

Ninth Circuit Upholds Montana Electioneering Communications Law

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A U.S. Court of Appeals for the Ninth Circuit panel recently upheld Montana's electioneering communications law against a constitutional challenge brought by the National Association for Gun Rights (NAGR). NAGR had argued Montana's law was overly broad by regulating issue speech relating to state candidates.

Similar to federal law and the laws in many (but not all) states, Montana law regulates certain forms of public communications that refer to a candidate within a pre-election time window, and that are targeted to the candidate's electorate, as "electioneering communications." An organization that spends more than \$250 on a single electioneering communication that refers to a state candidate or ballot measure is required to register and report as a "political committee" (often known as a "PAC") in Montana.

For organizations that only engage in independent activities and do not make monetary or in-kind contributions to Montana state candidates, political parties, or PACs, Montana distinguishes between "incidental committees" and "independent committees." Incidental committees are organizations that occasionally engage in regulated campaign finance activities, and are subject to less extensive reporting requirements. Importantly, for organizations concerned about their donors' privacy, incidental committees are not required to indiscriminately report their donors in Montana.

Independent committees are organizations that have "the primary purpose" of receiving political contributions or making political expenditures in Montana. Such organizations are subject to more extensive reporting requirements, including public identification of most of their donors.

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NAGR intended to mail voter guides to Montana voters identifying which state elected officials “have supported the rights of citizens to keep and bear arms and engage in lawful self-defense, as well as those who have not done so.” NAGR did not purport that its mailers would urge voters to vote for or against any particular elected officials or candidates. As a Section 501(c)(4) advocacy group under the federal tax code, political campaign activity also may not constitute NAGR’s primary purpose.

NAGR maintained that Montana’s electioneering communications law was unconstitutionally overbroad on its face and as applied to NAGR. NAGR argued that only communications that expressly advocate for the election or defeat of candidates, or that are the “functional equivalent” of express advocacy, may be regulated.

The Ninth Circuit panel applied the “exacting scrutiny” standard of judicial review, which asks whether a law is “substantially related to a sufficiently important governmental interest.” Although NAGR’s voter guides would not expressly advocate for or against candidates, the panel characterized them as “subtle and indirect communications likely to influence voters’ votes.” The panel therefore identified the governmental interest in Montana’s electioneering communications law as “ensuring that voters have access to information about the speakers competing for their attention and attempting to win their support” and “promoting transparency and discouraging circumvention of [Montana’s more general] electioneering laws.”

As for whether Montana’s law was “substantially related” to this governmental interest, the court reasoned that the reporting requirements were “commensurate” insofar as they did not require ongoing reports to be filed by incidental committees or public identification of a group’s donors. This is in contrast to some other states’ laws that have been invalidated previously that required ongoing reporting by groups that only occasionally engaged in regulated political activity, as *Election Law News* has reported on in the past.

The Ninth Circuit panel did side with the NAGR in striking down one narrow aspect of Montana’s law. Montana requires PACs to have a treasurer who is a Montana registered voter. The court held that states may have a valid interest in requiring PACs to have in-state individuals “who can be held accountable for violations of electioneering laws” and for serving subpoenas in legal proceedings. However, the court held that this interest could be met just as effectively by requiring a treasurer who is a Montana resident, but who is not necessarily a registered voter in Montana.

Several other states similarly require PACs operating in the state to have treasurers who are state residents or to maintain bank accounts at financial institutions located in the state or that are registered to do business in the state.

Wiley Rein’s Election Law Practice advises clients on the electioneering communications reporting requirements in all states that have such laws, as well as on other campaign finance laws.