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Opinion No. 06-023

Limits on Campaign Expenditures

QUESTION

Senate Amendment 134 to Senate Bill 7001 places limits on campaign expenditures for candidates in state elections. Is this provision constitutional?

OPINION

To the extent that proposed Amendment 134 limits the right of an individual to contribute to his or her own campaign, it is unconstitutional. Based on authority decided by the United States Court of Appeals for the Sixth Circuit, the general limit on expenditures also is unconstitutional because it is not narrowly tailored to support a compelling state interest.

ANALYSIS

This request concerns the constitutionality of Senate Amendment 134 to Senate Bill 7001, the "Comprehensive Governmental Ethics Reform Act of 2006," (the "Reform Act"). This amendment would add a new section to state laws governing campaign finance. Under the new section, campaign expenditure limitations apply to all candidates for all state elections starting with the 2008 election cycle, "where such candidate is financing such candidate's campaign from contributions, or from the candidate's own resources or that of the candidate's immediate family." The act limits a candidate for governor to no more than five million dollars ($5,000,000) in campaign expenditures in any two-year election cycle; a candidate for state senator to campaign expenditures of no more than one hundred fifty thousand dollars ($150,000) in any two-year election cycle; and a candidate for state representative to no more than seventy-five thousand dollars ($75,000).

Included in the limits are related campaign expenditures of more than fifty dollars made on a candidate's behalf. A "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by, or approved by the candidate or the candidate's political campaign committee. Political party expenditures that recruit or endorse candidates, or that benefit six or fewer candidates associated with the party are presumed to be related campaign expenditures made on behalf of those candidates. Excepted from this presumption are expenditures of less than one hundred dollars for refreshments

at a campaign event the purpose of which is to provide a group of voters with the opportunity to meet the candidate personally. An incumbent governor may expend only 85% of the limit for reelection. An incumbent legislator may expend only ninety percent of the legislative limit for reelection. The amendment provides for adjustments in future expenditure limitations based on the average consumer price index.

The proposed limitations by their terms limit a candidate's right to contribute his or her funds to his or her campaign. The United States Supreme Court has found that such limits unconstitutionally infringe on an individual's First Amendment rights. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In that case, the Court ruled that a federal statute limiting a candidate's right to make campaign expenditures from his or her personal funds violated the First Amendment to the United States Constitution. The Court concluded that the limitation imposed a substantial restraint on the candidate's ability to engage in protected First Amendment activity. 424 U.S. at 41. The Court then concluded that the restriction did not further a compelling governmental interest in preventing actual corruption and apparent corruption of the political process. *Id.* at 43. Research indicates that *Buckley* has not been overruled or modified with respect to this conclusion. The United States Court of Appeals for the Sixth Circuit recently affirmed this principle. *Anderson v. Spear,* 356 F.3d 651 (6th Cir. 2004), *cert. denied,* 542 U.S. 956, 125 S.Ct. 453, 160 L.Ed.2d 317 (2004) (prohibition on candidate loaning his campaign more than fifty thousand dollars violated candidate's First Amendment rights). To the extent that proposed Amendment 134 limits the right of an individual to contribute to his or her own campaign, therefore, it is unconstitutional.

The United States Supreme Court has found that limitations on campaign expenditures impose far greater restraints on the freedom of speech and association than limits on contributions and are, therefore, subject to "exacting scrutiny." *Buckley v. Valeo,* 424 U.S. 1, 45-46, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Court reaffirmed this distinction in *McConnell v. Federal Election Commission,* 540 U.S. 93, 124 S.Ct. 619, 655, 157 L.Ed.2d 491 (2003). Thus, limits on campaign expenditures must be narrowly tailored to promote a compelling state interest. In *Buckley,* the Court found that independent expenditure limitations were not narrowly tailored to further a compelling state interest in avoiding corruption or the appearance of corruption. Since then, the United States Court of Appeals for the Sixth Circuit has invalidated campaign expenditure limitations. *Kruse v. Cincinnati,* 142 F.3d 907 (1998), *cert. denied,* 525 U.S. 1001, 119 S.Ct. 511, 142 L.Ed.2d 424 (1998). The Court found that supporters of the limits failed to advance any governmental interest justifying the limits outside of those interests considered and rejected as constitutionally insufficient by the *Buckley* Court. 142 F.3d at 919.[1] For these reasons, the general limits on campaign expenditures are unconstitutional because they are not narrowly tailored to further a compelling state interest.

[1]The United States Supreme Court may address these issues in a case decided by the United States Court of Appeals for the Second Circuit regarding which the Supreme Court accepted *certiorari* on September 27, 2005. *Sorrell v. Randall,* 126 S.Ct. 36, 162 L.Ed.2d 933, 73 U.S.L.W. 3751, 74 U.S.L.W. 3170, 74 U.S.L.W. 3199 (U.S. Sep 27, 2005) (NO. 04-1697). Until then, *Kruse* is controlling within the Sixth Circuit.

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