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Opinion No. 06-021

Constitutionality of Amendment 93 to SB 7001

QUESTION

Whether proposed Amendment 93 to SB 7001 is constitutional?

OPINION

No. To the extent that the proposed amendment would ban campaign contributions by a member of the proposed Ethics Commission in support of or in opposition to a proposition, we believe that a court of competent jurisdiction would find that the ban is not narrowly tailored to further the State's interest in avoiding the appearance of a conflict of interest and, therefore, is an unconstitutional restriction on the members' First Amendment rights of speech and association. Furthermore, as currently drafted, the proposed amendment unconstitutionally infringes on the First Amendment rights of the family members to whom it applies.

ANALYSIS

SB 7001 is entitled the "Comprehensive Governmental Ethics Reform Act of 2006." Among other things, this bill creates a Tennessee Ethics Commission, which is comprised of six (6) members. (Proposed § 3-6-103(a)). The bill provides that the Governor shall appoint one member who is a member of the majority party and one member who is a member of the minority party. The Speaker of each House is authorized to appoint one member from a list of three candidates submitted by the majority caucus of that house and one member from a list of three candidates submitted by the minority caucus. (Proposed § 3-6-103(c)). The Commission is vested with jurisdiction to administer the provisions of Tenn. Code Ann. §§ 2-10-122 — 2-10-129 and the "Conflict of Interest Disclosure Law," Tenn. Code Ann. §§ 8-50-501, *et seq*. (Proposed § 3-6-105(a)). The Commission is further given the authority to investigate any complaints alleging acts by a member of the General Assembly that constitute misuse of office for personal financial gain. (Proposed § 3-6-105(b) - (f)). In addition to these powers, the Commission is charged with the following duties:

- Recommend guiding principles of ethical conduct for consideration and adoption by the legislative or executive branches;

- Develop prescribed forms for complaints, registrations, statements and other documents required to be filed under the laws administered and enforced by the Commission;

- Develop filing, coding and cross-indexing systems;

- Review all filed documents to ensure compliance with the laws administered and enforced by the Commission;

- Prepare and publish quarterly reports on the Commission's website;

- Prepare and publish manuals and guides to facilitate compliance;

- Administer ethics training; and

- Provide an annual report to the Governor and the General Assembly concerning the administration and enforcement of laws under the jurisdiction of the Commission.

(Proposed § 3-6-106).

Proposed section 3-6-103(h)(4) currently provides as follows:

> No member of the commission or such member's immediate family, as defined in § 3-6-301, shall during such membership:
>
> (4) Permit such person's name to be used or make campaign contributions in support of or in opposition to any candidate or proposition, except that a member's immediate family may make campaign contributions in support of or in opposition to any candidate or proposition[.]

"Immediate family" is defined as a spouse or minor child living in the household. (Proposed § 3-6-301(12)). You are proposing to amend this section by deleting the language following the comma, so that section (h)(4) would read as follows:

> No member of the commission or such member's immediate family as defined in § 3-6-301, shall during such membership:
>
> (4) Permit such person's name to be used or make campaign contributions in support of or in opposition to any candidate or proposition[.]

With the proposed amendment, subsection (h)(4) would prohibit a member of the Commission and the member's immediate family from making a campaign contribution to any candidate or proposition. You have asked whether this amendment would be constitutional.

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes this guarantee of rights applicable to the states as well as the Congress. In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), the United States Supreme Court made clear that restrictions on campaign contributions and expenditures "operate in an area of the most fundamental First Amendment activities," namely, the rights of freedom of association and freedom of expression. 424 U.S. at 14. *See also Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495, 105 S.Ct. 1459 (1985) (noting that "contributors obviously like the message they are hearing . . . and want to add their voices to that message; otherwise they would not part with their money"); *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684 (1983) (emphasizing "the Constitution's special concern with threats to the right of citizens to participate in political affairs"); *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government.").

