wiley

NEWSLETTER

Election Law News

July 2020

Supreme Court Rules in Favor of States' Authority Over Presidential Electors Through the Party System in "Faithless Elector" Cases

By Lee E. Goodman and Jeremy J. Broggi

On July 6, the U.S. Supreme Court unanimously held in *Chiafalo v. Washington and Colorado Department of State v. Baca* that a State may compel a presidential elector to vote for the presidential candidate who won his State's popular vote. These decisions affirm two centuries of constitutional tradition and secure the continuing vitality of the Electoral College.

The disputes in *Chiafalo* and *Baca* arose from a similar set of facts. In both cases, a few of the States' presidential electors violated state law when they voted for individuals who had not won their State's popular election. In *Chiafalo*, Washington penalized these "faithless electors" by issuing them $1,000 fines. In *Baca*, Colorado removed a faithless elector from his position. The electors challenged these penalties, claiming that the U.S. Constitution grants them an affirmative right to vote as they wish. The Washington

continued on page 2

IN THIS ISSUE:

3 Hickenlooper Guilty Verdict – A Cautionary Tale for Corporations

4 New Washington State Law Requires 'No Foreign National' Certification for Corporate and PAC Contributions

5 Major TCPA Updates with Implications for Political Callers: FCC Weighs In on P2P Texting Platforms; Supreme Court Invalidates Narrow TCPA Exception and Agrees to Consider 'Autodialer' Definition

9 Federal Appeals Court Upholds FEC Debate Regulation: 15% Polling Threshold is Lawful

10 FEC Changes: One Commissioner Arrives, One Leaves, Quorum Lost

11 Illegal Raffle Incident Is a Good Reminder for PACs and Nonprofits

12 IRS Finalizes Regulations Eliminating Donor Disclosure Requirement for Certain Tax-Exempt Organizations

12 Events

13 Political Privacy Law Update

14 Reminder: Upcoming Political Conventions Trigger Electioneering Communication Rules

15 Election Law Professionals

Pennsylvania Ban on Contributions from Gambling Industry Held Unconstitutional

By D. Mark Renaud and Eric Wang

A panel of the U.S. Court of Appeals for the Third Circuit recently upheld a district court ruling that struck down Pennsylvania's ban on campaign contributions from those involved in the state's gaming industry. As - first reported in 2018, the ban applied to "principals" and "key employees" of holders of and applicants for Pennsylvania gaming licenses.

The Third Circuit acknowledged that "a democratic government must make every effort to fight corruption, and the perception of it." At the same

continued on page 3

Supreme Court Rules in Favor of States' Authority Over Presidential Electors Through the Party System in "Faithless Elector" Cases *continued from 1*

Supreme Court rejected that argument, but the U.S. Court of Appeals for the Tenth Circuit accepted it. The Supreme Court granted review.

The Court, in an opinion by Justice Kagan that was joined by seven other Justices, wrote that the Constitution grants the States power to penalize an elector who fails to vote for the winner of his State's popular election. Article II specifies that each State may appoint electors "in such Manner as the Legislature thereof may direct." The Court said that this power to appoint an elector includes the lesser power to condition his appointment on the requirement that he align his vote with the State's popular vote. Moreover, "[n]othing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion."

Notwithstanding this brief textual analysis, the driver of the Court's opinion was history and tradition. The Court emphasized the long-standing practice of the States, explaining that state laws "appointing electors chosen by the winner's party" who are "pledge[d]" to that party's nominee reflect a consistent "tradition more than two centuries old." "In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen." Relying in part on an *amicus* **brief** filed by Wiley Rein LLP on behalf of the Republican National Committee, the Court dismissed "[t]he history going the opposite way" as "one of anomalies only." Indeed, although the electors tried to make much of 180 alleged instances of faithless voting, the Court countered that these "faithless votes represent just one-half of one percent" of the 23,000 votes cast by electors since the Founding, and that one-third had come during a single election in 1872 when the Democratic Party's nominee died just after Election Day.

Justice Thomas concurred in the judgment. In a separate opinion joined in part by Justice Gorsuch, Justice Thomas agreed that "States have the power to require Presidential electors to vote for the candidate chosen by the people of the State." But Justice Thomas viewed the people of each individual State, not the text of Article II, as the ultimate source of a State's power over its electors. "This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment."

The majority and Justice Thomas agreed that whatever the source of their power, the States cannot violate the express provisions of the Constitution when they appoint electors. Justice Thomas pointed out that "Article I, § 10, contains a brief list of powers removed from the States." That qualification may prove important if the advocates of the National Popular Vote Interstate Compact or similar initiatives are successful in urging some States to appoint their electors based on the national popular vote. Among other things, Article I, § 10 provides that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State."

In the meantime, the Court's decisions will guard against the electoral "chaos" that *amici* warned about and which concerned some of the Justices at **oral argument**. And going forward, *Chiafalo* and *Baca* should reinforce the integrity of the Electoral College by affirming the authority of the States to express effectively the will of their people in presidential elections.

For more information, please contact:

Lee E. Goodman
202.719.7378
lgoodman@wiley.law

Jeremy J. Broggi
202.719.3747
jbroggi@wiley.law

Shane Roberts, a Law Clerk at Wiley Rein LLP, contributed to this article.

