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Opinion No. 06-024

Aggregate Contribution Limits and Disclosure Requirements under Proposed Ethics Bill

QUESTIONS

1. Section 17 of the proposed Comprehensive Governmental Ethics Reform Act sets an aggregate limit of $25,000 for all contributions annually. Would this provision be preempted by federal law?

2. Section 23 of the same act applies to certain organizations established under Section 527 of the Internal Revenue Code.

a. Any such organization that is not registered as a political campaign committee or a multicandidate political campaign committee in Tennessee and that raises or spends money for the purpose of advocating the election or defeat of a state or local candidate or the approval or rejection of an issue must provide its name, address, and the name of a contact person to the Registry of Election Finance. Is this provision constitutional?

b. Any such organization that engages in activities either expressly advocating the election or defeat of a clearly identified candidate for statewide office or for the legislature may not accept contributions totaling more than $1,000 from individuals and organizations, or more than $7,500 from any multicandidate political campaign committee with respect to any election cycle. Is this provision constitutional?

OPINIONS

1. Under Tenn. Code Ann. § 2-10-102(9), the term "contribution" includes only those made to influence elections for state and local office, or state and local referenda. The aggregate, therefore, would not apply to contributions made to influence federal elections. For this reason, the provision would not be preempted by federal law, and is otherwise constitutional.

2. a. Federal statutes do not prohibit states from regulating political organizations formed under Section 527 of the Internal Revenue Code. Further, the requirement that these organizations provide minimal information to the Registry of Election Finance does not unconstitutionally infringe on First Amendment rights.

b. To the extent that these limits apply to organizations that do not make contributions to candidates, but make only independent expenditures for express advocacy, the limits are constitutionally suspect because they infringe on First Amendment rights and are not closely drawn to further a sufficiently important state interest.

ANALYSIS

1. Aggregate Limits on Contributions

This opinion addresses the constitutionality of two provisions under the proposed "Comprehensive Governmental Ethics Reform Act of 2006," (the "Reform Act"). The first question concerns Section 17. That provision would prohibit an individual from making contributions that total more than twenty-five thousand dollars annually. Section 17 would add a new section to Tenn. Code Ann. §§ 2-10-301, *et seq*. The new section would provide:

> No individual shall contribute more than twenty-five thousand dollars ($25,000) in the aggregate to all candidates, political campaign committees and multicandidate political campaign committees annually. All contributions made to political campaign committees controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly shall count toward the aggregate limit in this section. The contributions a candidate makes to such candidate's own election shall not count toward the aggregate limit in this section.

Despite the new section's reference to "political campaign committees controlled by a political party on the national . . . level," the "Reform Act" does not change the definitions that now appear in Tenn. Code Ann. § 2-10-102. Under these definitions:

> "Political campaign committee" means:
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> (A) A combination of two (2) or more individuals, including any political party governing body, whether state or local, making expenditures, to support or oppose any candidate for public office or measure, but does not include a voter registration program;
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> (B) Any corporation or any other organization making expenditures, except as provided in subdivision (4), to support or oppose a measure; or
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> (C) Any committee, club, association or other group of persons which receives contributions or makes expenditures to support or oppose

> any candidate for public office or measure during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars ($250)[.]

Tenn. Code Ann. § 2-10-102(12).

> "Multicandidate political campaign committee" means a political campaign committee to support or oppose two (2) or more candidates for public office or two (2) or more measures[.]

Tenn. Code Ann. § 2-10-102(9).

