Constitutional Aspects of S.132: A Bill Requiring Lobbyist Employers that are Membership Organizations to Disclose the Number of Their Members and the Names and Addresses of Those Members that are not Natural Persons

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I. Introduction

My name is Peter Teachout. I am a Professor of Constitutional Law at Vermont Law School. I appreciate the opportunity to testify today on constitutional aspects of S.213, a bill which would require lobbyist employers that are membership organizations to disclose the number of the members and names and addresses of those members that are not "natural persons." The question I have been asked to address is whether the legislation, if adopted, would be vulnerable to constitutional challenge under the federal or state constitutions on grounds that it violates "the right of association." Closely related is the question of whether it would be found to violate the "right to petition" government. I will focus in this testimony on the question of whether the proposed legislation, if adopted, would be vulnerable to a challenge based on the claim that the required disclosures violate the "right of association." I will simply note here that, although the analysis is somewhat different, the courts have been no more receptive to the "right to petition" argument than they have been to the argument that disclosure laws violate the "right to association."

It is my judgment that S.132, if adopted, would survive constitutional challenge. Generally speaking federal and state courts have upheld disclosure requirements in both the lobbying registration and campaign finance law contexts. The courts have found that (1) disclosure requirements such as those involved here serve important if not compelling governmental interests and (2), in this context, they do not significantly inhibit the right to associate. That is not to say that membership disclosure requirements will never be found to violate the right to association – there is at least one important Supreme Court case where in fact such a violation was found – but the general pattern has been for the courts to uphold disclosure requirements absent a showing that such requirements exert a significant "chilling effect" on associational rights. Nonetheless, because the right to associate is considered to be a fundamental and important First Amendment right, and because compelled disclosure of personal information always has at least the potential to inhibit one's willingness to join and participate in the activities of an association, it is important not to dismiss out of hand the possibility of a "right of association" challenge.

II. Disclosure Requirements Imposed by S.132

S.132 would amend existing Vermont lobbying disclosure law to require, in addition to what is already required, that "employers" of lobbyist that qualify as "membership organizations" disclose (1) the number of their members and (2) the names and addresses of those members that are not "natural persons." Significantly, the legislation would not require disclosure of the names and addresses of natural persons who are members of the employer organization. Since the proposed legislation would require disclosure of the names and addresses only of member organizations, not individuals, there is diminished likelihood that the compelled disclosure would significantly inhibit participation in the employer's

association under any imaginable set of circumstances. The circumstances involved in the *NAACP v. Alabama* case, discussed below, offer a stark contrast in this respect.

III. Disclosure Requirements and the Right of Association

The Supreme Court has recognized that lobbying plays a legitimate and important role in democratic government. Activities such as lobbying, public advocacy, and political expression, the Court has noted, play a crucial role in helping ensure informed and responsible legislative decision making. The Court has emphasized in this respect the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." While individual advocacy can play a role in this public debate, for effective advocacy individuals need to form and act together through associations. Because of the crucial role played by associations in this process, legislative measures which significantly restrict and limit the ability to form political associations should be subject to careful constitutional scrutiny.

This view underlies the Court's decision in *NAACP v. Alabama*, 357 U.S. 449 (1958). In that case, the Court overturned a state court contempt citation against the National Association for the Advancement of Colored People [NAACP] for refusing to disclose its local membership list. Being forced to disclose the names and addresses of its members, the NAACP argued, would result in acts of economic retaliation, even violence, against its members. Fear of such retaliation in turn would undermine the organization's ability to form an effective political association. The Supreme Court begins its opinion by noting that "[e]ffective advocacy of public and private points of view, particularly controversial ones, is undeniably enhanced by group association." In order to meaningfully protect the First Amendment rights of freedom of speech, petition and assembly, therefore, there had to be "freedom to engage in association for the advancement of beliefs and ideas." Given the then-existing political climate, the Court found, requiring disclosure of membership lists of the NAACP would have a serious and significant "chilling effect" upon the exercise of the constitutional right of association. Therefore, the state could not require the NAACP to disclose its membership lists and the contempt citation had to be withdrawn.

In subsequent cases involving challenges to disclosure requirements, however, the Supreme Court and the lower courts have consistently distinguished *NAACP v. Alabama* on grounds that, in these latter contexts, the plaintiffs have failed to allege or show any significant chilling effect on the exercise of the right to associate. On that basis, the courts have upheld disclosure requirements against constitutional challenge in both lobbying and campaign finance contexts. While recognizing that disclosure requirements inevitably may have some impact on the willingness of individuals to form and join associations, the courts have found that the important public interests served by disclosure requirements in these contexts far outweigh the negligible and often speculative impacts those disclosure requirements might have on the ability to form and join associations.

