S T A T E O F T E N N E S S E E
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Opinion No. 10-11

Constitutionality of Restriction on Fund-Raising Activities of Incumbent Legislators

QUESTIONS

1. Whether the different treatment of the fundraising activities of incumbent legislators versus non-incumbent candidates for the general assembly is constitutional?

2. Who would have standing to challenge the constitutionality of Tennessee's statutes governing the election of appellate court judges, *i.e.*, the Tennessee Plan?

3. What provision of the Tennessee Constitution grants to the Legislature the power to fill a vacancy in a judicial office by appointment rather than by an election?

OPINIONS

1. The United States District Court for the Eastern District of Tennessee in *Emison v. Catalano*, 951 F.Supp. 714 (E.D.Tenn. 1996), held that the "black-out" provision in Tenn. Code Ann. § 2-10-310(a) could not constitutionally be applied to contributions to non-incumbent candidates for seats in the legislature. After this decision, the Act was amended in 1998 to provide that the prohibition on fundraising during the legislative session applied only to incumbent members of the general assembly. This Office has previously concluded that this statute as applied only to incumbent legislators is constitutionally defensible because the restrictions it places on fundraising by incumbent legislators during session are narrowly tailored to support the compelling state interest of avoiding corruption or the appearance of corruption in the legislative process. This Office has also previously concluded that the ban on campaign contributions by lobbyists and employers of lobbyists to members of the General Assembly during the regular legislative session is constitutionally defensible because non-incumbent candidates for membership in the General Assembly are not in the same position as incumbent legislators to influence the legislative process and the ban was narrowly tailored to further the State's compelling interest in preventing corruption or the appearance of corruption.

2. In order to establish standing, a plaintiff must demonstrate that: (1) he has sustained a distinct and palpable injury, (2) the injury was caused by the challenged conduct, and (3) the injury is likely to be redressed by a remedy that the court is prepared to give. Whether a party has standing under these standards to challenge the constitutionality of the Tennessee Plan would

depend upon the individual facts and circumstances and, further, would have to be determined by a court of competent jurisdiction.

3. The Tennessee Supreme Court in *State ex rel. Higgins v. Dunn* held that Art. VII, § 4 authorizes the Legislature to enact legislation providing for the filling of judicial vacancies by appointment.

ANALYSIS

1. Tenn. Code Ann. § 2-10-310(a)(1) provides that "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." You have asked whether this statute is constitutional because it restricts the fundraising activities of incumbent members of the legislature but not of non-incumbent candidates for the legislature while the General Assembly is in session.

This statute, when originally enacted as part of the Campaign Contribution Limits Act of 1995, applied to *any* candidate for the office of member of the general assembly or any candidate's campaign committee. *See* Public Acts of 1995, Ch. 531, § 1. Soon after the Act went into effect, however, a lawsuit challenging the constitutionality of certain provisions, including § 2-10-310(a), 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).[1] The District Court held that the "black-out" provision in Tenn. Code Ann. § 2-10-310(a) could not constitutionally be applied to contributions to non-incumbent candidates for seats in the legislature. In doing so, the District Court recognized but rejected the rationale underlying the statute:

> [A] black-out provision like that in T.C.A. § 2-10-310(a), although inspired by 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

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

> money to a nonincumbent to punish his or her incumbent opponent for a position taken on certain legislation.
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> However, . . . "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."

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

After the *Emison* decision, the Act was amended in 1998 to provide that the prohibition on fundraising during the legislative session applied only to incumbent members of the General Assembly. *See* Public Acts of 1998, Ch. 1062, § 7. This Office has previously concluded that this statute as applied only to incumbent legislators is constitutionally defensible because the restrictions it places on fundraising by incumbent legislators during session are narrowly tailored to support the compelling state interest of avoiding corruption or the appearance of corruption in the legislative process. *See* Op. Tenn. Att'y Gen. 02-062 (May 16, 2002) (copy attached).

This Office has also previously concluded that, based upon the District Court's reasoning in *Emison*, the prohibition on contributions by lobbyists and employers of lobbyists to non-incumbent candidates for Governor and membership in the General Assembly during the regular legislative session is unconstitutional. *See* Op. Tenn. Att'y Gen. 01-134 (August 29, 2001) (copy attached).[2] This Office has further opined that this prohibition is defensible against a challenge on the grounds that it unconstitutionally discriminates against incumbent members of the General Assembly. Specifically, we noted that non-incumbent candidates for membership in the General Assembly are not in the same position as incumbent legislators to influence the legislative process and that a ban on lobbyist contributions to legislators during the session was narrowly tailored to further the State's compelling interest in preventing corruption or the appearance of corruption. *See* Op. Tenn. Att'y Gen. 02-062 (May 16, 2002).