Hickenlooper Guilty Verdict – A Cautionary Tale for Corporations

By Carol A. Laham and Hannah J. Miller

On June 5, the Colorado Independent Ethics Commission found that John Hickenlooper violated state ethics law while in the governor's office in 2018, when he flew on a private plane provided by one corporation and when he accepted transportation and private security paid for by another corporation. Four other violations were dismissed. The now-Senate candidate was fined $2,750.

While legal liability falls on Hickenlooper for accepting the prohibited gifts, both corporate gift givers were contacted by the Ethics Commission in the course of the investigation, and their responses are a matter of public record.

This incident should serve as a cautionary reminder to all corporations to be aware of jurisdictional gift rules before giving a gift. In addition to potential fines, the public perception of a prohibited gift giving can be costly.

Corporations should establish a process in which all gifts of transportation, lodging, meals, etc., to any public official are vetted to ensure compliance with the gift bans or limits of the jurisdiction, along with any attendant reporting requirements. Having a clearly defined process is especially important when a company has multiple actors who interact with public officials but do not necessarily coordinate with one another.

Our **Election Law & Government Ethics Practice** frequently advises corporate clients on gift giving. We are available to assist your corporation with vetting gifts, as well as navigating gift bans and limits under both federal and state law.

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wiley.law

Hannah J. Miller
202.719.3573
hmiller@wiley.law

Pennsylvania Ban on Contributions from Gambling Industry Held Unconstitutional *continued from 1*

time, it also affirmed the courts' long-standing recognition that contributing to candidates is part of "[p]articipating in the election of our governmental representatives [that] is the essence of our democracy." The court noted that Pennsylvania's blanket ban on contributions from covered individuals in the gaming industry precluded them from "mak[ing] even symbolic expressions of support" through small contributions that pose no threat of corruption.

The court also found Pennsylvania's law to be an anomaly. Among the 26 states that have some form of legalized gambling outside of tribal casinos, Pennsylvania was the only state that imposed a blanket ban on contributions from those with an interest in the gaming industry. Like the district court, the Third Circuit found that Pennsylvania had failed to provide sufficient evidence to demonstrate that its law was "closely drawn" to address the state's concerns about corruption.

Additional contribution restrictions at the federal, state, and local levels are common for certain industries, lobbyists and their principals, and government contractors. If you have any questions about whether you are subject to any of these enhanced contribution restrictions, please consult Wiley's Election Law and Government Ethics Practice.

For more information, please contact:

D. Mark Renaud
202.719.7405
mrenaud@wiley.law

Eric Wang
202.719.4185
ewang@wiley.law

New Washington State Law Requires 'No Foreign National' Certification for Corporate and PAC Contributions

By Caleb P. Burns and Eric Wang

A new Washington state law went into effect on June 11 that is aimed at preventing foreign money from entering campaigns in the state. The state law generally parallels the preexisting federal law banning foreign national participation in federal, state, and local elections. However, the new state law imposes an additional certification requirement that will apply whenever corporations, PACs, and other organizations make contributions in connection with Washington state elections.

Specifically, the new Washington law applies whenever a non-individual entity makes a contribution to a Washington state or local candidate, party committee, or PAC. On the contributor side, entities subject to the new requirement include not only business corporations and PACs, but also Section 527 political organizations, 501(c)(4) groups, and 501(c)(6) trade associations.

When a Washington state recipient receives a contribution from such an entity, the recipient is now required to obtain a certification from an individual "authorized to make the contribution" on behalf of the contributing entity that: (1) the entity itself is not a foreign national; (2) the contribution is not "financed in any part" by a foreign national; and (3) no foreign national was involved in making any decisions regarding the contribution.

Similar to the federal law, the Washington law defines a foreign national entity as one that is organized under the laws of a foreign country or that has its principal place of business abroad. With respect to the "financing" element, the new state law is aimed at foreign nationals providing "anything of value ... for less than full consideration." Therefore, simply having revenues from commercial sales to foreign customers or clients will not trigger the ban. The Washington Public Disclosure Commission (PDC) also has confirmed in public guidance that merely having foreign shareholders does not trigger the law.

With respect to the decision-making element, the PDC has issued emergency regulations that also are similar to the federal law. Under the state regulations, a foreign national is involved in decision-making if he or she "directs, dictates, controls, or directly or indirectly participates in the decision-making process" regarding the contribution.

The PDC's guidance and regulations also track the federal law in addressing domestic subsidiaries of foreign corporations. Domestic subsidiaries are still permitted to make contributions in Washington under the new law, provided that their contributions are not "financed" by their foreign parent and no foreign nationals are involved in the domestic subsidiary's decision-making regarding the contributions.

For more information, please contact:

Caleb P. Burns
202.719.7451
cburns@wiley.law

Eric Wang
202.719.4185
ewang@wiley.law

Major TCPA Updates with Implications for Political Callers: FCC Weighs In on P2P Texting Platforms; Supreme Court Invalidates Narrow TCPA Exception and Agrees to Consider 'Autodialer' Definition

By Megan L. Brown, Scott Delacourt, Kathleen E. Scott, and Boyd Garriott

June and July have been marked by major Telephone Consumer Protection Act (TCPA) news.