The United States Supreme Court has further held 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." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S.Ct. 2908 (1973). 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 goals 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 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed.2d 902 (1988).

In order to survive constitutional scrutiny, therefore, the ban on campaign contributions with respect to members of the Commission and their immediate family must be narrowly tailored to further a compelling state interest. Presumably, the ban is intended to prevent a conflict of interest or the appearance of a conflict of interest that might arise when a member or member's immediate

family makes a campaign contribution to a candidate. Such "public expression" of support for that candidate could unduly influence the member's judgment in administering and enforcing the provisions of the laws over which the Commission has jurisdiction. The United States Supreme Court has recognized that governments have a "sufficiently important" or "compelling" interest in preventing political corruption and the appearance of corruption that justifies limits on campaign contributions. *McConnell v. Federal Election Commission* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). Several courts have upheld statutes prohibiting campaign contributions by members of certain industries, such as gaming, lobbying, and liquor licensees. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153, 120 S.Ct. 1156, 145 L.Ed.2d 1069 (2000) (upholding complete ban on campaign contributions by out-of-district lobbyists); *In re Petition of Soto*, 236 N.J.Super. 303, 565 A.2d 1088 (1989) *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) (upholding New Jersey's complete ban on campaign contributions by gaming interests); *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill.2d. 499, 349 N.E.2d 61 (1976) (upholding complete ban on campaign contributions by liquor licensees or their representatives); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S.Ct. 1156, 145 L.Ed.2d 1069 (2000); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F.Supp.2d 1183 (E.D.Cal. 2001) (upholding complete bans on campaign contributions by lobbyists).

In light of the authority given to members of the Commission to investigate complaints filed against members of the General Assembly, it can be argued that the ban on campaign contributions furthers a compelling state interest in preventing the appearance of a conflict of interest. However, the ban is not narrowly tailored to further that interest. In addition to banning contributions to candidates, proposed amended SB 7001 would also ban contributions to propositions. Under that bill, the Tennessee Ethics Commission only has authority to administer and enforce laws with respect to candidates and/or members of the General Assembly. Thus, a contribution in support of or in opposition to a particular proposition would not create the appearance of a conflict of interest, such as a contribution to a candidate might. Thus, to the extent that the proposed subsection (h)(4) would ban campaign contributions by a member of the Commission in support of or in opposition to a proposition, we believe that a court of competent jurisdiction would find that the ban is not narrowly tailored to further the State's interest in avoiding the appearance of a conflict of interest and, therefore, would find such ban to be an unconstitutional restriction on the members' First Amendment rights of speech and association.

With respect to the ban on contributions by a member's immediate family, we have found no case that directly addresses the constitutionality of such a ban. Even if it can be successfully argued that the ban furthers a compelling state interest in preventing the appearance of a conflict of interest, it is not narrowly tailored to further that interest. As already discussed, because the Commission has no authority with respect to propositions, a contribution by a family member in support of or in opposition to a proposition would not create the appearance of a conflict of interest. Furthermore, there are clearly less restrictive ways of targeting the situations where campaign contributions to candidates by family members might give rise to a conflict of interest. State law already requires candidates to disclose the source of campaign contributions, Tenn. Code Ann. § 2-10-105, a restriction which the Supreme Court has upheld. *See Buckley v. Valeo, supra*. A

defensible law might require a member of the Commission to recuse himself or herself from participating in any matter before the Commission involving a candidate to whom his or her spouse and/or minor children have made a contribution. As currently drafted, however, the proposed amendment to § 3-6-103(h)(4) unconstitutionally infringes on the First Amendment rights of the family members to whom it applies.

In addition, we would note that, because subsection (h)(4) and the proposed amendment thereto, as currently drafted, would ban campaign contributions to all candidates, this provision would certainly be preempted by federal law with respect to campaign contributions by either a member or the member's immediate family to a candidate for federal office. *See* Federal Election Campaign Act, 2 U.S.C. § 453.

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