Manufacturers' Center for Legal Action

MCLA Constitutional Law Series

GOVERNMENT INVESTIGATIONS AND THE FIRST AMENDMENT

The First Amendment prohibits public officials from wielding the coercive power of the government to silence private organizations—including corporations—with differing or opposing viewpoints on controversial issues of public concern. Corporations, either alone or through their participation in trade associations, and in conjunction with other third parties, make substantial and important contributions to issues of public debate contributing their industry knowledge, experience and research to enhance understanding of important issues of public concern. In order to safeguard these rights, Government officials and courts must cautiously evaluate motives for subpoenas and investigative demands that target activities relating to legitimate participation in the public policy process and must guard against the use of these powers to silence or censure particular points of view.

Corporations Contribute to Important Public Policy Issues Involving Economic, Scientific, and Other Issues of Public Concern

Corporations' important contributions to the marketplace of ideas are protected by the First Amendment. The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes."[1] It "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[2] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[3] Governmental actions targeting speech should be evaluated in "light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[4]

In addition to conducting research and public policy work on their own, companies regularly work with third parties—including their trade associations—to research and advocate on issues

---

[1] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[2] *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).
[3] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
[4] *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation and quotation marks omitted).

of public concern that may be controversial. Examples of corporate participation in the marketplace of ideas are myriad. For example, some jurisdictions have recently sought to address environmental concerns by banning plastic straws. Business interests have weighed in[5] on both sides of this debate.[6] Likewise, companies contribute to research (on both sides) about genetically modified organisms[7] and the debate over the health effects of sugar in dietary consumption.[8]

Conclusions concerning these issues may be disputed in good faith, but public debate is advanced through the diverse contributions of corporations—in conjunction with trade associations, think tanks, and academics—all exercising their First Amendment rights.

The First Amendment Protects Corporate Speech—Including on Public Policy Issues

The First Amendment Speech and Petition Clauses protect four interrelated rights, all of which can be implicated when the government exercises its investigative power based on the speech of corporations in public policy debates. Of course, the First Amendment first protects the freedom to speak. It also protects freedom of association, because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[9] Thus, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[10]

In addition, the First Amendment protects the right to petition the government.[11] That right is "intimately connected both in origin and in purpose, with the other First Amendment rights," and

---

[5] *See* Starbucks, *What is the Role and Responsibility of a For-Profit, Public Company?*, https://www.starbucks.com/responsibility (last visited Aug. 10, 2018).

[6] *See* S. Russel, *Using Plastics Means Less Waste in the First Place* (Feb. 2, 2018), https://blog.americanchemistry.com/2018/02/using-plastics-means-less-waste-in-the-first-place/?gclid=EAIaIQobChMIiYWp1Lfd3AIViwOGCh2NXQpfEAMYASAAEgKkFfD_BwE.

[7] *See* Monsanto, *Biotechnology and GMOs*, https://monsanto.com/innovations/biotech-gmos, (last visited Aug. 10, 2018).

[8] *See* Alliance for a Healthier Generation, *Alliance for a Healthier Generation and American Beverage Association Issue First Progress Report on Reducing Beverage Calories* (Nov. 22, 2016), https://www.healthiergeneration.org/news_events/2016/11/22/1646/alliance_for_a_healthier_generation_and_american_beverage_association_issue_first_progress_report_on_reducing_beverage_calories; Keybridge, *Balance Calories Initiative: Baseline Report for the National Initiative* (Mar. 31, 2016), https://www.healthiergeneration.org/_asset/wcn25l/Balance-Calories-Initiative-Baseline-Report_FINAL_MC22417.pdf.

[9] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted).

[10] *Id.* at 460-461.

