumption of validity," and "bears the burden of proving [its case] beyond a reasonable doubt."[2] Further, the OEC urges this Court to use its "imagination" to make wish away both facial and as-applied constitutional defects.

The Supreme Court explicitly rejected this low level of scrutiny for protection of First Amendment rights in *McIntyre*, holding "This Court's precedents make abundantly clear that the Ohio Supreme Court's reasonableness standard is significantly more lenient than is appropriate in a case of this kind,"[3] and continuing "[this] is a regulation of core political speech. * * * When a law *burdens* such speech, the Court applies 'exacting scrutiny,' upholding the restriction *only* if it is narrowly tailored to serve an overriding state interest."[4] And this is the state's burden ("[a]lthough a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, *Ohio has not met that burden here*).[5]

B. Forced PAC classification clearly burdens political speech

OEC, while downplaying the extent of Ohio's burdens on political speech rights, argues that it may "burden" Ohioans' rights all it wants, so long as it does not "violate" them. But this is simply not the law. In *MCFL*, the Supreme Court explained that PAC disclosure "regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty

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2 February 7 Merit Brief of OEC, p. 16.
3 *McIntyre*, at 334.
4 Id., at 335.
5 Id.

to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. * * * Furthermore, such duties require a far more complex and formalized organization than many *small groups* could manage. * * * Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act [and] it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it."[6] Thus "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak,"[7] and the fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."[8]

Here, first, just as in *MCFL*,"[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records" are at issue. In this case, the administrative costs associated with PAC status, disclosure of anonymity and reporting and other disclosure requirements, *actually* impose administrative costs that chill political speech. As Mr. Corsi affirmed, registration with the state in conjunction with speaking out on political issues would cause him to "simply cease to speak out on political issues," (1) to avoid "retaliation;" and (2) because "Ohio's campaign finance laws are very intimidating" and he would "have to hire a campaign finance lawyer to assist, * * * a cost [he] certainly cannot afford."[9] And this, while no money "gets spent on attempting to elect or defeat political candidates or issues."[10]

This burden is enhanced here because, as referenced in *MCFL* a "small group," if a "group" at all, is burdened. Ohio campaign finance laws already recognize that small groups are distinguishable from large groups, and should be accorded greater First Amendment protections.[11] And while OEC proposes a test whereby a PAC can consist of just *two* persons, the administrative burdens of Ohio's PAC laws are fixed, no matter the size of the association. The loss of anonymity is both more likely, and its burden more acute, when the association is small: it is likely that one of the two speakers will be required to serve as the treasurer and also disclose his name and home address to register the PAC. Indeed, while OEC has never clarified who it believes to be a member of *this* supposed

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6 *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), at 255.

7 Id., at 255, Footnote 7.

8 Id.

9 April 28, 2011 Affidavit of Ed Corsi, Paragraph 14.

10 Id., at Paragraph 17.

11 R.C. 3517.20(A)(1)(h) describes a "limited political action committee" as "a political action committee of fewer than ten members," and R.C. 3517.20(A)(3) provides distinctive regulations for these smaller groups. See also 1995 H 99, Sections 5,6 eff. 8-22-95. quoted *infra*.

PAC, the record identifies, at most, three people, each of whom engages in political speech and would no doubt prefer to maintain anonymity.

OEC shrugs off this considerable burden, arguing that "GCC could appoint Corsi, another GCC member, a lawyer hired by GCC, or any other person . . . and nothing . . . would require that Corsi identify himself on his political literature."[12] Put another way, the state's argument is as follows: *First*, Corsi can be forced to announce his name, address, email and phone number to the state (all of which are required by "Form 30-D, Designation of Treasurer," pursuant to R.C. 3517.10, without violating his right to speak anonymously. *Second*, Mr. Corsi can be forced associate with and to disclose his identity to a strawman - - a friend or other person who would then become treasurer, without violating his right to speak anonymously. *Third*, Mr. Corsi can hire a lawyer to be the treasurer, and thus pay expensive legal fees to "buy" his First Amendment rights, while simultaneously being forced to disclose his identity as speaker to the lawyer.