> "Contribution" means any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift, pledge or subscription of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, *made for the purpose of influencing a measure or nomination for election or the election of any person for public office or for the purpose of defraying any expenses of an officeholder incurred in connection with the performance of the officeholder's duties, responsibilities, or constituent services.*

Tenn. Code Ann. § 2-10-102(4) (emphasis added). The term "election" means "any general, special or primary election or run-off election, held to approve or disapprove a measure or nominate or elect a candidate for public office." Tenn. Code Ann. § 2-10-102(5). The term "measure" means "any proposal submitted to the people of the entire state, or any political subdivision of the state, for their approval or rejection at an election, including any proposed law, act or part of an act of the general assembly, or revision of or amendment to the constitution." Tenn. Code Ann. § 2-10-102(8). The statute defines the term "public office" as follows:

> "Public office" means any state public office or local public office filled by the voters;
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> (A) "Local public office" means any state, county, municipal, school or other district or precinct office or position, including judges and chancellors, that is filled by the voters, with the exception that "local public office" does not include any state public office as defined in subdivision (13)(B); and
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> (B) "State public office" means the offices of governor, member of the general assembly, delegate to a Tennessee constitutional convention, district attorney general, district public defender, judge of the court of criminal appeals, judge of the court of appeals and supreme court judge[.]

Tenn. Code Ann. § 2-10-102(13). The term "contribution" as used in the statute, therefore, refers only to contributions made to influence a measure submitted to voters in Tennessee, nomination for election or the election of any person for Tennessee local or state public office, or for the purpose of defraying an officeholder's official expenses. While the statute does not define the term, "officeholder," in context, that term is obviously limited to officeholders in Tennessee. By its terms, therefore, the aggregate limit would apply to contributions made to influence elections for state or local office, or state or local referenda. It would not apply to contributions to influence federal elections. For this reason, the aggregate limit would not be preempted by federal law.

The aggregate limit proposed in Section 17 of SB 7001 is otherwise constitutional. State law currently limits the amount that individuals and multicandidate political campaign committees may contribute to any one candidate with respect to an election. Tenn. Code Ann. § 2-10-302(a) and (b). State law also limits the aggregate amount a candidate may accept from multicandidate political campaign committees, excluding political parties. Tenn. Code Ann. § 2-10-302(c). Separate aggregate limits apply to political parties. Tenn. Code Ann. § 2-10-306. In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 644, 46 L.Ed.2d 659 (1976), the United States Supreme Court found that a similar aggregate limit under the federal law then in effect was constitutional. The Court first discussed the federal limit on the amount an individual could contribute to a single candidate for any single election and found the limit constitutional. The Court then addressed a $25,000 limit on total contributions and stated:

> Although the constitutionality of this provision was drawn into question by appellants, it has not been separately addressed at length by the parties. The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

96 S.Ct. at 644. *See also Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648-49 (6th Cir. 1997), *cert. denied,* 522 U.S. 860, 118 S.Ct. 162, 139 L.Ed.2d 106 (1997) (aggregate limit of $1,500 a year for each individual's contributions to permanent committees upheld). Similarly, the aggregate limits in the Reform Act ensure that the other limits on political contributions will not be evaded. This provision, therefore, is constitutional.

2. Restriction on 527 Organizations

The second provision places limits on contributions to all organizations established under Section 527 of the Internal Revenue Code. Section 23 of the Reform Act would add the following language to Tenn. Code Ann. §§ 2-10-101, *et seq.*:

> (a) Any political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986, as amended from time to time) that is not registered as a political campaign committee or a multicandidate political campaign committee, and that raises or spends money for the purpose of advocating the election or defeat of a state or local candidate or the approval or rejection of an issue shall disclose the following information to the registry of election finance on a form prescribed by the registry:
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> (1) Name of organization;
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> (2) Executive director or contact name for the organization; and
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> (3) Address.
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> Such political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986, as amended from time to time) shall not solicit or accept contributions until it has notified the registry of election finance of its existence and of the purposes for which it was formed.
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> (b) A political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986, as amended from time to time) that engages in activities either expressly advocating the election or defeat of a clearly identified candidate for a statewide office or for general assembly may not accept contributions totaling more than one thousand dollars ($1,000) from any person or more than seven thousand five hundred dollars ($7,500) from any multicandidate political campaign committee with respect to any election cycle. [1] Nothing in this section is intended to limit or abrogate the ability of an individual to exercise such individual's right of free speech by expending personal funds on such individual's own behalf to engage in activities either expressly advocating the election or defeat of a clearly identified candidate for a statewide office or the general

[1] State law already bans the use of corporate funds for the purpose of "aiding in the election or defeat in any primary or final election" of candidates for public office. Tenn. Code Ann. § 2-19-132. The United States Supreme Court has found that this ban could constitutionally extend to corporate contributions to nonprofit independent advocacy groups making contributions to candidates. *Federal Election Commission v. Beaumont*, 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003).

