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Opinion No. 01-134

Ban on Lobbyist Contributions to Nonincumbents during the Legislative Session

QUESTION

Under Tenn. Code Ann. § 3-6-108(i), "[n]o lobbyist, employer of a lobbyist or multicandidate political campaign committee controlled by a lobbyist or employer of a lobbyist shall make a contribution to a candidate for the office of governor, member of the general assembly or public service commission during the time that the general assembly is in a regular annual legislative session." Is this statute unconstitutional when applied to prohibit contributions by the persons listed to nonincumbent candidates for Governor and membership in the General Assembly during the regular legislative session of the General Assembly?

OPINION

In light of the reasoning in *Emison v. Catalano,* 951 F.Supp. 714 (E.D.Tenn. 1996), we think a court would conclude that this statute is unconstitutional when applied to nonincumbent candidates for Governor and membership in the General Assembly.

ANALYSIS

This opinion concerns the constitutionality of Tenn. Code Ann. § 3-6-108(i) as applied to prohibit certain contributions to nonincumbent candidates during the regular annual session of the General Assembly. The statute provides:

> No lobbyist, employer of a lobbyist or multicandidate political campaign committee controlled by a lobbyist or employer of a lobbyist shall make a contribution to a candidate for the office of governor, member of the general assembly or public service commission[1] during the time that the general assembly is in a regular annual legislative session.

[1] Statutes creating the Public Service Commission were repealed by 1995 Tenn. Pub. Acts Ch. 305, § 5. After the effective date of this act, any reference to the Public Service Commission is to be deemed a reference to the Tennessee Regulatory Authority or appropriate department. *Id.* at § 54.

Under Tenn. Code Ann. § 3-6-102(4), a "candidate for public office" means:

> . . . an individual who has made a formal announcement of candidacy or qualified under the law of this state to seek nomination for election or elections to any state public office, or has received contributions or made expenditures except for incidental expenditures to determine if one shall be a candidate, or has given consent for a campaign committee to receive contributions or make expenditures with a view to bringing about such person's nomination for election or the election to state public office, and any individual who has been nominated for appointment as an official in the legislative or executive branch.

This definition of "candidate for public office" would include an individual who does not currently hold that office as well as an incumbent officeholder seeking reelection.

Tenn. Code Ann. § 3-6-108(i) was part of the Campaign Contribution Limits Act enacted by the General Assembly in 1995. Soon after this Act went into effect, a lawsuit challenging the constitutionality of certain provisions, including § 3-6-108(i), was filed in the United States District Court for the Eastern District of Tennessee. *Emison v. Catalano*, 951 F.Supp. 714 (E.D.Tenn. 1996).

The primary issue raised by the plaintiffs in that lawsuit was the constitutionality of Tenn. Code Ann. § 2-10-310(a), which provided:[2]

> From the convening of the general assembly's regular annual session each year to the earlier of May 15 or the conclusion of the annual session, a member or a candidate for the general assembly or a member's or a candidate's campaign committee shall not conduct a fundraiser or solicit or accept contributions for the benefit of the caucus, any caucus member or candidate for the general assembly or governor.

This Office had previously concluded that extending the ban on contributions to include nonincumbent candidates as well as incumbent members of the General Assembly would violate the First Amendment to the Constitution because it was not the least intrusive means possible to further a compelling state interest of avoiding the appearance of corruption from fundraising while the General Assembly was

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[2] 1998 Tenn. Pub. Acts ch. 1062, § 7, amended § 2-10-310(a), so that it now reads:

> From the convening of the general assembly in organizational session through the earlier of the last day of regular session or June 1 in odd years, and from the convening of the general assembly in regular session to the earlier of May 15 or the conclusion of the annual session in even years, no member of the general assembly or a member's campaign committee shall conduct a fundraiser or solicit or accept contributions for the benefit of the caucus, any caucus member or member or candidate of the general assembly or governor.

in session. *See* Op. Tenn. Atty. Gen. 95-58 (May 24, 1995). This Office, therefore, declined to defend the constitutionality of this provision.

The District Court subsequently held that the "black-out" provision in § 2-10-310(a) could not constitutionally be applied to contributions to non-incumbent candidates for seats in the legislature. The Court held that this application did not

> . . . provide the least intrusive means of achieving the elimination of political corruption, because [it] deprive[s] nonincumbents, who are not subject to corrupting *quid pro quo* arrangements in the same way as are sitting legislators, of any means to counterbalance incumbents' advantage of "virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy."

Emison v. Catalano, 951 F.Supp. at 723.

