No. 05-1570

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STEPHEN P. LAFFEY,
Plaintiff-Appellant

vs.

ROGER N. BEGIN and THE RHODE ISLAND BOARD OF ELECTIONS,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF AMICUS CURIAE RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT FOR REVERSAL

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I. Statement of the Identity of the Amicus Curiæ

The Rhode Island Affiliate of the American Civil Liberties Union ("RI ACLU") is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization with over 400,000 members. RI ACLU, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution and, especially, the First Amendment. The RI ACLU, through volunteer attorneys, has appeared in numerous cases in this court and the District Court for the District of Rhode Island, both as counsel for parties or, as here, as amicus curiæ on numerous issues involving First Amendment rights and election law. *See*, e.g., *Ayers-Schaffner v. DiStefano*, 37 F.3d 726 (1st Cir. 1994); *Bonas v. Town of North Smithfield*, 265 F.3d 69 (1st Cir. 2001); *Vote Choice v. DiStefano*, 4 F.3d 26 (1st Cir. 1993); and *Duke v. Connell*, 790 F.Supp. 50 (D.R.I. 1992).

Because amicus believes that this case and the decision below raise issues of profound importance to First Amendment freedoms, we therefore have an interest in the outcome of this case and believe, and

hope, that our participation in this case will assist the Court in resolving the very important issues at stake.

Counsel for amicus has received the consent of the Appellant and Appellees to file this brief.

F.R.A.P. Rule 26.1 Corporate Disclosure Statement

Rhode Island Affiliate of the American Civil Liberties Union (RI ACLU) is a corporation with no parent corporation; no publicly held company owns 10% or more of the stock of RI ACLU. RI ACLU is affiliated with the national ACLU by shared goals.

I. INTRODUCTORY STATEMENT

Amicus will not duplicate the extensive briefing by the parties on the factual background of this case and many of the issues raised on appeal. It is instead the purpose of amicus to highlight a few of the significant First Amendment concerns raised by the administrative order issued by the Appellees that forms the heart of this dispute.

II. ARGUMENT

Defendant-Appellees Begin and the Rhode Island State Board of Elections ("Appellees" or "Board") have issued an order enjoining appellant from hosting a radio talk show on the grounds that appellant is, under R.I.G.L. §17-25-3(2), a candidate for public office (despite the fact that no forthcoming election will occur for more than a year in which appellant Laffey might run), and his receipt of airtime from radio station WPRO to host a talk show constitutes a corporate contribution prohibited by R.I.G.L. §17-25-10.1.[1]

[1] In its brief and in oral argument before the District Court, Appellees referenced on a number of occasions Appellant's concession that the value of the radio broadcast was in excess of $1,000. See, e.g., Appellee's brief, p. 22. Although state campaign finance law generally limits contributions to candidates to $1,000, that figure is irrelevant if

Amicus vigorously disputes the Board's interpretation of the statutes at issue. Its interpretation (or the statutes themselves, if the Board's interpretation is correct) and the order issued by the Board in this case are both overbroad and vague in contravention of the First Amendment. Amicus urges reversal of the district court's denial of relief to Appellant.[2]

A. **Appellees' order is an overbroad and unauthorized prior restraint on freedom of speech.**

In its brief, Appellees acknowledge that "if Laffey's radio show dealt with … anything that the Board determined did not constitute campaign activity, Laffey could continue to air his weekly radio show." (Appellees' Brief, p. 32.) However, the order issued by Appellees completely bars Laffey from "appearing as the host of *The Steve Laffey*

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the Board's interpretation of the relevant statutes is correct. Corporations are barred by state law from making contributions of *any* amount to a candidate. R.I.G.L. §17-25-10.1(2)(h).

[2] Although Appellees have raised abstention issues, Amicus believes that this case is properly before the court pursuant to the principles enunciated in *Steffel v. Thompson*, 415 U.S. 452 (1974).

Show." The Order does not in any way attempt to limit its application to hosting a show that "constitute[s] campaign activity."[3]

The U.S. Supreme Court has repeatedly expressed the view that any prior restraint on speech must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case." *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U.S. 175, 183-184 (1968). *See also Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973) (a prior restraint should not "swee[p]" any "more broadly than necessary"), cited in *Tory v. Cochran*, 73 U.S.L.W. 4404, 4405 (May 31, 2005).

The Board's unqualified Order cannot withstand the strict scrutiny required in the case of a prior restraint. Therefore, it should be deemed invalid.

The Order is also overbroad because its remedy exceeds the Board's authority. Judge Lisi expressed her own "concerns as to

[3] As briefly discussed *infra*, amicus believes that the content-based distinction underlying the Board's analysis is itself problematic for numerous reasons, and a distinction not made by the statutes on which the Board relies.

whether or not the Board is statutorily authorized to issue its own injunction." (Tr. pp. 60-61). Whether deemed *ultra vires* or an overbroad application of its powers to remedy violations of the state's campaign finance laws, the Board's actions clearly violated the First Amendment when it barred Appellant from hosting a radio show – quintessential free speech activity – without lawful authority to do so.