> assembly, subject to the reporting and disclosure requirements of this chapter.
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> (c) It shall be an offense for any person to create, establish or organize more than one (1) political organization (as defined in Section 527(e)(1) of the Internal Revenue Code of 1986, as amended from time to time) with the intent to avoid or evade the contribution limitations contained in subsection (a).

The Reform Act, therefore, imposes two types of limits on political organizations as defined under the United States Internal Revenue Code. First, each such organization that raises or spends money for the purpose of advocating the election or defeat of a state or local candidate or the approval or rejection of an issue must file its name, address, and the name of its director or a contact person with the Registry of Election Finance before it solicits or accepts a contribution as defined under Tenn. Code Ann. § 2-10-102(4). Second, every such organization that engages in activities either expressly advocating the election or defeat of a clearly identified candidate for statewide office or for the General Assembly may not accept a contribution of more than one thousand dollars from any person, or more than seven thousand five hundred dollars from any multicandidate political campaign committee with respect to any election cycle.

Section 527 of the Internal Revenue Code sets forth the extent to which a "political organization" is subject to federal income tax. Under Section 527(e)(1), the term "political organization" means "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." The term "exempt function":

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).

26 U.S.C. § 527(e)(2). Under subsection (j) of Section 527, a political organization that accepts a contribution or makes an expenditure for an exempt function during any calendar year must disclose persons contributing two hundred dollars or more during the calendar year, along with the amount and date of the contribution. The organization also must disclose the amount, date, and purpose of each expenditure over five hundred dollars made to a person, along with the person's name, address, and occupation and employer. Under federal law, therefore, political organizations seeking exempt status under this statute are already required to disclose contributions accepted and expenditures

made to influence elections for state or local public office, including those in Tennessee. The Reform Act, in addition, would require an organization that raises or spends money to advocate the election or defeat of state or local candidates, or an issue, in Tennessee to file its name, address, and the name of a contract person in Tennessee before receiving a contribution or making an expenditure as those terms are defined under state law. The Reform Act would also impose a limit on the amount some organizations may accept from any one person or multicandidate political campaign committee with respect to any election cycle.

Section 527 of the Internal Revenue Code addresses the tax exempt status of political organizations. It does not preempt states from regulating these organizations. In fact, the statute itself acknowledges that states may impose their own disclosure requirements. *See, e.g.*, 26 U.S.C. § 527(e)(5). By its terms, the Reform Act limits the right of certain political organizations to accept contributions or make expenditures to influence state and local elections. Provisions of the federal election laws and the rules prescribed under them "supersede and preempt any provision of State law with respect to election to Federal Office." 2 U.S.C. § 453. Federal law, therefore, does not prevent the State from imposing the limits on certain political organizations under the Reform Act, with respect to state and local elections.

The question then becomes whether the Reform Act limits unconstitutionally infringe on rights of free speech and association protected under the United States Constitution. The requirement that certain organizations file information with the state Registry of Election Finance before accepting a contribution or making an expenditure to influence a state or local election is clearly constitutional. It is not an onerous requirement, does not even indirectly burden the exercise of free speech rights, and serves the State's compelling interest in ensuring compliance with campaign fundraising limits in Tennessee.