- On June 25, the Federal Communications Commission's (FCC) Consumer and Governmental Affairs Bureau (Bureau) issued a Declaratory Ruling (P2P Declaratory Ruling) that supports a narrow construction of the "automatic telephone dialing system" (ATDS or autodialer) definition and is a significant win for peer-to-peer (P2P) platforms, which are used by a variety of entities and organizations, including campaigns.
- On July 6, the U.S. Supreme Court decided **Barr v. American Association of Political Consultants, Inc.**, a closely watched case brought by political callers questioning the constitutionality of the TCPA's government-debt-collection exception. The Supreme Court invalidated the narrow exception because it unconstitutionally favored debt-collection speech over political and other speech, but the Court found the provision severable and thus upheld the remainder of the statute.
- Finally, on July 9, the Supreme Court granted a petition for certiorari to consider the scope of the TCPA's threshold autodialer definition. The Court will consider that case, **Facebook v. Duguid**, next term.

Accordingly, for this election cycle, the TCPA largely still stands, meaning that campaigns and other political callers must get consent before they reach out to voters' wireless numbers using autodialers. The FCC has partially clarified the definition of 'autodialer,' determining that P2P texting platforms that require human intervention to dial numbers are squarely outside of the reach of the TCPA. For next election cycle, the Supreme Court's forthcoming decision on the scope of the autodialer definition will have significant impacts on all callers, including political callers.

The P2P Declaratory Ruling Supports a Narrow Reading of the Term 'Autodialer' and Is a Win for Organizations Utilizing Peer-To-Peer Platforms

The Bureau's P2P Declaratory Ruling was issued in response to a May 2018 Petition for Clarification **filed** by the P2P Alliance, which, among other things, asked the Commission to clarify that P2P text messaging platforms are not autodialers. The ruling is significant not simply because it addresses how the TCPA may apply to a specific messaging platform, but also because it opines on the hotly contested scope of the term 'autodialer.' Political callers placing calls or texts using any modern calling equipment – including but not limited to P2P platforms – should take note.

The threshold definition of autodialer under the TCPA is the subject of much debate. The TCPA **makes** it unlawful to initiate any non-emergency call to wireless numbers using an ATDS without the consent of the called party. Because TCPA liability – which triggers infamously steep penalties – often hinges on whether the equipment used to place calls or texts is an autodialer, the scope of the definition is highly litigated.

The FCC itself has contributed to the legal uncertainty surrounding the term 'autodialer.' In 2015, the FCC put forth an extremely broad interpretation of ATDS, which was subsequently **vacated by the D.C. Circuit** in *ACA International v. FCC*. Since the D.C. Circuit's decision, the FCC has **sought comment** – on multiple occasions – on the autodialer definition. Curiously, the P2P Declaratory Ruling does not resolve the broader, still-open autodialer proceeding, explaining that "[t]he details of the Commission's interpretation of the autodialer definition remain pending[.]" However, as a matter of black letter law, the construction of ATDS adopted in the P2P Declaratory Ruling is now binding on the agency unless and until it is modified or overturned by the full Commission.

Even though the P2P Declaratory Ruling does not resolve the broader autodialer definition issues

continued on page 6

arising from the D.C. Circuit decision, it is significant because it sheds light on the Bureau's current position on the scope of ATDS. The P2P Declaratory Ruling construes the term 'autodialer' much more narrowly than the Commission did in 2015. In the P2P Declaratory Ruling, the Bureau:

clarif[ies] that the fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative [sic] of whether that equipment constitutes an autodialer under the TCPA. Instead, [it] make[s] clear that if a calling platform is not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls or texts made using it are not subject to the TCPA's restrictions on calls and texts to wireless phones.

. . .

If a text platform is not capable of storing or producing numbers to be called using a random or sequential number generator and dialing such numbers automatically but instead requires active and affirmative manual dialing, it is not an autodialer and callers using it are, by definition, not "evading" the TCPA.

The ruling leaves open several questions – including what "manually dialing" entails and what it means to "be capable of" meeting the definition of autodialer. But the Bureau's reasoning is consistent with a narrow interpretation of the statutory definition of ATDS.

More specifically, the P2P Declaratory Ruling addresses the question of whether "texts sent via a particular type of peer-to-peer messaging platforms are not subject to the TCPA's restrictions." The Declaratory Ruling does not green light *all* P2P platforms – explaining that it "do[es] not rule on whether any particular P2P text platform is an autodialer because the record lacks a sufficient factual basis for [the Bureau] to confirm (or for commenters to assess) whether any particular P2P text platform actually works as claimed in the *P2P Alliance Petition*." However, it does explain that "if a texting platform actually requires a person to actively and affirmatively manually dial each recipient's number and transmit each message one at a time and lacks the capacity to transmit more than one message without a human manually dialing each recipient's number, as suggested in the *P2P Alliance Petition*, then such platform would not be an 'autodialer' that is subject to the TCPA."