As Judge Lisi indicated, pursuant to R.I.G.L. §17-25-5(a)(7), the Board is authorized to issue to alleged campaign finance law violators a summons to appear before the district court and be prosecuted by the Attorney General. Nothing in that statute purports to give the Board the authority to enjoin Appellant's activities. To the contrary, Chapter 25 of Title 17 specifically addresses the issue in a separate section entitled "Enjoining of illegal acts." R.I.G.L. §17-25-16. That section provides in relevant part:

> Whenever the board of elections has reason to believe that a candidate ... has accepted a contribution or made an expenditure in violation of the provisions of this chapter … the board may, in addition to all other actions authorized by law, request the attorney general to bring an action in the name of the state of Rhode Island in the superior court against the person and/or committee to enjoin them from continuing the violation, or doing any acts in furtherance of the violation, and for any other relief that the court deems appropriate.

In short, two statutory provisions explicitly give the Attorney General, not the Board, the authority to take action, including seeking injunctive relief. Appellees' Order preventing Laffey from hosting a radio talk show constitutes an unconstitutional prior restraint and should be struck down.

B. **The Explanation Offered by Appellees Lacks any Rational Basis, and Therefore Violates the First Amendment**

It is difficult to easily comprehend the limits of the Board's position in determining that the air time given to Laffey was an illegal corporate contribution. As Appellant's brief notes, the broad definition given by the Board to the term "contribution," in conjunction with its interpretation of the term "candidate," would appear to "bar a little league from inviting an elected official to throw the ceremonial first pitch" or bar an elected official "from speaking at the Lions Club." (Appellant's brief, pp. 23-24).

Appellees' most detailed explanation of its rationale for trying to distinguish Appellant's situation from that of myriad scenarios involving many similarly-situated public officials is as follows:

> Laffey's ability to host a radio program free of charge was a contribution that benefited Laffey as a candidate and not merely

> as a public official. The Board's determination was based upon its analysis of the totality of the circumstances: the Laffey's website anticipated a future campaign; the website solicited volunteers and contributions for his next campaign; Laffey's website directed individuals to listen to the weekly radio program; the radio program dealt with public issues that were likely to relate to a state or federal campaign; and the call-in format presented a substantial likelihood that other candidates, a potential election, and Laffey's view on potential election issues might be discussed by Laffey. (Appellees' brief, Page 23.)

The problem with this analysis is not only its ad hoc nature in a context – the exercise of First Amendment rights – that requires carefully drawn and narrowly tailored rules, but its failure to provide any meaningful guidance whatsoever as to when a public official (not to mention media organizations) may be found to have violated a criminal law.

The Board clearly seeks to place great emphasis on the fact that Laffey was "the host – not a guest" on the show (Appellees' Brief, p. 34), but its rationale does not explain why his "continu[ing] as a guest speaker on WPRO in the same time slot in which he formerly appeared" (Appellees' Brief, p. 12) is not an illegal corporate contribution as well. All the same factors contained in the Board's "totality of the circumstances" remain at play. Under the Board's rationale, surely Laffey benefits as a "candidate" just as much either way. It is a distinction without meaning.

To the extent the Board relies on the "buffer" of a third-party host as the distinguishing factor (and that appears to be the only possible distinction), its "totality of circumstances" test and broad interpretation of the campaign finance laws would appear to still make this an illegal "in concert" corporate contribution. *See* R.I.G.L. §§17-25-10(b), 17-25-23(1)(restricting "in concert" contributions and expenditures, defined as, *inter alia*, contributions made or expenditures received where there "is any arrangement [or] coordination … between the candidate … and the person making the expenditure.") Both Appellant and the radio station providing air time to him as a "guest" remain subject to the threat of criminal prosecution under both the Board's interpretation of the statutes and its specific actions in this matter.[4]

[4] To give another example of the problems underlying the Board's rationale, consider the weekly Presidential addresses run on radio stations across the country. If the Governor of Rhode Island were extended the same opportunity by WPRO, he would essentially be acting as a "host," not a guest, since no external control over his speech is exercised by the station. This would thus appear to be an illegal corporate contribution. That WPRO offered the opposition party a chance to respond (as occurs with the President's addresses) could not resolve the problem. That is because the Board's action is not based on any sort of "equal time" rationale, but rather on the basis that the free air time is an illegal corporate contribution. Surely a radio or TV station cannot absolve itself of this campaign law violation by giving other candidates "equal" illegal contributions.

The overbroad nature of the Board's rationale is further evident when examining its attempts to differentiate Laffey's situation from that of Barbara Szepatowski, an actual declared candidate for town office in Jamestown.

As the Board explains it:

> Szepatowski writes a weekly column in the Newport Daily News and has done so frequently since March of 2004. Admittedly, Szepatowski gets recognition from writing the column. However, the column does not relate to campaign activity – it is devoted to the topic of pets. Szepatowski owns and operates a business called Paws & Claws. Szepatowski is not compensated for writing the column. Szepatowski is also active in trying to get an animal shelter built in the Town of Jamestown. In rendering its advisory opinion, the Board focused on this significant distinction. Unlike Laffey's weekly radio talk show, the pet column is not political in subject matter. There is no discussion on political issues nor is there any reference to a political message: the column focuses exclusively on pet-related issues. (Appellees' Brief, p. 32.)