However, "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney * * * before discussing the most salient points of our day."[13] Moreover, with a small group (if at all) one reviewing a "GCC" communication could simply look up the designation of treasurer with the secretary of state to determine the identity of the speaker. After all, even if a stand-in treasure were a constitutionally permissible option, Ohio SOS Form 30-D, a public record obtainable by anyone, *actually requires the street address of the PAC - - obviously Mr. Corsi's home address*. Accordingly, The Supreme Court, in *Watchtower*, noted that "[t]he requirement that a canvasser must be identified *in a permit application* filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity."[14]

Next, OEC asserts that "GCC's Compliance with Ohio's PAC statutes does not require loss of anonymity *on political literature*."[15] First, this qualification is irrelevant, given the loss of anonymity in other ways, as outlined above. But in any event, Ohio campaign finance laws *actually do immediately* burden the speech of those classified as PACs by requiring disclosures of anonymity that would not otherwise be required of Mr. Corsi or others: R.C. 3517.20(A)(3), (A)(4), (A)(6), and (A)(7) apply to PACs and "limited" PACs and require disclosure of the "name and residence or business address" of the treasurer "in a conspicuous place" on any political publication

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12 OEC Merit Brief, at p. 17.
13 *Citizens United*, at 889.
14 *Id.* at 166.
15 OEC Merit Brief, p. 17.

"for or against a candidate" or "for or against an issue." According to OEC, this applies to any statement of express advocacy Mr. Corsi makes on his blog, in a pamphlet he writes, or even in a letter to the editor (this also shatters OEC's contention "No PAC regulations have been applied to any independent blogger or pamphleteer)."[16]

Further, the official in charge of enforcing the law, Geauga County Board of Elections head Edward Ryder actually testified, after being criticized by Mr. Corsi's blog and pamphlet, that the lack of such a disclosure on Mr. Corsi's *pamphlet*, which he was distributing at the Geauga County Fair, was the *very reason he referred GCC for prosecution*, for the crime of improper disclosure.[17] Apparently, this campaign finance law is so complex that even those charged with enforcing it cannot understand it, a phenomenon found to weigh heavily against its constitutionality in *Sampson*, *Citizens United*, and elsewhere. Thus, PAC classification severely burdens the freedom to speak anonymously.

Next, Ohio's disclosure-related burdens on speech dramatically exceed those of the federal government and other states, and are rated an outlier, amongst the worst in the nation. On this front, OEC represents to this Court as though *Citizens United* gave free reign to states to impose any disclosure requirement on anyone. However, *Citizens United* only commented on disclosure laws that "do not prevent anyone from speaking," and provide information about "sources of election-related spending"[18] But the Ohio statute *actually does* prevent Ohioans as in this case from speaking until he/they designates a treasurer, and forces the surrender of anonymity despite *no* election-related spending. Thus, when OEC exclaims "GCC's prior restraint theory is simply wrong [because then] federal PAC laws as well as a majority of state PAC laws, are equally unconstitutional,"[19] it becomes clear that OEC clearly hasn't read those laws: they are vastly distinguishable from Ohio's in that they require registration and disclosure only after an association has spent money on politics, not on the mere conjecture that they may do so.

First, analogous federal law on PACs, 2 U.S.C. § 431(4) and 431(8), requires PAC registration only after, *inter alia*, an association receives $1000 earmarked for express advocacy, as required by the definition of "political committee," with federal courts describing the only permissible alternative as "rather than waiting until it expends $1,000."[20] Thus, federal PAC burdens are triggered by money received or spent on politics.

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16 See Also R.C. 3517.20(B)(1) (prohibiting PACs from speaking through broadcast media without disclosure).
17 OEC Decision and Finding, p. 6.
18 OEC Merit Brief, p. 18.
19 Id., at p. 20.
20 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. ,2010).

Other states' laws operate similarly - - take the Maine statute that OEC cites, for example. In *National Organization for Marriage v. McKee*, the Court, in upholding Maine's laws as against a vagueness challenge entirely dissimilar from the issues here, explained "Central to our holding is the nature of the laws NOM challenges here,"[21] since "they promote the [state interest in] dissemination of information about those who deliver *and* finance political speech."[22] Specifically, under the Maine law, like federal law and the law of nearly every other state, An organization that "'has as its major purpose initiating, promoting, defeating or influencing a candidate election, campaign or ballot question' must register as a PAC in Maine [only] if it receives contributions or makes expenditures aggregating more than $1,500 in a given calendar year for that purpose."[23] *Only* "Within seven days of *exceeding the relevant contribution or expenditure threshold*, a PAC must register."[24] Thus, the First Circuit did indeed hold that "Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech"[25] because *Maine's* laws, unlike Ohio's, actually don't.

