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Opinion No. 07-20

Constitutionality of ban on in-session contributions

QUESTION

When a member of the general assembly is a candidate in a state election and that election campaign will occur entirely during the legislative session, does the in-session ban on contributions to a member of the General Assembly contained in Tenn. Code Ann. § 2-10-310(a)(1) violate the United States Constitution.

OPINION

The ban on in-session fundraising, as applied in the circumstances described, is constitutionality defensible.

ANALYSIS

Tenn. Code Ann. § 2-10-310(a)(1) provides:

> Except as provided in subdivisions (a)(2) and (a)(3), 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, and from the convening of the general assembly in any extraordinary session through the conclusion of such extraordinary session, no member of the general assembly or a member's campaign committee or the governor or the governor'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.

Subdivisions (2) and (3) allow a member of the General Assembly who is a candidate for local public office to engage in fund-raising for that campaign in narrowly defined circumstances. A "contribution" is defined as:

> any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift 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. "Contributions" shall not be construed to include the following:
>
> (A) Services, including expenses provided without compensation by a candidate or individuals volunteering a portion or all of their time, on behalf of a candidate or campaign committee; . . .

Tenn. Code Ann. § 2-10-102(4).

This Office has previously opined that the general ban on in-session fund-raising by incumbent members of the legislature contained in Tenn. Code Ann. § 2-10-310(a) is constitutionally defensible, based upon our conclusion that the ban furthers the State's compelling interest in preventing corruption or the appearance of corruption arising from fund-raising while the legislature is in session. *See* Op. Tenn. Atty. Gen. 00-011 (January 24, 2000); Op. Tenn. Atty. Gen. 95-058 (May 24, 1995) (copies attached). However, to the extent Tenn. Code Ann. § 2-10-310(a)(1) prohibits a member of the General Assembly from using personal funds for his or her campaign during the legislative session due to the definition of "contribution," such provision is unconstitutional. *See* Op. Tenn. Atty. Gen. 98-061 (March 9, 1998) and Op. Tenn. Atty. Gen. 98-062 (March 9, 1998) (copies attached). *See also Gable v. Patton*, 152 F.3d 940, 951-953 (6th Cir. 1998).

You have asked, however, whether the ban on in-session campaign contributions is also constitutionally defensible in the instance when a member of the general assembly is a candidate for a state election that will occur entirely during the legislative session (presumably a special election to fill a vacancy pursuant to Tenn. Code Ann. §§ 2-14-201 and 202). The United States Supreme Court has held that campaign contribution limitations are permissible as long as the government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*). In *Buckley*, the Court found that the interest advanced, "prevent[ing] corruption" and its "appearance," was "sufficiently important" and that the contribution limits were "closely drawn." *Id*. at 25-26, 96 S.Ct. 612. However, the court recognized that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a difference, noting that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id*. at 21, 96 S.Ct. 612.

While the Supreme Court has consistently upheld contribution limits in various state statutes since *Buckley*, it has also recognized that contribution limits might sometimes work more harm to protected First Amendment interests than their anticorruption objectives could justify. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395-97, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000); *Buckley*, *supra*, at 21, 96 S.Ct. 612. In the recent case of *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006), the Supreme Court addressed the issue of whether the campaign contribution limits contained in Vermont's campaign finance laws were too low and too strict to survive First Amendment scrutiny. The statute in question imposed strict contribution limits, providing that the amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is restricted to the following amounts: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. These amounts are not indexed for inflation. *See* Vt. Stat.Ann., Tit. 17, § 2805(a).

In determining whether these contribution limits violated the First Amendment, the Court stated:

> Nonetheless, as *Buckley* acknowledged, we must recognize the existence of some lower bound. At some point the constitutional risks to the democratic electoral process become too great. After all, the interests underlying contribution limits, preventing corruption and the appearance of corruption, 'directly implicate the integrity of our electoral process.' Yet that rationale does not simply mean "the lower the limit, the better." That is because contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote.

Randall, __ U.S. at __, 126 S.Ct. at 2492. The Court then found that the contribution limits in the Vermont statute were not narrowly tailored and disproportionately burdened numerous First Amendment interests, based upon the following five factors:

> [T]he Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. Vermont does not point to a legitimate statutory objective that must justify these special burdens.

Id., 126 S.Ct. at 2499.

Obviously, several of the factors which led the Supreme Court to find the contribution limits in *Randall* to be unconstitutional are not present with respect to the ban on in-session fundraising contained in Tenn. Code Ann. § 2-10-310(a)(1). For example, the Supreme Court's concern with the treatment of volunteer services under the Vermont Act is not an issue under Tennessee's statute. While the Vermont Act excluded "service provided without compensation by individuals volunteering their time on behalf of candidate" from the definition of "contribution," it did not exclude the expenses incurred by those volunteers in the course of campaign activities, and thus the Court found that such expenses could be counted against a volunteer's contribution limits, at least where the expense was facilitated or approved by campaign officials. These circumstances the Court found could impede a campaign's ability effectively to use volunteers, thereby making it more difficult for individuals to exercise their First Amendment right of association through volunteering for a candidate. *Id.*, 126 S.Ct. at 2498-99. The definition of contribution in Tennessee's campaign finance laws, however, specifically excludes "[s]ervices, including expenses provided without compensation by a candidate or individuals volunteering a portion or all of their time, on behalf of a candidate or campaign committee." Tenn. Code Ann. § 2-10-102(4)(A).

Similarly, the Supreme Court's concern as to the effect of the contribution limits on challengers in competitive elections is not at issue. In *Randall,* the Court recognized that a challenger typically must bear higher costs in order to overcome the name-recognition advantage enjoyed by an incumbent and, therefore, was concerned that the contribution limits were so low that they would "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.*, 126 S.Ct. at 2492, 2496. This concern is not present with the ban on in-session fundraising in Tenn. Code Ann. § 2-10-310(a)(1) as that statute, by its terms, only applies to incumbents (members of the general assembly) and not the challengers.

The Supreme Court also found the contribution limits in the *Randall* case to be unconstitutional because Vermont was unable to point to a legitimate statutory objective that would justify the special burdens, other than the paradigmatic state interest in the prevention of corruption, or the appearance of corruption in the political process. However, the Supreme Court has recently determined that this interest can encompass more than simple *quid pro quo* transactions:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger the office-holders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize.

McConnell v. FEC, 540 U.S. 93, 153, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). Thus, the State's interest in preventing corruption or the appearance of corruption while the legislative process is

actually ongoing is heightened, particularly since, as the Supreme Court noted, such corruption is neither easily detected nor practical to criminalize.

Thus, the question is whether the in-session ban on incumbent candidates in a special election will prevent them from amassing the resources necessary for effective advocacy such that the constitutional risks to the democratic electoral process are too great. We would note that unlike the contribution limit in *Randall*, which was an amount limitation, the ban on in-session fundraising is a temporal limitation and there is nothing that would prevent the incumbent from transferring funds from a previous campaign pursuant to Tenn. Code Ann. § 2-10-114(a)(1) or from soliciting and accepting contributions after the session has ended.[1] Thus, the statute appears to be narrowly tailored to match the State's heightened interest in preventing corruption and the appearance of corruption that may arise when an incumbent legislator engages in fundraising for another state office while the legislative session is ongoing. Accordingly, we conclude that the statute is constitutionally defensible as applied in those circumstances.

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[1]Presumably the incumbent candidate could either loan his or her own personal funds or obtain a loan in accordance with the provisions of Tenn. Code Ann. § 2-10-304 and then repay the loan with contributions solicited after the end of the legislative session.