

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division**

CENTER FOR INDIVIDUAL
FREEDOM, INC.,

Plaintiff,

v.

No. 1:08-CV-190
Hon. David A. Faber

BETTY IRELAND, *et al.*,

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION OF BOB BASTRESS,
MENIS KETCHUM, AND MARGARET L. WORKMAN TO VACATE
PRELIMINARY INJUNCTION**

Intervening Defendants, Bob Bastress, Menis Ketchum, and Margaret L. Workman (hereinafter “the Candidates”), by counsel, Anthony J. Majestro and Powell & Majestro, PLLC, have moved [Doc 64] to vacate the preliminary injunction entered by this Court on April 22, 2008 [Doc. 38] (“the Injunction”). The Candidates now file this supporting memorandum.

The Candidates incorporate and rely on the arguments set forth in the previously filed memoranda in opposition to the original motion for a preliminary injunction. The candidates further incorporate and rely on the Motions and Memoranda filed by Defendant Ireland [Doc 63] and the Intervening Defendants West Virginia AFL-CIO and West Virginia Education Association [Docs 61, 62]. These arguments will not be repeated here.

As set forth below, the Candidates believe that the Injunction is moot. 2008 If the Court does not find the Injunction moot, the Candidates request that the Court hold an evidentiary hearing to allow them to present evidence and oral argument.

STATEMENT OF FACTS

On June 28, 2008, H.B. 219 was enacted into law after being adopted in the June, 2008 Special Session of the West Virginian Legislature. *See* H. B. 219 (W.Va. 2d Sp. Sess. 2008). In that bill, the Legislature amended West Virginia's campaign finance laws as is set forth in Secretary Ireland's memorandum [Doc. 63]. As noted therein, this amendment substantially changed the statute facially challenged by the Plaintiff. In connection with this amendment, the Legislature made a number of supporting findings that set forth the State's compelling interest in regulating the conduct at issue and the basis for the regulations enacted. *See* W.Va. Code § 3-8-1(a) (2008).

For the reasons noted below, these findings are entitled to substantial deference. Even if they were not, however, these findings, particularly the decision of the Legislature to require disclosures to be filed for electioneering communications disseminated through non-broadcast media outlets such as direct mail, telephone banks, newspapers, etc., *see* W.Va. Code § 3-8-1a(12)(A), are correct.

The candidates have filed two declarations from political campaign experts. *See* Doc. 64 at Exhibit 1 (Van Dorn Declaration) & Exhibit 2 (Gold Declaration). Van Dorn and Gold each have years of experience conducting campaigns both in West Virginia and nationally. Van Dorn who has been involved in hundreds of West Virginia legislative races explains the increasing presence of electioneering communications by groups desiring to remain anonymous, the impact of the West Virginia disclosure laws, the effective use of non-broadcast media, and the need for disclosure requirements to apply to both broadcast and non-broadcast media. *See* Motion Exhibit 1. Similarly Gold, who has 25 years experience conducting direct mail campaigns in federal, state, and local elections, explains why direct mail communications are cost effective and how

election participants will use unregulated non-broadcast media to circumvent broadcast *See* Motion Exhibit 2. These findings support the amendments adopted by H.B. 219 and the findings made therein.

ARGUMENT

I. SUBSEQUENT AMENDMENTS TO A STATUTE MATERIALLY CHANGING THE CHALLENGED LEGISLATION RENDER PRE-AMENDMENT PRELIMINARY INJUNCTIONS MOOT.