The flaws in this rationale are enormous, and in the context of a First Amendment restraint, intolerable.

First, contributions are not defined in the General Laws by whether they are "political in nature," but instead whether they are "of value" to a candidate. Especially in the context of a non-incumbent like Szepatowski running for office, name recognition is a key factor and extremely important commodity in promoting an electoral campaign, a

factor that the Board specifically acknowledges is present with Szepatowski's column.[5]

But even assuming *arguendo* the propriety of a political versus non-political distinction, the Board fails to recognize that a pet column can be just as political as the various issues discussed by Appellant on his talk show, which included such diverse topics as adolescent attire and the death of Pope John Paul II. (Plaintiff's complaint, Paragraphs 36, 39.)

For example, Szepatowski's "activ[ity] in trying to get an animal shelter built" in the Town could raise enormous political issues for zoning and other reasons.

Further, issues relating to pets or the rights of animals can be part of a political platform. For example, one state Representative in Rhode

[5] This is also recognized in the FCC's "equal time" application, where the agency rejected any "basis for distinguishing between political and non-political appearances by candidates." See Pat Paulsen, 33 F.C.C.2d 342, aff'd sub nom. *Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974). Thus, "equal time" applied, to give one example, to movie broadcasts of Ronald Reagan films during his Presidential campaign, notwithstanding the fact that, like supposedly innocuous pet columns, the films were "non-political" in nature.

Island has sponsored at least six pieces of legislation this year specifically addressing issues relating to animals.[6]

In noting these problems, amicus does not, of course, suggest that the Board could resolve the issue by expanding its definition of what constitutes corporate contributions to cover situations such as those of Szepatowski.

Rather, amicus seeks to demonstrate that the Board's interpretation of the law cannot be allowed to stand without having significant and untoward consequences for the exercise of free speech by public officials and candidates for public office.

Ultimately, the Board's order leaves all public officials without any meaningful guidance on how to comply with its interpretation of "contributions."[7]

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[6] *See* 05-H 5396(creating a fund for the spaying and neutering of cats and dogs); 05-H 5430 (addressing creation a trust for the care of animals); 05-H 5433 (allowing a cause of action for the intentional or negligent death of a pet); 05-H 5724 (related to the disposition of animals); 05-H 5725 (same); 05-H 6169 (relating to adequate shelter for animals). All of these bills are sponsored by Rep. Lewis, and some have generated news coverage, even if partly tongue-in-cheek. See, "Putting Teeth into Animal Cruelty Laws," Providence Journal, by Jennifer Levitz, April 22, 2005 available at <http:// www.projo.com/news/content/projo_20050422_animal22.257d7d0.html >; and "Questions Dog Rep. Lewiss Before Pet Trust Bill Passed," by Scott Mayerowitz, May 9, 2005, available at <http: //www.projo.com/news/content/projo_20050509_pets7.22db532.html>.

CONCLUSION

The Mayor of Cranston has been enjoined from hosting a weekly radio talk show, and faces possible criminal penalties under state election law for that activity, some eighteen months before an election. The radio station which allowed him to host the show similarly faces criminal penalties under the Board of Election's interpretation of campaign finance laws.

The Board has enjoined the Mayor from any further hosting of that talk show, without qualification. The Board's purported rationale cannot withstand rational basis scrutiny, much less the strict scrutiny required in this context.

Defendants have elsewhere called the Board's ruling "cutting edge," and we believe that is accurate, but enjoining a public official

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[7] Judge Lisi's comments that there "is no absolute constitutional right to access to commercial air time" and that the "right here is essentially created by contractual arrangement" (Tr. pp. 65-66) also miss the point. The question here is whether Appellees can, consistent with the First Amendment, interfere with this contractual arrangement, and amicus submits they cannot. Similarly, the commercial nature of the arrangement forms no basis for interfering with Appellee's First Amendment rights. Thus, in numerous cases, the U.S. Supreme Court has held that the fact that speech may be intertwined with monetary considerations does not eliminate First Amendment protection. See, e.g., *Secretary of State v. Munson*, 467 U.S. 947, 959-960 (1984).

from appearing as the host of a radio show cuts far too deep. It is, as far as we can tell, unprecedented, and one that the First Amendment cannot tolerate.

For all of the above stated reasons and for those as outlined in Appellant's brief, amicus requests that the ruling below be reversed.

Respectfully submitted,

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Attorney's Rule 32(a)(7(B) Statement of Compliance

The within Memorandum of law complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29 (Brief of an Amicus Curiæ) and 32 (form and length of briefs). Specifically, this memorandum is less than the 7,000 words in length (half the length permitted of a party's principal brief) authorized by the Rules.

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Carolyn A. Mannis

Certificate of Service

I hereby certify that on the 6th day of June , 2005, two copies of the within Brief of Amicus Curiæ was hand-delivered and/or sent by first class mail, postage prepaid, to each of the following:

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