

## Ban on Federal Election Contributions Heading to Court

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A longstanding ban on contractors making contributions in federal elections is under legal challenge. The U.S. Court of Appeals for the District of Columbia (DC) will hear oral arguments in the case on Monday, September 30, 2013.

The issue for New Jersey is how the outcome of this case will impact its own pay-to-play law. In Wagner v. Federal Election Commission (FEC), three federal contractors are suing for the right to make campaign contributions. They claim the prohibition is a violation of their First and Fourteenth

Amendment rights of free speech and equal protection.

The case thus far has followed an interesting path; In November of 2012, the U.S. Court for DC upheld the ban in the Federal Election Campaign Act on federal contractor donations.

The Act prevents contractors receiving federal contracts from donating to any political party, committee, or candidate for public office. Subsequently, the plaintiffs appealed the case, challenging the ban in section 441c of the Federal Election Campaign Act (FECA). They said the prohibition is not justified by a “sufficiently important governmental interest” because there is no evidence that contributions lead to corruption.

Further, they challenged the Act as violating the equal protection clause of the Constitution. On May 31st of this year, the Appeals Court remanded this case to the DC District Court. In taking this action the Appeals Court said that under section 437h of FECA, district courts are limited in terms of constitutional challenges.

The court ordered the District Court to develop a record for appellate review and certify the case for a review by the whole DC Appeals Court. Thus, the case will be given an en banc review (heard by full court) in September.

Though it is difficult to predict the outcome of this case there is certainly the possibility, considering recent decisions by the DC Court of Appeals, that the decision may find for the plaintiffs and rule the ban as unconstitutional.

If this is the case, then what are the ramifications for New Jersey’s pay-to-play law?

It is difficult to say. However, there is a significant difference between New Jersey’s law and federal law. Pay-to-play in New Jersey does not ban contributions in state elections. It only limits them. This is a major distinction. So there may not be as sufficient a First Amendment concern.

The Fourteenth Amendment equal protection argument may be a bigger problem. While individual contributors are subject to a \$2,600 contribution limit, contractors cannot give more than \$300.

The equal protection clause of the constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Over time, the clause has been interpreted to apply to federal laws as well.

The difference between \$300 and \$2,600 could be viewed as not treating certain contributors similarly under the law. The State’s pay-to-play law is complicated and convoluted. It is not easy to understand, even sometimes for lawyers and regulators.

It has led to precipitous drops in fundraising by candidates and parties, the entities most accountable. On the other hand, those groups less accountable, PACs and independent, often anonymous groups, are proliferating and often are recipients of contractor contributions.

The New Jersey Election Law Enforcement Commission has proposed changes to existing law. It has called for one state law, rather than the current situation which allows local governments to adopt their own ordinances or circumvent the state law by invoking the fair and open loophole.

Moreover, the proposal calls for strengthening disclosure by requiring reporting for all contracts over \$17,500, an end to fair and open, and an increase in the contractor contribution limit from \$300 to \$1,000.

It is not known what the DC Appeals Court will do. But if it decides that the federal pay-to-play law is unconstitutional, these reforms would strengthen the state’s case against similar action taken against it.

Simplifying the law, ending fair and open, and in particular raising the contribution limit would help defend against the charge of unequal treatment, let alone an abridgement of First Amendment free speech rights.

*Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission. The opinions presented here are his own and not necessarily those of the Commission.*