

Is New Jersey's pay-to-play law in danger of being found unconstitutional?

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The answer to that question may be clearer after September 30, when the U.S. Court of Appeals for the District of Columbia will hear arguments in a case challenging federal pay-to-play law.

In *Wagner v. Federal Election Commission* three contractors are challenging the law, which prohibits federal government contractors from making contributions to national political parties, committees or candidates for federal office.

The federal pay-to-play law is so broad it even bars donations to any person for any political purpose.

The challenge is being made on the basis of the First Amendment, which protects free speech, and the Fifth Amendment, which guarantees equal protection.

Initially the case was heard by the U.S. District Court for the District of Columbia. That court upheld the long-standing prohibition on federal contractors.

However, on May 31, 2013, a three-judge panel of the D.C. Court of Appeals determined that neither the district court nor an appellate panel had jurisdiction to consider constitutional issues in this case.

The appellate panel therefore remanded *Wagner v. FEC* to the district court for the purposes of certifying questions of constitutionality.

On June 5, 2013, the district court agreed these are constitutional issues, directing *Wagner* to be heard by the full D.C. Court of Appeals.

The potential for this case to impact New Jersey's pay-to-play law is real, despite one main difference between the federal law and New Jersey's.

Federal law places an outright ban on contributions by federal contractors. New Jersey law merely limits contributions by public contractors.

Yet this distinction might not override First Amendment concerns and the fact that both laws treat contractors differently than other contributors.

Certainly it is not clear what the appeals court will decide, nor ultimately the U.S. Supreme Court if it decides to take the case on appeal.

The appeals court may determine that despite the fact that federal pay-to-play law falls under the Federal Elections Campaign Act it really has more to do with contracts, therefore upholding its constitutionality.

On the other hand, the court may rely on Chief Justice Robert's narrowed definition of corruption as articulated in *McCutcheon v. FEC*. The chief justice indicated that the "appearance of corruption" does not constitute actual corruption and therefore should not be held up as a standard in deciding campaign finance cases.

Regardless of the outcome of the federal case, it would behoove the New Jersey Legislature to amend the pay-to-play law along the lines recommended by the Election Law Enforcement Commission, Governor Chris Christie, and Senator James Beach, (D. Camden).

Besides simplifying the law, by establishing one state law, eliminating the Fair and Open loophole, and enhancing disclosure, this proposal would importantly raise the contribution limit impacting contractors from \$300 to \$1,000.

These reforms would help the state defend against any constitutional challenge in the off chance that the federal law is deemed to be unconstitutional.

In any event, New Jersey's pay-to-play law needs to be reformed. It is too complicated and replete with loopholes. Though well intentioned, it has driven would be contributors to either stop contributing or to seek ways to circumvent the statute.

Now with the Wagner case looming in the background there is even more reason for the Legislature to move legislation to amend existing law.

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.