The District Court did not address the other issues raised in plaintiffs' complaint, including the challenge to the constitutionality of Tenn. Code Ann. § 3-6-108(i). The parties later agreed to a permanent injunction that prohibited enforcement of § 2-10-310(a) as against non-incumbent candidates and dismissed the remainder of the lawsuit. However, the District Court did note in its memorandum opinion that § 3-6-108(i) was the complement to the black-out provision contained in § 2-10-310(a), which it had found to be unconstitutional as applied to non-incumbent candidates.

The United States Supreme Court has acknowledged that governments have a legitimate interest in regulating lobbyists. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20, 115 S.Ct. 1511, 1523 n. 20, 131 L.Ed.2d 426 (1995) ("The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."). As such, courts have upheld laws regulating and monitoring the activities of lobbyists. *See, e.g., United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (holding that federal lobbying act does not violate lobbyists' constitutional guarantees of freedom of speech and petitioning the government).

The United States Supreme Court has also recognized that governments have a "sufficiently important" or "compelling" interest in preventing political corruption and the appearance of corruption. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 531 U.S. 923, 121 S.Ct. 2351, 2366, __ L.Ed.2d __ (2001); *Federal Election Commission v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985). Toward this end, courts have upheld restrictions on the ability of certain groups of individuals to make political contributions to certain elected officials and candidates. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (ruling that Hatch Act provision which prohibits federal employees from certain partisan political activities and positions is constitutional); *Blount v. Securities Exchange Commission*, 61 F.3d 938 (D.C.Cir. 1995) (upholding SEC regulation prohibiting certain municipal securities professionals from contributing or soliciting

contributions to the political campaigns of state officials from whom they obtained business), *cert. denied*, 517 U.S. 1119, 116 S.Ct. 1351, 134 L.Ed.2d 520 (1996); *Gwinn v. State Ethics Comm'n*, 262 Ga. 855, 426 S.E.2d 890 (1993) (upholding state law prohibiting insurers from contributing to or on behalf of the insurance commissioner or candidates for that office); *Petition of Soto*, 236 N.J. Super. 303, 565 A.2d 1088 (App.Div.1989) (rejecting constitutional attack on a statute which prohibited key employees of casinos from making political contributions to public officials and candidates), *cert. denied*, 121 N.J. 608, 583 A.2d 310 (1990), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3216, 110 L.Ed.2d 664 (1990).

However, the United States Supreme Court has also long recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broaderick v. Oklahoma*, 413 U.S. 601, 611-12, 935 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citations omitted). The Tennessee Supreme Court has incorporated these guidelines in reviewing statutes that may infringe upon First Amendment guarantees:

> The United States Supreme Court has made it clear "that regulation of First Amendment rights is always subject to exacting judicial review." *Citizens against Rent Control v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). Under this standard of review, the State must demonstrate that the burden placed on free speech rights is justified by a compelling State interest. The least intrusive means must be utilized by the State to achieve its goal and the means chosen must bear a substantial relation to the interest being served by the statute in question.

Bemis Pentecostal Church v. State, 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed. 2d 902 (1988).

In *Emison*, the District Court recognized but rejected the rationale underlying both Tenn. Code Ann. § 2-10-310(a) and its complement, § 3-6-108(i):

> [A] black-out provision like that in T.C.A. § 2-10-310(a), although inspired by the commendable impulse to eliminate corruption and the appearance of corruption in political life, cannot constitutionally be applied to contributions to nonincumbent candidates for seats in the legislature.
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> In reaching this conclusion, the court has not ignored the affidavit testimony offered by the defendant . . ., in which experts in this field, including former Tennessee Attorney General W.J. Michael Cody, point out that contributions to nonincumbent candidates, like contributions to

> incumbents, can have an effect on the legislative process, and can create the appearance of improper motivations for supporting or opposing proposed legislation, and even of corruption. Individuals and organizations may contribute money to a nonincumbent to punish his or her incumbent opponent for a position taken on certain legislation.
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> However, as the Tennessee Attorney General recognized in his formal opinion, Tenn.Op.Atty.Gen. No. 95-058 at ----, "any legislative restriction on the exercise of First Amendment rights must be justified by a compelling state interest; further, it must represent the least intrusive means to achieve the legislative goal." And as the Florida Supreme Court recognized . . . black-out provisions like the one challenged here do not provide the least intrusive means of achieving the elimination of political corruption, because they deprive nonincumbents, who are not subject to corrupting *quid pro quo* arrangements in the same way as are sitting legislators, of any means to counterbalance incumbents' advantage of "virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy."