[11] *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

includes objections to popular opinion, political consensus, and government policy.[12] When the right to petition is at issue, a "heightened level of protection" is warranted.[13]

Finally, the First Amendment protects the right *not* to speak.[14] Forcing a private party to "speak where it would prefer to remain silent" intrudes on its right to decide for itself what it wants to address and when.[15] These rights are enjoyed by corporations and business organizations. "[S]peech does not lose its protection because of the corporate identity of the speaker."[16] Corporations and associations have First Amendment rights because the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[17] The Supreme Court has repeatedly affirmed this point.[18]

For more than forty years, the Supreme Court has also made clear that the purely economic interests of a speaker do not disqualify the speaker from protection under the First Amendment.[19] Protection of economically motivated communication is essential to our "predominantly free enterprise economy."[20] Thus, in *Gordon & Breach Science Publishers S.A. v. American Institute of Physics*, a federal court confirmed that an organization's ranking of academic journals in a manner that economically benefitted them fell within the scope of expression fully protected by the First Amendment.[21] It was immaterial that the organization "stood to benefit from publishing Barschall's results—even that they *intended* to benefit."[22] Indeed, to "hold otherwise would be to squelch the expression of facts and opinions which might not otherwise find ready expression through commercial media."[23]

Similarly, in *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, the District of New Jersey held that a corporation's publication of scientific articles in peer-reviewed journals was protected by the First Amendment.[24] The Court emphasized that publication of scientific research is protected "even if it contains incorrect statements or erroneous conclusions."[25] This is so largely because a

---

[12] *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).
[13] *White v. Lee*, 227 F.3d 1214, 1233 (9th Cir. 2000) (quoting *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991)).
[14] *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11 (1986).
[15] *Id.* at 18.
[16] *Id.* at 16 (citation omitted).
[17] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.").
[18] *See, e.g.*, *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Cox Broad. Corp. v. Cohn,* 420 U.S. 469 (1975).
[19] *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).
[20] *Id*. at 765; *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).
[21] 859 F. Supp. 1521, 1540-41 (S.D.N.Y. 1994), *holding adopted and modified by Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48 (2d Cir. 2002).
[22] *Id.* (citation omitted).
[23] *Id.* at 1541 (citations omitted).
[24] 627 F. Supp. 2d 384, 456 (D.N.J. 2009).
[25] *Id.*

federal court is not the appropriate place to dispute the validity of scientific theories, particularly in the context of important First Amendment concerns.[26]

Exercise of Government Investigatory Powers Can Chill Corporations' Contribution to the Exchange of Ideas when they Target Opinions

All exercises of governmental power, including investigative tactics, must respect the rights protected by the First Amendment. At its core, "[t]he First Amendment is a limitation on government."[27] To be sure, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position."[28] But the government is not entitled to use its police power to "burden the speech of others in order to tilt public debate in a preferred direction."[29]

Government investigations implicate First Amendment protected activities because investigative tactics may discourage inquiry and collaboration on controversial issues and force self-censorship. "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[30] As one commentator notes, "coercive discovery chills speech by deterring people from speaking, writing, or joining an organization," and "[a]nonymity and, to a lesser degree, confidentiality foster free expression by relieving an individual's fear that he'll be fired, harassed, or socially ostracized based on the content of his speech."[31]

Because subpoenas and civil investigative demands destroy anonymity and open internal debates to review and government sanction, they can encourage self-censorship. Under threat of subpoena, for example, a company might decide not to take a controversial public position or discuss a policy proposal with leading experts, its trade association, or a think tank. "Without protection against government probing, countless conversations might never occur or might be carried on in more muted and cautious tones."[32] This is why Courts must be vigilant to protect the "vital relationship between freedom to associate and privacy in one's associations."[33]

It is not hard to imagine the *in terrorem* effect that these tactics could have on debates and speech concerning myriad issues of public concern, because "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[34] Courts should continue to strictly scrutinize subpoenas that implicate First Amendment rights and invalidate subpoenas that fail to satisfy strict scrutiny.

---

[26] *Id.* (stating that "scientific disputes must be resolved by scientific means" (quoting *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005))).
[27] *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment).
[28] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).
[29] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).
[30] *Talley v. California*, 362 U.S. 60, 65 (1960).
[31] Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards A Heightened Discoverability Standard*, 57 UCLA L. Rev. 841, 847-48 (2010).
[32] Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112, 121-22 (2007).
[33] *NAACP*, 357 U.S. at 462.
[34] *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Judicial supervision of investigative tactics that target opinions expressed in public policy debates is critical to ensuring the protection of First Amendment rights. Even "valid[] and reasonable[]" justifications for an investigation "cannot save" government action "that is in fact based on the desire to suppress a particular point of view."[35] When the First Amendment is implicated, "the usual deference to the administration agency is not appropriate, and protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency."[36] In other words, because the political process may be insufficient to protect the First Amendment rights of those expressing unpopular opinions, courts have repeatedly reviewed government investigations for intrusions upon First Amendment rights.

