ON TAXES AND HEALTH CARE, MODERATE OHIO REPUBLICANS CANNOT HIDE BEHIND ARCANE ANTI-PLEDGE STATUTE

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**This analysis is intended to address concerns over the merits of enforcing tax pledges in Ohio. The merits of Ohio refraining from imposing a severance tax on producers and property owners are chronicled elsewhere.*[1]

Introduction: Politicians Attempt to Hide Behind Ohio's Anti-Pledge Statute

To hold their elected officials accountable, a conglomerate of conservative, libertarian, and tea-party groups representing Ohio taxpayers have recently devised two pledges for state legislative candidates. These pledges are directed toward educating Ohio voters as to who can be counted on to limit onerous taxation and regulation.

Specifically, the taxpayers call upon legislative candidates to pledge that they (1) will not vote in a manner inconsistent with health care freedom; and (2) will note vote to impose a severance tax on fledgling oil and gas production in Ohio.

The tax pledge, for instance, states as follows:

> **I pledge that I will not vote to raise the severance tax on oil, gas, and other liquids in Ohio, thereby protecting Ohio's competitive advantage over other states**.[2]

As citizens began to ask candidates to sign this pledge, something interesting - - beyond a policy debate - - happened: some Republican candidates began to balk at the idea of a pledge.

Rather than take a stance, some candidates have even responded that the request that they take the pledge is illegal, and that the person asking them to sign it could be fined out of house and home. Take, for instance, this email response to a constituent from Dorothy Pelanda, state representative for Ohio's 83rd District:

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1 See, for instance http://ohiotaxpledge.org/wp-content/uploads/2012/07/Severance-Tax-Presentation-2.pdf.

2 See entire tax pledge at http://ohiotaxpledge.org/wp-content/uploads/2012/07/Severance-Tax-Pledge-PDF2.pdf. (The pledge adds statements of belief, but no other substantive constraint: "I believe that by maintaining Ohio's severance tax competitive advantage, the responsible leveraging of Ohio's energy resources will result in increased energy production, more jobs, and greater economic activity in those companies providing goods and services to energy companies, all of which will provide additional tax revenues to government entities. I also believe that raising the severance tax will have a negative impact on job creation, will hurt Ohio's small business energy entrepreneurs, will make Ohio a less attractive state for energy exploration and production, will weaken Ohio farmers and landowners who have to pay the tax, and will result in higher energy costs for Ohioans because the tax hike will be passed on to consumers.").

> I am in receipt of your email dated July 17, 2012 in which you asked me to sign a pledge NOT to vote for an increase in the severance tax and if not, reasons why.
>
> Please see Ohio Revised Code Section 3599.10 CORRUPT PRACTICES-CANDIDATE FOR GENERAL ASSEMBLY SHALL NOT BE ASKED TO PLEDGE VOTE. * * *.[3]

Are Rep. Pelanda's concerns over R.C. 3599.10 correct?

No. While it's unclear how vastly this view is held amongst the Ohio Republican Caucus, or Democrats, for that matter, two things are clear: (1) it's not a violation of a law to ask one's candidate to sign the pledge; and (2) the statute is, itself, flagrantly unconstitutional.

The statute Rep. Pelanda cites is an arcane statute - - a relic from the 1950's - - that has never been enforced. Here is what the statute actually states:

> **No person, firm or corporation shall demand of any candidate for the general assembly any pledge concerning his vote on any legislation, question, or proposition that may come before the general assembly; provided that this shall not be understood to prohibit a reasonable inquiry as to such candidate's views on such question or legislation. Whoever violates this section is guilty of a corrupt practice and shall be fined not less than five hundred nor more than one thousand dollars.**

When is a request a "demand," and does it even matter?

First, was Rep. Palenda's constituent "demanding" a pledge? The statute doesn't answer that question: the word "demand" is not defined. But common sense does answer that question: a "request" is not a "demand."

Even if Rep. Palenda's constituent was pounding her fist on the table when she calls or emails the representative, this still is not a demand. And even if the constituent threatened to withhold her vote for the representative, and to urge others to do the same, this still isn't a "demand." But in this instance, that wasn't the case: even Rep. Palenda's email response to the constituent acknowledges that the constituent merely "asked" her to sign the petition.

Second, even if this were a "demand," the statute does not forbid a representative from actually responding by signing the pledge - - the supposed liability only applies to the person that asks the question. But even this concedes too much, because this statute clearly violates the First Amendment.

Is Ohio's anti-pledge statute even constitutional?

Third, and above all else, this statute is flagrantly unconstitutional. And such strong language is not exaggerative: just two years ago, the Sixth Circuit Court of Appeals explained "*it is doubtful that a*

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[3] July 17, 2012 Email response to a constituent from Rep. Palenda.

single federal or state court judge in the country" would uphold a statute that forbid legislative candidates from "communicat[ing] to their constituents how they will vote on the issues of the day."[4]

This is not surprising. The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances."

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[5] And "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[6] Due to these understandings, in *Buckley*, the Court assailed "restrictions [that] significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions."[7]

Applying these principles, the United States Supreme Court has already struck down a *more narrowly tailored* Kentucky law that forbid legislative candidates from pledging to support a certain policy once in office.[8] In *Brown v. Hartlage*, the Supreme Court explained that these kinds of statutes implicate the core constitutional principles:

> Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."[9]

As a consequence, such statutes are subject to "strict scrutiny," and "a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection."[10]

In voiding the Kentucky statute, the Court explained that "candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in

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4 *Carey v. Wolnitzek*, 614 F.3d 189, citing *Brown v. Hartlage* (1982), 456 U.S. 45, 55-59. Emphasis added.

5 *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)

6 *Id.,* at 101-102, 60 S.Ct., at 744.

7 *Buckley*, supra.

8 The statute at issue, Kentucky Section 121.055, provided ""Candidates prohibited from making expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for vote. -- No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract." Ky. Rev. Stat. § 121.055 (1982). (of note: the Kentucky statute had actually replaced the word "demand" with the word "require").

9 *Brown,* supra., at 59, citing *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)

10 *Brown,* supra., at 59.

predicting the effect of their vote,"[11] and in that case "*like a promise to lower taxes*, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding."[12]

Ohio's anti-pledge statute is no different in these regards. It quite clearly inhibits important political dialogue, and does so even when there is no *quid pro quo* corruption, through exchange of money or otherwise.

In addition, the Ohio's anti-pledge is unconstitutionally vague. With respect to political speech, the Supreme Court has spoken of the test to be applied to regulations that implicate vagueness concerns: the test is whether the language * * * affords the "(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms."[13] Otherwise, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"[14]

"First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[15] And prohibiting "a demand of any candidate" can hardly be considered sufficiently precise or specific. Thus, this is precisely the type of statute that traps the innocent without fair warning.

Conclusion

Ohio's anti-pledge statute (1) does not forbid Ohioans from requesting candidates to sign any pledge, including the current anti-tax and health care freedom pledges; (2) does not forbid any legislative candidate from signing any pledge; and (3) is, in any event, flagrantly unconstitutional and therefore unenforceable. The anti-pledge statute, and public officials' threats to enforce it, should not dissuade freedom-seeking Ohioans from attempting to hold their candidates for public office accountable.

For more information, see www.OhioConstitution.org, or contact Maurice A. Thompson, Director of the 1851 Center for Constitutional Law at (614) 340-9817, or MThompson@OhioConstitution.org.

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11 Id., at 56.

12 Id., citing *Buckley* v. *Valeo*, 424 U.S., at 27.

13 *NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340.

14 *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

15 *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).