In short, leaving the open question of the scope of the word "capacity" aside, the Bureau granted the P2P Alliance Petition to the extent that P2P platforms require human intervention to dial numbers. This is a significant win for P2P platforms, which are used by a variety of entities and organizations, including nonprofits and campaigns.

The Supreme Court's Decision in Barr v. Association of Political Consultants, Inc. Invalidates a Narrow TCPA Robocall Exception, But Upholds the Broader TCPA

Barr v. American Association of Political Consultants, Inc. was a closely watched case involving the First Amendment, robocalling regulations under the TCPA, and severability. Chagrined that their political calls were regulated, the American Association of Political Consultants and three other organizations that participate in the political system filed a declaratory judgment action, claiming that **47 U.S.C. § 227(b)(1)(A)(iii)** – an exception to TCPA liability for calls "made solely to collect a debt owed to or guaranteed by the United States" – violated the First Amendment. In the end, **as predicted in Wiley's analysis of the oral argument**, the Court found a First Amendment violation but declined to strike down the entire TCPA, instead severing the government-debt provision from the statute. Going forward, calling parties need to be careful in their calling campaigns.

The issues before the Court were whether the TCPA's preferential treatment was a content-based regulation of speech, what level of scrutiny applied if it was, and whether the TCPA's broad robocalling restrictions had to be invalidated if the exception violated the First Amendment. The Court found that Section 227(b)(1)(A)(iii)'s robocall restriction, with the government-debt exception, is content-based

continued on page 7

because it favors speech made for the purpose of collecting government debt over other speech. As Justice Kavanaugh wrote for a plurality:

Under §227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets.

Accordingly, six Justices found that the TCPA violated the First Amendment by "impermissibly favor[ing] debt-collection speech over political and other speech, in violation of the First Amendment." Justice Kavanuagh, Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch all applied strict scrutiny. Justice Sotomayor came to the same conclusion applying intermediate scrutiny.

However, the Court upheld the remainder of the TCPA. Justice Kavanaugh, Chief Justice Roberts, and Justices Alito and Sotomayor found that the government debt exception was severable from the rest of the statute, despite the First Amendment violation. Justice Breyer, joined by Justice Ginsburg and Justice Kagan, would have upheld the government-debt exception, but given the contrary majority view, agreed that the provision was severable from the rest of the statute. In dissent, Justices Gorsuch and Thomas would have enjoined enforcement of the entire statute against the plaintiffs.

Many Court watchers were worried about the severability issue, fearing the entire TCPA could be invalidated if the debt collection exception was struck down. The majority refused to undermine the TCPA, spurring an important doctrinal debate, which will continue to be disputed.

From a practical perspective, the TCPA lives on. Accordingly, for now and importantly for this election cycle, the TCPA still imposes restrictions on **political callers**.

Next Up: The Supreme Court Will Consider the Scope of the Autodialer Definition

Just days after issuing its much-anticipated decision in *Barr v. American Association of Political Consultants, Inc.*, the Supreme Court on July 9 **agreed to hear** a case that will significantly impact the reach of the TCPA. The Court will take up Facebook's challenge to a Ninth Circuit TCPA ruling that broadly defined what qualifies as an ATDS under the TCPA. Specifically, the Court will consider "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" This question is at the heart of a circuit split, which has resulted in disparate and inconsistent rulings across jurisdictions. A range of stakeholders should pay attention to this case in light of the central role that the ATDS definition plays in TCPA application and litigation. Given that the Supreme Court's action may further discourage the FCC from weighing in on the ATDS issues pending before it, the cert grant presents an opportunity for stakeholders to engage on ATDS at the Court to resolve uncertainty that chills communication.

In the case that Facebook is challenging, *Duguid v. Facebook*, the plaintiff alleged that Facebook sent unsolicited security alerts via text message using an ATDS. Facebook argued that its equipment was not an ATDS because it stored numbers to be called only "reflexively" in response to "outside stimuli" such as a suspicious login. Because this equipment did not "use a random or sequential number generator," Facebook argued that it should not be considered an ATDS.

Facebook's argument stems from the ambiguous wording of the statute, which **defines** ATDS as: "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Some courts – such as the **Eleventh Circuit** – have interpreted this definition to mean that the phrase "using a random or sequential number generator" modifies both "store" and "produce." Under these courts' reading, equipment cannot be an ATDS unless it uses a random or sequential number generator.

The Ninth Circuit **disagreed** with Facebook and these other courts. It interpreted ATDS to include

continued on page 8

equipment that stores numbers for purposes other than calling – specifically, "the equipment need only have the 'capacity' to store numbers to be called." The Ninth Circuit held that the phrase "using a random or sequential number generator" modified only the word "produce," *not* the word "store." Under this reading, equipment meets the first prong of the ATDS definition if they either (i) "produce" numbers using a random or sequential number generator *or* (ii) merely "store" numbers. Other courts, such as the **D.C. Circuit**, have noted that this interpretation would encompass every smartphone in America – as smartphones can "store" numbers – which would give the statute an "eye-popping sweep."

Facebook filed its **petition for certiorari** in October 2019 asking the Court to consider the ATDS definition, as well as whether the TCPA's prohibition on calls made using an ATDS is an unconstitutional restriction of speech. After months of waiting, the Court granted cert on the definition of ATDS.