The First Circuit noted "[W]e acknowledge that disclosure can, in some cases, unduly burden or chill political speech."[26] This is one of those cases. In Ohio, under R.C. 3517.10(D)(1): "*Prior to* receiving [any] contribution or making [any] expenditure, every * * * PAC * * * shall appoint a treasurer and shall file, on a form prescribed by the secretary of state, a designation of that appointment, including the full name and address of the treasurer."[27] It is this prior restraint on speech, requiring the surrender of anonymity once classified as a PAC before one may speak at all, that has caused independent experts to report Ohio's burdens speech as amongst the most draconian in the nation - - While other state's regulations are triggered by the spending of money on express advocacy, Ohio actually compels its citizens to register as a PAC and surrender their anonymity *before* speaking at all, even if those citizens have spent no dollars on express advocacy, and have no plans to do so in the future, such as here.[28] Thus, once classified as a PAC, an association of Ohioans must designate a treasurer immediately, or

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21 *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir., 2011).

22 Id.

23 Id.

24 Id. Also noting "A major-purpose PAC must report any contribution to the PAC of more than $50 (including the name, address, occupation, and place of business of the contributor)"

25 Id.

26 Id.

27 See R.C. 3517.01(A)(5),(A)(6) for definitions of "contribution" and "expenditure." Neither is limited to contributions for or spending on express advocacy.

28 See *Full Disclosure: How Campaign Finance Laws fail to inform voters and stifle public debate*, by David Primo, PhD, October, 2011, available at http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf. See, specifically, "Table 7: "Minimum Dollar Thresholds for Selected Disclosure Requirements." For further evidence, and a comprehensive treatment of this issue, see *How State Campaign Finance Laws erect barriers to entry by political enreprenuers*, by *Jeffrey Mylo*, available at http://www.ij.org/about/3509.

otherwise stand by in an utter state of paralysis, entirely unable to engage in free speech. And imposing burdens before Ohioans spend causes the OEC to literally *guess* as to the primary or major purpose of the organization - - in Ohio, if an individual or group crafts a "mission statement" wrong on a personal blog, he/they must become a PAC and cease to speak until parting with anonymity, and then speak only subject to draconian disclosure and reporting requirements.

Finally, in weighing the magnitude of these burdens on speech, this Court must be mindful of the penalty imposed when the regulations are not perfectly followed. And here, in additional to criminal prosecution, which "may commence under this section,"[29] R.C. 3517.992(U) authorizes $500 fines for violation of R.C. 3517.20, and R.C. 3517.992(Z) authorizes $1,000 fines for violation of R.C. 3517.10. Meanwhile, under OAC 3517-1-14(B)(1)(a), "failure to file, late filing or filing incomplete or inaccurate campaign finance reports results in a fine of up to $100/Day." These are immense burdens on speech because "even minor punishments can chill protected speech."[30] Ohio's PAC regulations clearly dramatically burden association, anonymity, and spontaneous speech this burden. The issue is whether these dramatic burdens are justified.

C. Ohio maintains no state interest in regulating the speech at issue here.

This case has nothing to do with whether "Ohio's interest in Campaign finance disclosure supports Ohio's regulation of PACs," as the OEC alludes[31]: there is no dispute that Ohio has such an interest. The Issue before the Court is the extent of that interest, and whether it is effectuated in a narrowly-tailored manner, so that the burdens on Ohioans and Appellants' political speech are justified. More seriously, OEC proposes that the state has an "informational interest" in "providing the electorate with information as to where political campaign money comes from and how it is spent."[32] And indeed, OEC is partially correct: "the public has an interest in knowing who is speaking about a candidate *and who is funding that speech* * * *."[33]

However, First Amendment doctrine provides that the state maintains *no* informational interest in simply "identifying the sources of support for and opposition to" a political position or candidate sufficient to justify any

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29 R.C. 3517.20(D).

30 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002), citing *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)

31 OEC Merit Brief, p. 24.

32 OEC Merit Brief, p. 24.

33 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. ,2010).