The next question is whether the General Assembly may constitutionally limit the amount that individuals and multicandidate political committees may contribute annually to any political organization organized under Section 527 "that engages in activities either expressly advocating the election or defeat of a clearly identified candidate for statewide office or for general assembly." The United States Supreme Court has upheld a federal law limiting annual contributions by an individual or an unincorporated association to a "political committee." *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981). In that case, an association challenged a federal statute limiting individual and association contributions to a multicandidate political committee to $5,000 annually. The applicable statute defined "multicandidate political committee" as a "political committee which has been registered under section 433 of this title [the federal campaign finance laws] for a period of not less than 6 months, which has received contributions from more than 50 persons and . . . *has made contributions to 5 or more candidates for Federal Office."* 2 U.S.C. § 441a(a)(4), cited in note 1. In that case, therefore, the Court addressed limits on an organization that by definition contributed money directly to candidates for federal office.

Justice Marshall wrote the plurality opinion on behalf of four members. Justice Blackmun concurred. In his concurring opinion, Justice Blackmun emphasized this distinction. In his

concurring opinion, Justice Blackmun found that the contribution limits should be upheld only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 2725, quoting *Buckley,* 96 S.Ct. at 637. Justice Blackmun found that the limits met this standard because they were a means of preventing evasion of the limitations on direct contributions to a candidate. Justice Blackmun stated:

> I stress, however, that this analysis suggests that a different result would follow if [the challenged statute] were applied to *contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates.* By definition, a multicandidate political committee . . . makes contributions to five or more candidates for federal office. Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat. The Court repeatedly has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ...." By pooling their resources, adherents of an association amplify their own voices. . . . Accordingly, I believe that contributions to political committees can be limited *only if those contributions implicate the governmental interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest.*

101 S.Ct. 2712 at 2725 (emphasis added). Our examination of subsequent authority indicates that these concerns remain valid. The United States Supreme Court recently upheld federal statutes limiting individual and organization contributions to national political parties. *McConnell v. Federal Election Commission,* 540 U.S. 93, 124 S.Ct. 619, 656, 157 L.Ed.2d 491 (2003). The Court made it plain that contribution limits are subject to a less rigorous standard of review than strict scrutiny. The Court found that a contribution limit involving even "'significant interference'" with associational rights is nevertheless valid if it satisfies the "lesser demand" of being "'closely drawn' to match a "'sufficiently important interest.'" 124 S.Ct. at 656 (citations omitted).

In its opinion, the Court reviewed evidence of the corrupting influence that unlimited contributions to national parties — referred to as "soft money" — had exercised on previous federal elections. The Court found sufficient evidence to confirm that large soft money contributions to national party committees had a corrupting influence or gave the appearance of corruption. The Court noted, for example, that federal officeholders frequently asked donors to make soft money donations to party committees to assist federal campaigns, including the officeholder's own. *Id.* at 662. The Court also found evidence that large donors made soft money contributions expressly to secure influence over federal officials. *Id.* The Court, therefore, rejected First Amendment challenges to the limits.

By its terms, the proposed limit would apply to contributions to any political organization that engages in activities either expressly advocating the election or defeat of a clearly identified candidate for statewide office or for General Assembly. This definition includes organizations that make no direct contributions to a candidate and whose advocacy is wholly independent of the candidate. The United States Supreme Court has not ruled on whether such broad limits on contributions to independent groups are constitutional. Under the standard in *McConnell,* the limits would be constitutional if they are closely drawn to match a sufficiently important interest. Clearly, preventing corruption or the appearance of corruption is a sufficiently important interest under this standard. But, it is not clear how restricting contributions to organizations independently engaged in express advocacy of candidates for office in Tennessee would further this purpose. Nor is it clear why limits on contributions by groups engaged in this advocacy would further this purpose while individuals are left free to make unlimited independent expenditures. In fact, this feature of the proposed law supports the conclusion that, while framed as contribution limits, these limits would operate as limits on independent expenditures for political speech. In *McConnell*, the Supreme Court reaffirmed its position that limitations on campaign expenditures are subject to closer scrutiny than limitations on campaign contributions. 124 S.Ct. at 655. For these reasons, to the extent that they apply to organizations that do not make contributions to candidates, but make only independent expenditures for express advocacy, these limits are constitutionally suspect because they infringe on First Amendment rights and are not closely drawn to further a sufficiently important state interest.

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