2. Your next question asks who would have standing to challenge the constitutionality of Tennessee's statutes governing the election of appellate court judges, *i.e.,* the Tennessee Plan, codified at Tenn. Code Ann. §§ 17-9-101, *et seq*. The doctrine of standing prevents courts from "adjudicating 'an action at the instance of one whose rights have not been invaded or infringed.'" *American Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006)

[2] The statute discussed in this opinion, Tenn. Code Ann. § 3-6-108(i), was recodified at Tenn. Code Ann. § 3-6-304(i) when the Comprehensive Governmental Ethics Act of 2006 was adopted.

(internal citations omitted). The purpose of inquiring into a party's standing is to determine whether the party has a sufficiently personal stake in the outcome of the proceeding to warrant the exercise of the court's power on its behalf. *See Metropolitan Air Research Testing Auth. v. Metropolitan Gov't*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). As such, standing is a limitation upon judicial power. *See Tennessee Medical Ass'n v. Corker*, No. 01-A-01-9410-CH-00494, slip op. at 2 (April 19, 1995) (citing *Valley Forge Christian College v. Americans United For Separate of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed. 2d 700 (1982)).

The standing requirement imposes a duty to allege a "particularized injury concretely and demonstrably flowing from the action of the defendants which will be redressed by the remedy sought." *Lugo v. Miller*, 620 F.2d 823, 827 (6th Cir. 1981). Thus in order to establish standing, a plaintiff must demonstrate that: (1) he has sustained a distinct and palpable injury, (2) the injury was caused by the challenged conduct, and (3) the injury is likely to be redressed by a remedy that the court is prepared to give. *See Tennessee Envtl. Council v. Solid Waste Disposal Control Bd*., 852 S.W.2d 893, 896 (Tenn. Ct. App. 1992) and *Morristown Emergency & Rescue Squad, Inc. v. Volunteer Dev. Co*., 793 S.W.2d 262, 263 (Tenn. Ct. App. 1990).

Although standing does not depend on the merits of a claim, it often turns on the nature and source of the claim asserted. Thus, when the claimed injury involves the violation of a statute or constitutional provision, the court must ask whether the interests of the injured party fall within the zone of interests protected by the statute or constitutional provision in question. *See Town of Carthage v. Smith County*, No. 01-A-01-9308-CH-00391, slip op. at 5 (March 8, 1995). Furthermore, it is a well established rule in Tennessee that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally. *See Patten v. City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901). The reasoning behind this rule has been stated to be that "[c]ourts do not sit, to declare abstract propositions of law" and that, "[in matters common to all citizens], the law confers upon the duly elected representatives of the people the sole right to appeal to the courts for redress." *Id*. at 420.

Thus, whether a party has standing under these standards to challenge the constitutionality of the Tennessee Plan would depend upon the individual facts and circumstances as determined by a court of competent jurisdiction. For example, in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973), the issue of the constitutionality of the Tennessee Plan was raised within the context of a *quo warranto* proceeding to determine conflicting claims of two persons to the office of Supreme Court justice – one based upon appointment by the governor and the other based upon election by a write-in campaign. However, in *Johnson v. Bredesen*, 2009 WL 2251301 (6th Cir. 2009), the court found that the plaintiffs' status as registered voters was not sufficient to grant standing to challenge the constitutionality of the Tennessee Plan. Similarly, in *State ex rel. Hooker v. Thompson*, 249 S.W.2d 331 (Tenn. 1996), the court found that the plaintiff candidates lacked standing based upon their individual circumstances.

3. Your final question concerns the authority given to the Legislature in the Tennessee Constitution with respect to the election of judges and the filling of judicial vacancies. As this

Office has previously noted, this issue was addressed by the Supreme Court in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973). Art. VII, § 4, provides that "[t]he election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." While Art. VI, §§ 3 and 4, provide that appellate and trial court judges are to be elected by qualified voters, these sections are silent as to how vacancies in such judicial offices are to be filled. Furthermore, Art. VII, § 7, provides that "[n]o special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs." Reading these constitutional provisions together, the Supreme Court held that Art. VII, § 4, authorized the Legislature to enact legislation providing for the filling of judicial vacancies by appointment. 496 S.W.2d at 487. *See* Op. Tenn. Att'y Gen. 09-174 (November 2, 2009) (copy attached).

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