First Amendment burden, much less the considerable burdens here.[34] Further, the state interest expressly avowed by the Ohio General Assembly in passing these laws is far short of what the OEC asserts in its brief. When it redrafted Ohio's Campaign Finance statutes in response to *McIntyre*, the Ohio General Assembly explicitly disclaimed any state interest in regulating PACs that make minor expenditures:

> it is the intent of the General Assembly to enable the state of Ohio to identify the source of campaign materials and enforce sections 3517.10, 3517.102, 3517.105, and 3517.107 of the Revised Code, which limit contributions and require reporting of expenditures and contributions; to require organizations that may have an interest in the outcome of an election to disclose to the public their identification on written campaign literature; and to prevent fraud and defamation of candidates. **This state recognizes the right of individuals * * * and political action committees that make minor expenditures to anonymously issue and distribute written campaign literature** as defined by the United States Supreme Court in *McIntyre v. Ohio Elections Commission.*[35]
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> [I]t is the intent of the General Assembly to enable the state of Ohio to identify the source of campaign materials and enforce sections 3517.10 and 3517.11 that require the reporting of expenditures and contributions and to require organizations that may have an interest in the outcome of an election to disclose to the public their identification on written campaign literature. * * * **This state further recognizes that political action committees that make minor expenditures on written campaign literature to support or oppose a ballot issue should be accorded the same status as individuals who anonymously issue or distribute such literature.**[36]

In fact, the state's only avowed interest in House Bill 99 was "in requiring organizations and political action committees that make significant expenditures * * *."[37] Thus the state's informational interest is not greater because two people, instead of one, hand out a pamphlet, blog, or meet at a coffeehouse. And the legislature actually recognizes the absence of a state interest in regulating the conduct that Mr. Corsi and others have engaged in this case: *de minimus* express advocacy with virtually no spending.

Yet, oblivious to the above, OEC obstinately maintains "PACs do not have a First Amendment right to anonymously use money to influence elections without public disclosure,"[38] and "[t]he GCC has no support for the contention that the right of anonymous speech to an individual, as explained in *McIntyre*, applies to prohibit states from requiring PACs to disclose their funding."[39] However, even giving OEC's asserted state interest its most charitable reading - - the focus on "disclosure of campaign-related contributions and expenditures" that it concedes

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34 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. ,2010), citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290. 298, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981).

35 1995 H 99, § 5, eff. 8-22-95. Emphasis added.

36 1995 H 99, § 6, eff. 8-22-95. Emphasis added.

37 See 1995 H 99, § 6, eff. 8-22-95 (Emphasis added).

38 OEC Merit Brief, P. 18.

39 OEC Merit Brief, p. 18.

elsewhere[40] - - that state interest fails to manifest itself in how the political speech of Ohioans like Mr. Corsi and/or GCC are *actually regulated*: with no consideration whatsoever to whether they actually have or will spend money expressly advocating for or against a candidate.

D. OEC's "primary or major purpose" test policies, and subsequent PAC regulations are not narrowly-tailored to serve the state's interest in disclosure of spending on express advocacy.

As outlined in the Introduction, Ohio's campaign finance regulations are not narrowly-tailored to serve the state interest in disclosing spending on express advocacy because they invariably ensnare Ohioans *who do not spend* on express advocacy. This is a direct result of OEC's policy in applying "the primary or major purpose test." While OEC relies heavily on its finding that GCC maintains a primary or major purpose of engaging in express advocacy, the test it used to arrive at this finding is the primary *source* of Ohio's unconstitutional inhibition of core political speech: OEC's standards in applying the "primary or major purpose" test (1) ignore actual spending on express advocacy for or against identified candidates; (2) ignores the totality of a speaker's speech; and (3) only requires "a" major purpose of express advocacy. In doing so, it sweeps Ohioans into a designation that imposes burdens on speech that is not narrowly-tailored to achieve Ohio's interest in identifying the funding behind political candidates.

First, The OEC *admits* that in determining GCC's primary or major purpose, it did not inquire into whether "money [is] actually being spent to elect or defeat a candidate in any of those functions" because "there is no mention of money in the definition of a PAC."[41] Yet, spending on express advocacy is how an associations' primary or major purpose is constitutionally-required to be measured: As the Supreme Court in *MCFL* explains "should MCFL's independent spending become so excessive that the organization's purpose may be regarded as campaign activity, the corporation would be classified as a political committee."[42] Using a test that ignores spending in determining whether Ohioans' free speech is subject to PAC status and all of its burdens on speech divorces the only legitimate state interest in regulating speech from the regulation of that speech. In the face of the burdens on speech imposed R.C. 3517.10 once it is found to apply, this Court must issue a narrowing construction of Ohio's PAC definition, requiring a test focused on "comparison of the organization's independent spending with overall

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[40] Id., at p. 17.

