

## E-ALERT | Election and Political Law

February 25, 2010

### COLORADO SUPREME COURT STRIKES DOWN COLORADO PAY-TO-PLAY LAW

The Supreme Court of Colorado struck down Colorado's statewide pay-to-play law in its entirety on Monday, holding that it violated the First Amendment to the U.S. Constitution.<sup>1</sup> Colorado's pay-to-play law (known as Amendment 54 to the Colorado Constitution) was enacted in the fall of 2008. It prohibited those holding certain non-competitively bid contracts with the State of Colorado or its localities from contributing to any state or local candidate for office or political party in Colorado. The law also required such public contractors to register with the state.

#### The Court's Decision

A diverse group of plaintiffs—including the chancellor of a state university, a board member of a non-profit corporation, a labor union, and a local city council member—argued that this law violated the First Amendment by excessively burdening their right to political expression via political contributions. The Supreme Court held that significant portions of the law were unconstitutionally overbroad, including the complete ban (as opposed to a cap) upon contributions that reached to all levels of government regardless of a recipient's ability to influence contract awards or a recipient's relationship with the contractor.

The court's holding suggests that a pay-to-play law might be constitutionally flawed if it bears the following attributes, especially in combination with one another and when backed by severe penalties:

- a ban on contributions that applies all public contractors who enter non-bid contracts, regardless of whether public bidding is feasible or appropriate;
- a ban on contributions from a public contractor to any state or local candidate or political party (rather than just to those officials or candidates for office with oversight of a contract);
- a ban on contributions from a public contractor lasting years after conclusion of the contract; and
- a ban on contributions from a broad group of family members of officers, directors, and trustees of a public contractor.

Nevertheless, the court signaled that it would have upheld a narrower ban. For example, the court suggested it would have upheld a law that capped rather than banned contributions, that applied only to public contractors susceptible to public bidding, that limited contributions only to officials empowered to influence the award of contracts or otherwise connected to the contributor, that clearly defined affected family members of public contractors and the restrictions upon them, and that did not impose severe and inflexible penalties.

Unlike the Pennsylvania Supreme Court in its 2009 decision to strike down that state's pay-to-play restrictions on the gaming and racing industry based on the free speech provisions of the Pennsylvania Constitution,<sup>2</sup> the Supreme Court of Colorado rested its decision upon the First

Amendment to the U.S. Constitution, rather than upon a state constitutional analogue. This leaves open the possibility that the decision could be appealed to the U.S. Supreme Court.

### Broader Implications

Despite this sweeping defeat for Colorado's pay-to-play law, we expect that states will continue to enact and enforce pay-to-play laws. Statewide pay-to-play laws in Connecticut and New Jersey recently withstood First Amendment challenges on the basis that the interest in preventing corruption and its appearance was heightened in light of recent scandal in those states.<sup>3</sup> Targeted pay-to-play laws in Louisiana (aimed at casinos) and Georgia (aimed at insurance companies) as well as federal pay-to-play laws and regulations that apply to government contractors, brokers, and dealers of municipal securities also have withstood constitutional challenge.<sup>4</sup> The Supreme Court of Colorado's opinion reinforces the idea that states and courts may consider a properly crafted pay-to-play law to be an appropriate means to mitigate political corruption and *quid pro quos* in politics.

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<sup>1</sup> See *Dallman v. Ritter*, No. 09SA224 (Colo. Feb. 22, 2010). A link to the court's opinion is available [here](#).

<sup>2</sup> See *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009).

<sup>3</sup> See *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008); *In re Earle Asphalt Co.*, 950 A.2d 918 (N.J. Super. Ct. 2008), *aff'd* 966 A.2d 460 (N.J. 2009).

<sup>4</sup> See *Casino Ass'n of Louisiana v. State*, 820 So. 2d 494 (La. 2002); *Gwinn v. State Ethics Comm'n*, 426 S.E. 2d 890 (Ga. 1993); *FEC v. Weinstein*, 462 F. Supp. 243 (S.D.N.Y. 1978); *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).