A Supreme Court ruling could bring much-needed guidance. In the absence of a definitive decision from the expert agency, federal courts have inconsistently interpreted ATDS. As Facebook detailed in a **supplemental brief** filed in the wake of the Supreme Court's TCPA decision in *Barr v. American Association of Political Consultants, Inc.*, there is an "irreconcilable conflict on an important and oft-litigated question that dictates whether the statute reaches specialized robocalling equipment or every modern smartphone." In short, the Second and Ninth Circuits have interpreted ATDS more broadly, while the Third, Seventh, Eleventh, and D.C. Circuits have taken a narrower approach. Given the central role of the ATDS definition under the TCPA, the Court's decision on this split will have profound implications for a range of stakeholders and will influence TCPA litigation for years.

The case will be argued and decided as part of the October Term 2020, which makes it likely a decision will come in 2021, after the election. The cert grant may make FCC action on numerous pending petitions unlikely, so interested parties should weigh in with the Court. The Supreme Court rarely takes TCPA cases, so addressing the statute twice in a month is remarkable.

. . .

As political callers know well, the TCPA is a high-stakes area, and the issues at play in these three recent TCPA items are of critical importance. While the Bureau's P2P Declaratory Ruling sheds some light on the definition of autodialer, the Commission has otherwise declined to more fully address the meaning of ATDS, despite years of opportunity and plenty of activity on unwanted and illegal robocalling. If additional relief is to come to political callers on this issue, it may be from the Supreme Court and not the FCC.

For more information, please contact:

Megan L. Brown
202.719.7579
mbrown@wiley.law

Scott D. Delacourt
202.719.7459
sdelacourt@wiley.law

Kathleen E. Scott
202.719.7577
kscott@wiley.law

Boyd Garriott
202.719.4487
bgarriott@wiley.law

Federal Appeals Court Upholds FEC Debate Regulation: 15% Polling Threshold is Lawful

By Lee E. Goodman and Andrew G. Woodson

Election Law News previously **reported** a federal district court's decision upholding the Federal Election Commission's (FEC) debate regulation and specifically the Commission on Presidential Debates' (CPD) use of a 15% polling threshold for candidates to qualify for debates. In June, the U.S. Court of Appeals for the District of Columbia **affirmed** the district court's opinion.

The plaintiffs – Level the Playing Field (a nonprofit), the Green Party, and the Libertarian Party – sought to force third-party candidates into the presidential debates by filing enforcement complaints against the CPD and by petitioning the FEC to initiate a new rulemaking to amend its regulation on neutral debate staging. They argued that the CPD intentionally and unfairly excluded third-party candidates by setting an unrealistic 15% polling threshold. The FEC dismissed the enforcement complaints, finding that the 15% polling threshold was a neutral standard, and declined to open a new rulemaking or revise its debate regulation to prohibit polling thresholds.

The plaintiffs sued the FEC arguing that the decision not to initiate a rulemaking, as well as dismissal of the complaints, were arbitrary, capricious, and contrary to the FEC's debate regulation. They argued that the use of a 15% polling threshold systematically discriminates against third-party candidates and turns debates into unfair corporate contributions to the major party candidates.

The Court of Appeals applied a "highly deferential" standard to the Commission's decision to dismiss the enforcement complaints and its decision declining to undertake a rulemaking. "Judicial review of decisions by the Federal Election Commission is highly deferential," the Court observed.

The Court walked through the Commission's point-by-point consideration of the plaintiffs' evidence and concluded that "far from ignoring plaintiffs' evidence, the Commission thoughtfully evaluated the record. The Commission offered detailed explanations in support of its view that plaintiffs failed to show impermissible bias against independent candidates or in favor of candidates from the two major political parties. And though plaintiffs may disagree with these explanations, they have failed to show that the Commission's decision making was arbitrary or unreasonable."

As to the Commission's decision against opening a new rulemaking, the Court again set forth a high standard. "Our review of a rulemaking denial is extremely limited and highly deferential." Under that standard, the Court rejected the plaintiffs' demand that the FEC revise its regulation.

The challenge to the CPD's participation criteria and neutrality focused on a corporate-funded nonprofit debate sponsor. But the FEC's debate regulation also purports to regulate press-sponsored debates too. As **detailed** by Commissioner Lee Goodman, presidential debates have a rich regulatory history that casts doubt upon the authority of the FEC to restrict press-sponsored debates in the same way it regulates debates sponsored by corporations or nonprofit organizations. In 1980, Ronald Reagan's famous pre-debate statement "I'm paying for this microphone Mr. Green" in a New Hampshire high school gym arose from the FEC's threatened enforcement action against the *Nashua Telegraph*. In 2015, Fox News exercised a newsroom editorial right to expand the number of candidates participating in an undercard debate, which became the subject of **enforcement interest** by the FEC's general counsel and several Commissioners.

In light of the federal Appeals Court's decision in this case, however, the regulatory rules appear to be well-marked for the 2020 general election. Wiley attorneys have advised debate sponsors and are available to advise would-be sponsors on compliance with the FEC's rules.