The Injunction has been mooted by the enactment of H. B. 219 (W.Va. 2d Sp. Sess. 2008), enacted June 28, 2008. When a challenged statute is amended subsequent to the adoption of a preliminary injunction, the preliminary injunction is moot. *See Virginia Society for Human Life, Inc. v. Caldwell*, 1999 WL 598846, 5 n.3 (4th Cir. 1999) (unpublished) (“At this point, the preliminary injunction entered by the district court enjoining Virginia from enforcing the 1995 Statutes became moot inasmuch as VSHL’s § 1983 challenge shifted from the 1995 Statutes to the Amended Statutes.”). When, as here, “there is no practical likelihood” that the regulation will be reenacted in its original form, substantial amendment to a statute or ordinance may moot a challenge to the original law. *See Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir.2006); *id.* at 349 (“The portions of the district court’s judgment holding that the Distribution, Delivery, and Shipping Privileges are unconstitutional and the portions of its final injunction barring their enforcement are vacated. . . .”); *see also Ragan v. Vosburgh* 1997 WL 168292, 4-5 (4th Cir. 1997) (unpublished) (finding case moot following amendment of challenged statute). The simple fact is that this Court enjoined a statute that no longer exists. The preliminary injunction is simply moot and should be vacated by this Court.

II. THE LEGISLATIVE FINDINGS ARE CORRECT AND ENTITLED TO DEFERENCE BY THIS COURT.

While the issues involved are questions of law for the Court, legislative findings are entitled to deference. *Akers v. Caperton*, 998 F.2d 220, 225 n.7 (4th Cir. 1993). This is true even in the context of first amendment challenges:

Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 196, 117 S.Ct. 1174, 1189 - 1190 (1997). Deference is required because Courts are, “not exercising a primary judgment,” *Rostker v. Goldberg* 453 U.S. 57, 64, 101 S.Ct. 2646 (1981), but rather reviewing the “carefully considered decision of a coequal and representative branch of our Government,” *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S.Ct. 3180 (1985). Deference to these legislative judgments, not disregard of them, constitutes the “paradigm of judicial restraint.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); cf. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) (“Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared”).

Deference is appropriate because the Legislature’s findings are not novel or in any way suspect as the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394, 120 S.Ct. 897 (2000). In this case, as set forth in the Candidates’ expert affidavits, the legislature’s findings are based

on common sense real world conclusions that are accepted by campaign professionals. Finally, this Court should recognize the expertise and judgment of the Legislature all of whom have experience in the very elections the statute regulates:

In answering these questions, we recognize, as *Buckley* stated, that we have “no scalpel to probe” each possible contribution level. *Id.*, at 30, 96 S.Ct. 612. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments, as legislators have “particular expertise” in matters related to the costs and nature of running for office. *McConnell*, 540 U.S., at 137, 124 S.Ct. 619. Thus ordinarily we have deferred to the legislature's determination of such matters.

Randall v. Sorrell, 548 U.S. 230, 248-249, 126 S.Ct. 2479, 2492 (2006).

For these reasons, this Court should accept the Legislative findings, which for the reasons noted by the other defendants are sufficient to support the acts minor restrictions on the Plaintiffs.

CONCLUSION

For the reasons noted here and by the other Defendants, this Court should vacate the preliminary injunction.

BOB BASTRESS, MENIS KETCHUM, AND
MARGARET L. WORKMAN,

By Counsel,

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CERTIFICATE OF SERVICE

I, Anthony J. Majestro, do hereby certify that on the 5th day of September, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1. H. B. 219 cured the alleged defects identified by the Court in granting the Injunction such that Plaintiff is no longer likely to succeed on the merits of their new challenge to the amended statute.
2. Substantial evidence exists to support the judgment and findings of the West Virginia Legislature in enacting H. B. 219.
3. In further support of this Motion, the Candidates rely on their contemporaneously filed memorandum of law and the attached Affidavits.
4. In addition, the Candidates incorporate and rely on the arguments set forth in the Motions and Memoranda filed by Defendant Ireland [Doc 63] and the Intervening Defendants West Virginia AFL-CIO and West Virginia Education Association [Docs 61, 62].

WHEREFORE, the Candidates move for the Court to vacate the Injunction entered April 22, 2008. If the Court does not find the Injunction moot, the Candidates request that the Court hold an evidentiary hearing to allow them to present evidence and oral argument.

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