



PACIFIC LEGAL FOUNDATION

December 4, 2020

Mr. Mac Warner
West Virginia Secretary of State
mwarner@wvsos.gov

Ms. Jennifer Twyman
Ms. Ashley Arthur
Charities Division
jtwyman@wvsos.gov; ANArthur@wvsos.gov; charities@wvsos.gov

Re: Professional Fundraiser Registration Requirements

Dear Secretary Warner, Ms. Twyman, and Ms. Arthur:

I am an attorney at the Pacific Legal Foundation (PLF), a nonprofit public interest law firm that has been litigating in the defense of constitutional rights and individual liberties for over 40 years. In that time, PLF has won 12 cases in the U.S. Supreme Court including a major free speech victory in *Minnesota Voters Alliance v. Mansky*.

I am writing in regard to the registration statement that is currently required for professional fundraisers and fundraising counsel (form CHF). I have been contacted by individuals in West Virginia who wish to register as professional fundraisers or fundraising counsel but are concerned that some of the requirements violate both West Virginia law and the United States Constitution.

In particular, the instructions for the registration form state that “[c]opies of all scripts and solicitation materials used to solicit funds in West Virginia must be submitted to the Secretary of State.”

This requirement is unlawful and contrary to binding precedent from both the West Virginia Supreme Court of Appeals and the Fourth Circuit Court of Appeals.

In *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71 (1997), the West Virginia Supreme Court of Appeals concluded that the Secretary of State lacked any authority to require charitable organizations to submit solicitation material. The court explained that the Solicitation of Charitable Funds Act expressly listed information that a charitable organization must submit, which clearly did not include a requirement that the organization send solicitation material to the Secretary of State. *Id.* at 87. The court made clear that if the legislature wanted to grant the Secretary the authority, it would require a statutory amendment. *Id.* at 88. The legislature has not granted the Secretary this authority.

Nor could the legislature grant this authority. In *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), the Fourth Circuit considered and invalidated a Virginia solicitation law which required that charitable fundraisers file the script of any oral solicitation at least ten days prior to the commencement of a solicitation campaign. The Fourth Circuit explained that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Id.* at 1233 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). Accordingly, there was a “heavy presumption” against the validity of this requirement. *Id.* The court noted that this restriction was “a powerful inducement” for charitable organizations to alter their speech to avoid messages which may displease state officials. *Id.* at 1234. This chilling effect could not be justified since any fraudulent or inaccurate statements could be punished through enforcement actions rather than prior restraint. *Id.* at

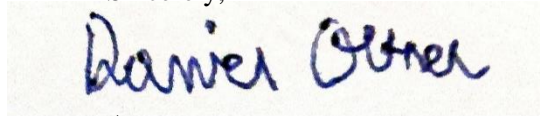
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1233-34.

Yet more than thirty years after *Telco* and twenty years after *Christian Action Network*, the demand that charitable organizations and fundraisers submit their scripts and material to the Secretary of State remains on the books and on registration forms. W. Va. Code R. 153-7-2. This continued demand for this information is squarely unlawful and constitutionally dubious. Ongoing enforcement of this provision chills speech, since many charitable fundraisers may not know about a more than two-decade-old decision and may either comply out of fear of sanction or choose not to raise funds in West Virginia at all.

It is clear that this requirement is unlawful and cannot be enforced. Accordingly, PLF requests that your office take immediate action to remove this requirement from the instructions for form CHF and recommends that your office consider repealing the unlawful regulation altogether. If your Department refuses to remove the language, then PLF may be required to take further action to secure the right of charitable organizations and fundraisers to operate in West Virginia without prior restraint.

Sincerely,

A rectangular area containing a handwritten signature in blue ink that reads "Daniel O'Neal".

Attorney
Pacific Legal Foundation