Buckley v. Valeo, 424 U.S. 1 (1976), is instructive in this regard. In that case, the plaintiffs challenged the constitutionality of several provisions of the Federal Election Campaign Act of 1971 including one that required political committees to keep and disclose records of contributions and the names and addresses of contributors. In addressing this last challenge, the Court began by recognizing again that "compelled disclosure . . . can seriously infringe on privacy of association." Disclosure of contributors can invade privacy of belief, the Court noted, as much as disclosure of membership lists.

Having recognized that, however, the Court went on to find that disclosure of the names and addresses of contributors in the campaign finance context served important governmental interests, interests that far outweighed any alleged harm to associational rights. In order to successfully challenge the disclosure requirements, the Court ruled, the plaintiffs had to show that compliance with those requirements posed more than a "speculative" threat to freedom of association: they had to show, for example, that the compelled disclosure would expose the contributors to the sorts of reprisals that were present in the *NAACP* case. Since the challengers in *Buckley* were unable to offer any such proof – the claims of injury to associational rights were at best only "speculative"- the Court dismissed that aspect of the challenge and upheld the disclosure requirements in the campaign finance law.

Subsequent court cases in both campaign finance and lobbying reporting contexts have followed the same basic pattern and yielded the same basic result. The recurring theme in these cases is that the important governmental interests served by the compelled disclosure in the challenged laws far outweigh any alleged intrusions on associational rights. In *ACLU v. New Jersey Election Law Enforcement Commission*, 509 F. Supp. 1123 (D.N.M. 1981), for example, the plaintiffs challenged a disclosure requirement in the state's lobbying registration law on grounds that it violated the associational rights of the lobbyist's employer. Rejecting that claim, the federal district court upheld the disclosure requirement. The court began by recognizing that "[f]reedom of speech and the right to petition for the redress of grievances are 'among the most precious of the liberties safeguarded by the Bill of Rights.'" Therefore, the disclosure requirement in the law should be subject to a strict scrutiny standard of review. Under that standard the state had to show that the disclosure requirements furthered a "compelling state interest" and moreover that the state had chosen "the least restrictive means" of doing so. The court identified three "compelling interests" served by the disclosure requirement: (1) the need for public officials to understand and evaluate the positions of particular constituencies on particular issues; (2) the need for the public to evaluate the performance of elected officials by knowing those with whom the elected officials have been dealing; and (3) the general state interest in "promoting openness in the system by which [a state's] laws are created." Having found that the disclosure requirement furthered these compelling interests, the court went on to find that the disclosure requirements established by the law were "the least restrictive means" of doing so and consequently upheld the disclosure requirements.

Other courts have reached the same result although sometimes by employing somewhat different modes of analysis. Thus, in a challenge to a California lobbying registration law, the court found that, since the challenged disclosure requirement had at most only an "incidental effect on [the] exercise of protected rights," strict scrutiny need not be applied. The appropriate standard of review rather was "rational basis." *Fair Political Practices Comm'n,* 599 P.2d at 53. The disclosure requirements in the challenged statute easily met that relaxed standard of review. Similar in thrust is the Vermont Supreme Court's decision in *Kimball v. Hooper*, 665 A.2d 44 (1995). In that case, the Vermont court upheld the provisions of a state statute requiring reporting of "indirect contacts to influence legislators," *id.* at 46, finding that requiring disclosure and reporting of that information was within the legislature's power to assure the integrity of the legislative and governmental processes.

IV. Conclusion

Absent a showing that challenged disclosure requirements would have a significant "chilling effect" on the right to associate, the courts have consistently upheld those requirements in the face of

challenge in both the lobbying registration and campaign finance contexts. To withstand challenge, however, there needs to be in the first instance a showing that the disclosure requirements imposed by particular legislation serve important governmental interests. That should not be difficult to do here since it is necessary to "pierce the veil" of employer membership organizations that retain lobbyists in order to discover who really is behind the promotion of, or opposition to, this or that piece of legislation. That information can be crucial to evaluating effectively the motivation and worth of lobbyist in-put. It is crucial to legislators who need to know with whom they are actually dealing and crucial to voters who need to know with whom the legislators have been dealing. It is crucial more generally to helping maintain the transparency and integrity of the legislative process. Lower courts have found these to be compelling state interests.

On the other side of the balance, it would be difficult to imagine circumstances in which requiring that the names and addresses of a lobbyist's employers organizational (as opposed to individual) members could be shown to have any significant inhibiting impact on the willingness of those organizational members to join in association with others who have similar interests. The threat of suffering serious economic or physical retaliation of the sort involved in the *NAACP* case would seem in this context to be remote and speculative at best. Absent a showing of a significant chilling effect on the right to form and join associations, the court decisions in this area make clear that any challenge to the disclosure requirements would likely fail.