951 F.Supp. at 722-23, citing *State v. Dodd,* 561 So.2d 263, 265 (Fla. 1990).

Since *Emison* was decided, the United States Court of Appeals for the Fourth Circuit has upheld a state statute preventing members of *and candidates for* the General Assembly and the Council of State from soliciting lobbyists or political committees employing lobbyists while the General Assembly was in session. *North Carolina Right to Life, Incorporated v. Bartlett,* 168 F.3d 705 (4th Cir. 1999), *cert. denied,* 528 U.S. 1153, 120 S.Ct. 1156 (2000). The statute also prohibited members *and candidates* from soliciting lobbyists or PACs during the session. The Court noted that, while the ban did burden First Amendment rights, "[t]he Supreme Court has long noted that restrictions on political contributions are constitutionally less problematic than are, for instance, restrictions on independent expenditures." 168 F.3d at 715. The Court concluded that the statute only placed a temporary hold on contributions and was therefore similar to limitations on campaign contributions upheld in *Buckley v. Valeo*. The Court agreed with the State that the limits advanced a compelling state interest of preventing corruption and the appearance of corruption. The Court found a "genuine risk of both actual corruption and the appearance of corruption." 168 F.3d at 715. The Court did not discuss any evidence the State submitted to support the existence of the corruption or the risk of corruption. The Court concluded that the statute was narrowly tailored, first, because it was limited to lobbyists and political committees that employ them — "the two most ubiquitous and powerful players in the political arena." *Id.* at 716. Second, the Court noted that the restrictions were temporally limited to cover "only that period during which the risk of an actual quid pro quo or the appearance of one runs highest." *Id.*

The Court rejected the plaintiffs' argument that the restrictions were not narrowly tailored because

they applied to candidates who were in no position to sell legislative outcomes. The Court stated:

> Appellees' argument might be persuasive were contributions to incumbents the only way to gain favorable treatment. But sticks can work as well as carrots, and the threat of contributing to a legislator's challenger can supply as powerful an incentive as contributing to that legislator himself.

168 F.3d at 716.

As discussed above, however, the District Court in *Emison*, reviewing Tennessee law, expressly rejected this argument when it invalidated the ban on fundraising by nonincumbent members under Tenn. Code Ann. § 2-10-310. Further, several months after the opinion in *Bartlett* was issued, the North Carolina Court of Appeals, in an apparently independent lawsuit, upheld the same statutory ban on contributions directly to legislators and nonincumbents, but found that the statute could not constitutionally apply to contributions to "political committees for individual candidates or groups of candidates." *Winborne v. Easley*, 136 N.C.App. 191, 523 S.E.2d 149, 151 (1999), *appeal dismissed*, 351 N.C. 480, 543 S.E.2d 511 (2000), *stay denied*, 351 N.C. 480, 543 S.E.2d 512 (2000).

It is not clear whether the effect of this case was to allow in-session contributions to the campaign committees of legislators and nonincumbent candidates for that office. Under Tennessee law, a contribution to a committee authorized by the candidate to accept contributions on the candidate's behalf is considered a contribution to the candidate. Tenn. Code Ann. § 2-10-303(1). It is therefore possible that, under *Winborne*, Tenn. Code Ann. § 3-6-108(i), to the extent it bans in-session contributions to the campaign committee of a legislator, the Governor, or of a nonincumbent candidate for these offices, would be unconstitutional. But this Office has taken the position that a ban on in-session fundraising by incumbent members of the legislature is constitutionally defensible. Op.Tenn.Atty.Gen. 00-011 (January 24, 2000); Op.Tenn.Atty.Gen. 95-058 (May 24, 1995). Further, the statutory scheme involved in those cases did not extend to the Governor or a candidate for that office. Since the Governor does not directly vote on legislation, the rationale that a lobbyist will attempt to coerce the Governor's support for legislation by threatening to contribute to a challenger — accepted as a basis for the ban on lobbyist contributions to nonincumbents in those cases — is even less apposite. For these reasons, we think the reasoning of *Bartlett* and *Winborne* upholding the constitutionality of a ban on lobbyist contributions to nonincumbent candidates for the legislature during the legislative session is unpersuasive, and inapplicable to the ban on lobbyist contributions to a nonincumbent candidate for the office of Governor. Therefore, we think that a court of competent jurisdiction would find the application of Tenn. Code Ann. § 3-6-108(i) to situations where the contribution was made to a nonincumbent candidate for the legislature or for Governor to be unconstitutional and unenforceable.

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