For more information, please contact:

Lee E. Goodman
202.719.7378
lgoodman@wiley.law

Andrew G. Woodson
202.719.4638
awoodson@wiley.law

FEC Changes: One Commissioner Arrives, One Leaves, Quorum Lost

By Michael E. Toner, Lee E. Goodman, D. Mark Renaud, and Andrew G. Woodson

June 26 was a day for big changes at the Federal Election Commission (FEC). Longtime Commissioner Caroline Hunter announced she would be stepping down after more than a decade of service. Shortly thereafter, the White House announced the President's intent to nominate Allen Dickerson to replace her. The moves come at a critical time for the FEC, which lacked a quorum for 10 months, resumed a quorum in June, and now faces the loss of a quorum again.

Commissioner Hunter, a Republican, was first appointed to the FEC in 2008. "Caroline has been a stalwart defender of limited government and agency accountability," said Michael Toner, chair of Wiley's Election Law and Government Ethics Practice and former FEC Chairman. She announced she would step down, **effective July 3,** to join a nonprofit organization, Stand Together in Arlington, VA.

Allen Dickerson has been the Legal Director for the Institute for Free Speech, where he leads a nationwide First Amendment litigation practice. Previously, he was an associate with Kirkland & Ellis, LLP. He also serves as Captain in the Judge Advocate General's Corps, United States Army Reserve.

"Allen has a brilliant legal mind and an established commitment to the proper balance between regulation and free speech," said Lee Goodman, a former Chairman of the FEC. "Allen Dickerson and Trey Trainor will work well together on the Republican side of the commission and bring much-needed stability to the agency."

The White House's decision to nominate Dickerson solo, without pairing him with a Democratic nominee, is a significant development. With Hunter's departure, the six-member Commission is down to three commissioners. Four commissioners are required to make a quorum that can conduct agency business. The three remaining commissioners are its new Chairman – Trey Trainor, a Republican – and incumbent commissioners Ellen Weintraub, a Democrat, and Steven Walther, an independent who traditionally has voted with the Democrats. Weintraub has served 18 years, since 2002, while Walther has served since 2006. Both serve long past their original six-year terms.

That composition leaves the White House and Senate some important decisions about how to remake the Commission. The White House could nominate five new commissioners, three Democrats and two Republicans, to join Chairman Trainor, who joined the Commission this month. Alternatively, the White House could nominate one Democrat to fill the empty Democratic seat and two new Republicans to fill the two empty Republican seats. The White House's announcement that it is nominating only Dickerson at this time indicates an incremental approach. Dickerson would join Trainor to fill two Republican seats, while Weintraub and Walther would continue serving past their terms in Democratic seats. The quorum would be restored with the bare minimum of four commissioners. Whether the Senate agrees with this approach remains to be determined.

For the foreseeable future, the agency once again will be without a quorum for at least some period of time this summer. The agency can resume regulatory business once Dickerson is formally nominated, confirmed by the Senate, and sworn into a seat. That process may take time.

For more information, please contact:

Michael E. Toner
202.719.7545
mtoner@wiley.law

Lee E. Goodman
202.719.7378
lgoodman@wiley.law

D. Mark Renaud
202.719.7405
mrenaud@wiley.law

Andrew G. Woodson
202.719.4638
awoodson@wiley.law

Illegal Raffle Incident Is a Good Reminder for PACs and Nonprofits

By Carol A. Laham and Louisa Brooks

A recent dust-up in the nation's heartland serves as a timely reminder that PACs and nonprofits must review – and follow – state law when it comes to fundraising. In late May, the *Kansas City Star* ran a story alleging that U.S. Senate candidate Dave Lindstrom's campaign committee had violated state law by raffling a Kansas City Chiefs jersey signed by Kansas City Chiefs quarterback and Super Bowl LIV champion Patrick Mahomes.

So what was the problem here? Was this some obscure state campaign finance provision that bans raffles? Not at all; in fact, it's a matter of state gambling law and applies to all types of entities, not just campaigns. As the Kansas Racing and Gaming Commission confirmed for the *Star*, a raffle conducted by an entity other than a qualifying nonprofit is considered an illegal lottery under Kansas law. This type of provision is not unusual nor particular to Kansas; most states and the District of Columbia have a similar legal construct. The default rule in most places is that a "lottery" – a raffle or other contest that involves the elements of (1) a prize, (2) chance, and (3) consideration – constitutes illegal gambling and is thus prohibited by the state criminal code. Often – but not always – a separate "charitable gaming" statute creates a carveout to allow certain types of nonprofit organizations to conduct raffles, usually under some type of license from the state. But PACs are not eligible for charitable gaming licenses, and, depending on how the statute is written, 501(c)(4) and 501(c)(6) organizations may not be eligible, either.

Ignoring state prohibitions on lotteries is not a good idea. State gambling laws are usually part of the criminal code and thus subject to enforcement by local prosecutors. While it may be unlikely for any particular raffle to draw attention from a local prosecutor, it's not unheard of; previously, another federal campaign committee received a letter from a county District Attorney informing the candidate that state law prohibited his campaign from raffling off tickets to the NCAA basketball tournament.