[41] Corsi Merit Brief, p. 2, citing OEC Decision, p. 3.

[42] MCFL, supra., at 262. MCFL was not required to be a PAC even though it "occasionally engaged in independent spending on behalf of candidates." Here, there was no such spending, and if any, on minimal - - certainly much less than MCFL.

spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates."[43]

OEC's policy in applying the "primary or major purpose" test is also not narrowly-tailored because in its application the state must assess the proportion of an organization's overall work that is express advocacy in order to properly determine whether that organization's "primary purpose" is express advocacy, or else, a statute risks "regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a relatively small amount of elections-related speech."[44] Yet, OEC prefers to flippantly seek out examples of expressed advocacy and ignore the entire body of communication an individual or association has engaged in, such as here, where Mr. Corsi has posted a blog post nearly every day since 2008, and yet just several of these are cited as express advocacy.[45]

Indeed, the OEC's Chairman has declared the test to be "we have to determine * * * is advocacy *a* primary or major purpose or something less than a primary purpose?"[46] And "based primarily on the mission statement, * * * one of your major or primary goals is to the things that the statute says it regulates, and that's express advocacy."[47] However, "[i]f organizations were regulable merely for having the support or opposition of a candidate as '*a* major purpose,' political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate," and "[t]his would not only contravene both the spirit and the letter of *Buckley*'s 'unambiguously campaign related' test, but it would also subject a large quantity of ordinary political speech to regulation."[48] This Court must narrow the factors and focus of Ohio's application of the "primary or major purpose" test if Ohio's campaign finance laws are to be constitutionally permissible, i.e. narrowly-tailored to serve the state informational interest of disclosure of spending on express advocacy for or against candidates.

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[43] *Colorado Right To Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir., 2007), citing *MCFL*, 479 U.S. at 252, 107 S.Ct. 616.

[44] See *Leak*, Supra, at 289; See also *Colo. Right to Life Comm. Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007); *Nat'l Right to Work Legal Defense and Educ. Found. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008)

[45] See OEC Decision and Finding, at p. 6; The OEC relied on a handful of statements on GCC's website that appeared to engage in express advocacy, but failed to note what the ratio of such statements was to those not constituting express advocacy. The counsel for the Complainant at the OEC hearing, speaking of the GCC website, admitted that "they post very regularly, sometimes daily, so I posted some samplings [as evidence]." See Tr. P.6 E1155-E22 (statement of Ms. Sheila Salem of Geauga County Prosecutor's Office). The OEC lists four examples of such advocacy; this is out of a total of 459 posts on the website between July 10, 2008 and September 16, 2011. See http://www.geaugaconstitutionalcouncil.org/archives.cfm (accessed September 21, 2011). It is impossible for this amount of express advocacy to be described as the primary or major purpose of such a website.

[46] Transcript of April 28, 2011 OEC Hearing on 2010R-275, p. 99

[47] Id., pp. 103-104.

[48] See *N.C. Right to Life, Inc. v. Leake* (4th Cir. 2008), 525 F.3d 274, 286, citing *Buckley v. Valleo*, 424, U.S., at 79.

CONCLUSION

This Court must order a narrowing construction of the "primary or major purpose test" in R.C. 3517.01(B)(8), so as to require an association of individuals' "primary or major purpose" to be judged by its actual expenditures on politics. If it finds that it cannot do so, because the statute does not permit such a reading, it must strike the statute, whether facially, or as-applied to those who do not spend money on political campaigns. Otherwise, OEC is left to erratically guess at this purpose, rather than judging it by actual expenditures on politics, because the statute requires the determination to be made, alongside stripping of anonymity, before one is free to speak in Ohio.[49]

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing APPELLANTS' REPLY BRIEF was served upon counsel specified below this 21ST day of February, 2012.

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[49] While there may be other legitimate ways to judge an organization's "primary or major purpose" in the absence of the burdens of R.C. 3517.10(D), so long as that statute remains in force, this purpose must be judged by contributions and expenditures on actual express advocacy for or against the campaigns of specific candidates.