Additional Safeguards Are Needed to Fully Protect Free Speech and Association in the Public Policy Realm

Although courts generally apply strict scrutiny to government subpoenas that implicate First Amendment rights, the importance of safeguarding such fundamental rights calls for additional protections to guard against politically-motivated investigations. Even if a motion to quash a subpoena is ultimately successful, the ultimate relief does not remove the chilling effect of the subpoena on the company for future communications or for other companies involved in the subject of the subpoena or that work in the same industry. The mere threat of expansive subpoenas to an industry in the government crosshairs can inhibit the ability of companies to speak freely or even conduct scientific research into politically-charged issues.

Lawmakers should consider imposing a heightened standard for issuing subpoenas and civil investigative demands that implicate the First Amendment. One way to prevent government investigations from infringing on First Amendment rights would be to impose meaningful limitations on the issuance of subpoenas and civil investigative demands. There are a variety of state and federal laws and rules governing such discovery tools, and those rules typically give law enforcement broad discretion to obtain any potentially relevant information that is not overly burdensome to produce.[37]

Lawmakers should consider revising those provisions to cabin discretion when discovery implicates First Amendment concerns. In particular, rules could be revised to require investigators to identify specific indicia of illegal conduct when a document request implicates scientific research or communications addressing issues of broad public concern. Such a heightened standard would be analogous to the heightened pleading standard for fraud under Federal Rule of Civil Procedure 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To address

---

[35] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985).

[36] *FEC v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (citation omitted); *see also FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 386-88 (D.C. Cir. 1981) ("[T]he highly deferential attitude which courts usually apply to . . . subpoena enforcement requests . . . has no place where political activity and association . . . form the subject matter being investigated.").

[37] *See, e.g.*, Fed. R. Crim. P. 17; 31 U.S.C. § 3733.

concerns that this would require prosecutors to reveal their case, judges could examine such information confidentially.

Additionally, with or without Congressional action, the U.S. Department of Justice ("DOJ") can establish additional guidelines and advance First Amendment protections by updating its U.S. Attorneys' Manual ("USAM") to reflect the importance of constraining government investigations that infringe on the First Amendment.

Accommodations in DOJ policy and the USAM are not unusual. Several years ago, the DOJ announced that it would require corporations to waive attorney-client privilege and work product doctrine in order to obtain full cooperation credit in an investigation.[38] Congress threatened to prohibit U.S. Attorneys and others from considering a valid assertion of privilege in evaluating cooperation. To avoid congressional intervention, the Department of Justice revised the USAM to address the issue.[39] Similarly, the USAM and DOJ policy require careful consideration of First Amendment values in investigations that involve journalists, requiring special showings and permissions before issuing subpoenas.[40]

To address the First Amendment rights identified above, DOJ could require heightened internal review and authorization to join state investigations or file a charge or complaint that implicates debates over economic or scientific research or private deliberations or communications debating issues of broad public concern. And the Manual could require supervisors to apply a heightened evidentiary standard before authorizing investigations into such issues.

Such leadership would set a good example for the states. Many states look to federal practice for best practices, and state investigations are often conducted with an eye toward federal proceedings and joint work. Moreover, State Attorneys General can also take a leadership role by emphasizing to their prosecutors and investigators the importance of considering the impact of their investigations on core First Amendment rights of targets and third parties.

CONCLUSION

Corporations make vital contributions to the marketplace of ideas by engaging in research, discussion, and debate on significant public policy issues. Those contributions can be stifled when public officials use their authority to issue subpoenas not to investigate suspected wrongdoing but instead to chill speech that does not align with the official's political preferences. In addition to the important role of courts in strictly scrutinizing such overreach, policymakers should consider imposing a heightened standard for issuing subpoenas that implicate First Amendment rights. The U.S. Attorney General should also consider issuing guidance for federal prosecutors on how best to restrain abusive subpoenas.

---

[38] *See, e.g.*, Memorandum from Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003).

[39] *See* United States Attorneys' Manual § 9-28.000, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.710

[40] *See id*. at § 9-13.400 at available at https://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.400