The best way to ensure that your organization or PAC fundraising efforts do not land you in the press – or in a courtroom – is to vet the terms of the contest under state law. For example, many states take a more relaxed approach to a "sweepstakes." The exact requirements for a legal sweepstakes contest vary from state to state, so it is important to review state law before planning your fundraising contests.

During the coronavirus (COVID-19) pandemic, we have seen an uptick in PACs interested in holding nationwide online sweepstakes contests as they seek to replace their in-person events. Importantly, these contests must comply with the state gambling laws in *each state* where at least one contest participant resides. A PAC can generally accomplish this by adopting contest rules that act as a kind of "least common denominator" across the various state laws. That said, note that a handful of states have legal provisions that may prohibit their residents from participating altogether. Moreover, let's not forget that the Federal Election Commission (FEC) has its own rules as they relate to raffles or sweepstakes.

Our **Election Law & Government Ethics Practice** frequently advises PAC and nonprofit clients on their sweepstakes contests and other fundraising incentive programs. We are available to assist your organization or PAC in navigating the issues under both federal and state law.

For more information, please contact:

Carol A. Laham
202.719.7301
claham@wiley.law

Louisa Brooks
202.719.4187
lbrooks@wiley.law

IRS Finalizes Regulations Eliminating Donor Disclosure Requirement for Certain Tax-Exempt Organizations

By Thomas W. Antonucci

The Internal Revenue Service (IRS) has issued **final regulations** to eliminate donor reporting requirements for certain tax-exempt organizations.

As *Election Law News* reported back in **September 2019**, the IRS had proposed regulations to eliminate the requirement that certain tax-exempt organizations (i.e., those other than 501(c)(3) and 527 organizations) report the names and addresses of their donors on Schedule B of Form 990. Those regulations were the IRS' attempt to end the drama that had been unfolding in recent years as certain groups and state officials argued that such information was necessary.

However, the IRS made clear in a revenue procedure in **July 2018** that it "does not need the names and addresses of [donors] in order to carry out the internal revenue laws" and that the regulations "will have no effect on information currently available to the public" (since the IRS is prohibited by law from disclosing donor names and addresses). That revenue procedure was set aside by a Montana federal court solely on procedural grounds, which the IRS has now remedied by issuing these regulations.

In the final regulations, the IRS explained that the donor disclosure requirement imposed compliance burdens on exempt organizations and administrative costs on the IRS. The IRS further cited to instances of "inadvertent disclosure" of the donor information by the IRS and state authorities that could result in the harassment of contributors. The IRS concluded that these burdens and risks – particularly when compared to the "lack of administrative need" for this information – made it appropriate to remove the disclosure requirement.

Exempt organizations will continue to be required to report the *amounts* of substantial contributions on Schedule B, and must maintain a record of the names and addresses of substantial contributors, which will need to be provided to the IRS upon request.

The regulations are effective for all tax returns filed after September 6, 2019.

For more information, please contact:

Thomas W. Antonucci
202.719.7558
tantonucci@wiley.law

Events:

Basics of the Federal Election Campaign Act 2020
August 4, 2020
Online Webinar
Practising Law Institute (PLI)
Jan Witold Baran

Corporate Political Activities 2020: Complying with Campaign Finance, Lobbying and Ethics Laws
September 10-11
Webcast
Practising Law Institute (PLI)
Jan Witold Baran, Co-Chair & Speaker,
Carol A. Laham, Panelist

Political Privacy Law Update

By Lee E. Goodman

Election Law News has been tracking developments in the U.S. Supreme Court's consideration of **three petitions for certiorari** seeking Court review of the California Attorney General's (AG) mandatory donor-disclosure rule for nonprofit organizations. The Court **requested a response** from the California AG in *Institute for Free Speech v. Becerra* (No. 19-793). The AG filed his opposition brief on May 1. The Institute for Free Speech replied on May 15. All three cases now are fully briefed and awaiting a Court decision on the grant of certiorari. However, they do not appear on the upcoming cert conference.

In his **opposition**, the state AG argues that the Internal Revenue Service (IRS) already requires nonprofit organizations to disclose their donors to the IRS on forms known as "Schedule B," and all California does is require the nonprofits to send a copy of that document to California as a condition of soliciting donations from California citizens. The AG argues that this disclosure of donors advances the AG's consumer protection functions and is not a significant burden on the free-association rights of nonprofits.

The Institute for Free Speech's **reply** emphasizes that all donor-disclosure mandates necessarily burden free-association rights by chilling donors from associating. Moreover, the Institute argues the state must demonstrate a greater, more specific need for the information than California can show.

New York Tries to Compel Nonprofit Donor Disclosure, Again

After a federal court **struck** a New York State mandatory donor-exposure law as unconstitutional, the New York legislature is trying to revive a modified reporting and donor-exposure law through language in a budget bill. The modified rule would require nonprofit organizations to disclose publicly the names of their donors when they "advocate[] for or against" any "elected official, executive or administrative or legislative body relating to ... any proposed legislation, pending legislation, rule, regulation, hearing or decision" and the donor contributed funds to the nonprofit "in whole or in part for the support of the covered communication." The legislature apparently believes these limitations will save the law from the federal court's previous First Amendment ruling. The modified rule also would require nonprofit organizations to file their IRS Schedule Bs (identifying donors) with the New York Secretary of State as well as the New York Attorney General. New York's latest legislation is explained by Wiley's Carol Laham and Eric Wang **here**.

