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Constitutional common sense absent in 6th Circuit's HB 1 ruling: Mark Brown

Guest Columnist, cleveland.com

5–7 minutes

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1. Opinion

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A recent federal appellate court ruling upholding Ohio House Bill 1's ban on ballot issue contributions by foreign nationals also left intact the law's constitutionally questionable criminalizing of speech on ballot issues by lawful permanent residents (green card holders) and by nonprofits that accept foreign donations, Capital University Law professor Mark Brown writes today. (Illustration by Chris Boehke, Advance Local)Illustration by Chris Boehke, Advance Local

By

- Guest Columnist, cleveland.com

Democracy in Ohio suffered a setback when the 6th U.S. Circuit Court of Appeals in Cincinnati last month refused to block Ohio's House Bill 1 ban on "foreign nationals" "[m]ak[ing] a contribution … or independent expenditure in support of or opposition to a statewide ballot issue." Unlike its federal counterpart, Ohio's ban extends to "issue advocacy" (ballot measures) and criminalizes speech by lawful permanent residents (green card holders) living in Ohio. Further deviating from the longstanding federal prohibition – which allows criminal penalties only when violations are "willful" -- Ohio's new prohibitions criminalize innocent mistakes.

As then-Judge Brett Kavanaugh explained a dozen years ago, Congress chose not to apply the speech restrictions placed on foreign nationals to green card holders because the latter "stand in a different relationship to the American political community …., [and] have a long-term stake in the flourishing of American society." Kavanaugh also noted that punishing "issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate" (which federal law does not do) -- could cross the constitutional "line drawn by the Supreme Court in [FEC v.] Wisconsin Right to Life," a

precursor to its better-known holding in Citizens United v. FEC (extending First Amendment protections from nonprofits to for-profit corporations).

House Bill 1 ignores all of this by both prohibiting green card holders' speech about ballot issues and then criminalizing domestic nonprofits' speech about ballot issues when they "us[e] any funds [they] know were received from a foreign national," including green card holders. Under HB 1's reach, an editorial printed by a church in a parish bulletin opposing an abortion amendment could be criminal if a green-card parishioner dropped a $1 bill in the Sunday collection plate. The same goes for Ohio's Fraternal Order of Police (FOP), which accepts dues from green card holders and often voices opinions on citizen initiatives.

House Bill 1 threatens just about every charity and membership organization that uses the marketplace of ideas in Ohio with a criminal investigation. Of course, those that fall into the Attorney General's and Secretary of State's good graces will have nothing to fear. The rest, however, will effectively be forced either to take complex, expensive and tedious measures to segregate money that is received from lawful permanent residents or simply not speak.

For this reason, three federal courts have agreed that Maine's and Minnesota's HB 1 variants violate the First Amendment rights of domestic corporations, both for-profit and nonprofit. The 1st U.S. Circuit Court of Appeals in Boston this past July, for example, invalidated Maine's ban on corporate issue advocacy by noting that it was just "an end-run around Citizens United." Most businesses and nonprofits, after all, receive money from foreign nationals, either through sales or donations. The 1st Circuit rightly pointed to the

inevitable “chilling effect” on “U.S. corporations …, [which] will likely choose not to speak at all rather than risk criminal penalties.”

Mark Brown is a law professor and the Newton D. Baker/Baker & Hostetler Chair at Capital University Law School.

To be sure, House Bill 1 avoids part of the overbreadth problem by exempting for-profit businesses. But this just makes its First Amendment violation worse. As the late Justice Robert Jackson stated in a 1949 case, underinclusive laws are particularly odious because they allow government to target disfavored groups. Under HB 1, for example, for-profit employers that depend on foreign purchasers abroad remain free to criticize Ohio’s minimum wage initiative, but unions with green-card members living in Ohio are not allowed to support it.

Interestingly, the 6th Circuit’s refusal to block HB 1 did not address whether “Ohio’s ban on ballot-issue spending (as compared to

spending on political candidates) by all foreign nationals violates the First Amendment." Because that question remains, constitutional common sense could still carry the day.

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