IRS Protects Donor Privacy for Certain Nonprofit Organizations

Meanwhile, in May 2020 the IRS adopted a new rule relieving nonprofit organizations other than 501(c)(3)s, such as 501(c)(4) advocacy organizations, from listing the names of their donors on Schedule Bs submitted with their annual tax information returns (Form 990s). Wiley's Tom Antonucci has **explained** the recent rulemaking.

The absence of donor names on Schedule Bs will frustrate the efforts of states such as California and New York that force donor disclosure by requiring nonprofits to file their Schedule Bs with the states. Because the IRS no longer requires 501(c)(4) organizations to list donor names on their Schedule Bs, the states that piggyback on the IRS reports will have to find another mechanism for obtaining the names of donors.

Under the IRS rule, charitable, religious, and educational 501(c)(3) organizations will be required to continue listing the names of donors on their Schedule Bs, so the states likely will continue to seek copies of their Schedule Bs. The IRS deemed donor disclosure by 501(c)(3) organizations necessary because the donors are entitled to income tax deductions for their donations, so disclosure of their names facilitates the IRS's cross-checks of allowable deductions.

For more information, please contact:

Lee E. Goodman
202.719.7378
lgoodman@wiley.law

Reminder: Upcoming Political Conventions Trigger Electioneering Communication Rules

By Andrew G. Woodson

Regardless of whether your organization intends to travel to a political party convention this year, the convention could still have an impact on your organization's public messaging. In particular, if your organization runs TV or radio ads referring to Donald Trump or Joe Biden anywhere in America this July or August, you may have additional work to do!

The Federal Election Commission regulates not only ads that are explicitly electoral (e.g., vote for, vote against, etc.) but also certain communications that merely refer to candidates and occur close-in-time to federal elections and conventions. This latter category of communication, called an "electioneering communication," was enacted as part of the Bipartisan Campaign Reform Act of 2002 and extends to a broadcast, cable, or satellite communication that (in this case) is distributed within 30 days of a presidential primary or nominating convention and simply mentions the candidate.

Because the Democratic Convention will be held between August 17 and August 20, essentially any TV or radio ad run that refers to Joe Biden in any way between July 18 and August 20 will trigger an electioneering communication report (i.e., an FEC Form 9). Similarly, because the Republican Convention will take place between August 24 and August 27, most TV ads that refer to Donald Trump in some fashion between July 25 and August 27 will trigger an FEC Form 9 filling too. (Note that this would encompass references to terms like the "Trump administration.") These forms are time-sensitive filings that can, in some cases, require disclosure of information that is not readily available to the general public – including information about your organization's financial supporters.

Wiley's experienced legal team and reporting professionals are available to assist your organization with these filings, should they be required. Organizations should also keep in mind that the electioneering communication period for the general election starts on September 4, 2020.

For more information, please contact:

Andrew G. Woodson
202.719.4638
awoodson@wiley.law

Election Law Professionals

Name	Phone	Email
Thomas W. Antonucci	202.719.7558	tantonucci@wiley.law
Jan Witold Baran Practice Founder	202.719.7330	jbaran@wiley.law
Jeremy J. Broggi	202.719.3747	jbroggi@wiley.law
Louisa Brooks	202.719.4187	lbrooks@wiley.law
Caleb P. Burns	202.719.7451	cburns@wiley.law
Ralph J. Caccia	202.719.7242	rcaccia@wiley.law
Tessa Capeloto	202.719.7586	tcapeloto@wiley.law
Claire J. Evans	202.719.7022	cevans@wiley.law
Lee E. Goodman	202.719.7378	lgoodman@wiley.law
Sarah B. Hansen	202.719.7294	shansen@wiley.law
Thomas W. Kirby	202.719.7062	tkirby@wiley.law
Carol A. Laham	202.719.7301	claham@wiley.law
Bruce L. McDonald	202.719.7014	bmcdonald@wiley.law
Hannah Miller	202.719.3573	hmiller@wiley.law
Daniel B. Pickard	202.719.7285	dpickard@wiley.law
D. Mark Renaud	202.719.7405	mrenaud@wiley.law
Michael E. Toner Practice Chair	202.719.7545	mtoner@wiley.law
Karen E. Trainer, Senior Reporting Specialist	202.719.4078	ktrainer@wiley.law
Robert L. Walker	202.719.7585	rlwalker@wiley.law
Eric Wang	202.719.4185	ewang@wiley.law
Andrew G. Woodson	202.719.4683	awoodson@wiley.law
Brandis L. Zehr	202.719.7210	bzehr@wiley.law

To update your contact information or to cancel your subscription to this newsletter, visit:

https://www.wiley.law/subscribe

This is a publication of Wiley Rein LLP, intended to provide general news about recent legal developments and should not be construed as providing legal advice or legal opinions. You should consult an attorney for any specific legal questions.

Some of the content in this publication may be considered attorney advertising under applicable state laws. Prior results do not guarantee a similar outcome.