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Opinion No. 05-054

Bill to Ban Lobbying by Spouses of Certain State Officials

QUESTIONS

1. May the General Assembly constitutionally prohibit the spouse of a legislator, legislator-elect, the Governor, a Governor's staff member, the Secretary of State, the Treasurer, or the Comptroller from receiving any fee for consulting services from any entity other than compensation paid by the State, a county, or a municipality?

2. Does a grandfather clause for current spouses as of the effective date of a statute change the constitutional analysis?

OPINIONS

1. In its current form, the ban on accepting consulting fees in this bill unconstitutionally infringes on the First Amendment rights of the spouses to whom it applies.

2. No.

ANALYSIS

1. Lobbying Ban

This opinion concerns the version of House Bill 1/Senate Bill 1841 as amended by the Senate and sent to a joint conference committee. A copy of the version of the bill on which this opinion is based is attached. The bill would make it an offense:

> for any member of the general assembly, member-elect of the general assembly, the governor, a member of the governor's staff, the secretary of state, the treasurer, the comptroller of the treasury, or the immediate family of such persons to knowingly receive a fee, commission or any other form of compensation for consulting services, other than compensation paid by the state, a county or a municipality. Provided, the provisions of this section shall not apply to such persons' immediate family members who are providing consulting services upon the effective date of this act.

(Proposed § 2-10-123(a)). The term "consulting services":

> with respect to an official in the legislative branch, an official in the executive branch, or the immediate family of either type of official, means services to advise or assist a person or entity in influencing legislative or administrative action as such term is defined in § 3-6-102(11), including services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term "consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative procedure or rule making procedure.

(Proposed § 2-10-122(1)).

Tenn. Code Ann. § 3-6-102(11) provides:

> "Influencing legislative or administrative action" means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies, or analyses requested by an official of the legislative or executive branch to such official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch;

We assume the bill, by incorporating this definition, also incorporates the definition of the other terms within this provision that appear in Tenn. Code Ann. § 3-6-102. The term "legislative action":

> means introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed in a legislative committee or in either house of the general assembly;

Tenn. Code Ann. § 3-6-102(12). The term "administrative action":

> means the taking of any recommendation, report or nonministerial action, the making of any decision or taking any action to postpone any action or decision, action of the governor in approving or vetoing any bill or resolution, the promulgation of a rule and regulation, or any action of a quasi-legislative nature, by an official in the executive branch.

Tenn. Code Ann. § 3-6-102(1). The term "official in the executive branch" is not defined for purposes of this bill by Tenn. Code Ann. § 3-6-102 but, instead, is found in proposed section 2-10-122(4):

> The term "official in the executive branch" means the governor, any member of the governor's staff or any person in the executive service as such term in defined in § 8-30-208(b); provided however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

Proposed section 2-10-122(5) provides that the term "official in the legislative branch" has the same meaning as the term has in section 3-6-102(17). That definition provides:

> "Official in the legislative branch" means any member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house thereof who takes legislative action. "Official in the legislative branch" also includes the secretary of state, treasurer, and comptroller of the treasury and any employee of such offices;

The term "immediate family" has the same meaning as such term is defined in Tenn. Code Ann. § 3-6-102(10). (Proposed § 2-10-122(3)). Tenn. Code Ann. § 3-6-102(10) provides:

> "Immediate family" means a spouse or minor child living in the household;

Subsection (b) of proposed section 2-10-123 provides:

> It is an offense for any person or other entity, other than the state, a county or municipality, to pay a fee, commission or any other form of compensation for consulting services to a person such person or entity knows to be a member of the general assembly, member-elect of the general assembly, the governor, a member of the governor's staff, the secretary of state, the treasurer, the comptroller of the treasury, or the immediate family of such persons. Provided, the provisions of this section shall not apply to such persons' immediate family members who are providing consulting services upon the effective date of this act.

(Proposed § 2-10-123(b)). Violation of proposed section 2-10-123 is a Class C felony punishable as bribery under Tenn. Code Ann. § 39-16-102(a)(2).

The first question is whether the General Assembly may constitutionally prohibit the spouse of a legislator, legislator-elect, Governor, Governor's staff member, Secretary of State, Treasurer, or Comptroller from receiving any fee for consulting services from any entity other than the State, a county, or a municipality. The term "consulting services" includes "services to advise or assist a person or entity in influencing legislative or administrative action as such term is defined in § 3-6-102(11), including services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state." All of these services involve petitioning government agencies. The state lobbying registration laws define "lobby" to mean "to communicate, directly or indirectly, with any official in the legislative branch or executive branch, for pay or for any consideration, for the purpose of influencing any legislative action or administrative action." Tenn. Code Ann. § 3-6-102(13). The ban includes any such fee from "any person or entity" other than the State, a county, or a municipality.

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." Lobbying unquestionably concerns core political speech that "implicates First Amendment guarantees of petition, expression, and assembly." *Kimbell v. Hooper,* 164 Vt. 80, 83, 665 A.2d 44, 46 (Vt. 1995); *United States v. Harris,* 347 U.S. 612, 625, 74 S.Ct. 808, 98 L. Ed. 989 (1954). The fact that the proposed ban is on accepting a fee for lobbying services, rather than on actually performing the activity of lobbying, does not shield it from First Amendment analysis. "The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights." *Moffett v. Killian,* 360 F.Supp. 228, 231 (D.Conn. 1973). In that case, the United States District Court found that a tax aimed at paid lobbyists burdened their exercise of First Amendment rights and far exceeded the State's cost of administering the State's lobbying registration laws. The Court found the tax unconstitutional. In concluding that paid lobbyists are exercising rights protected by the First Amendment, the Court noted that the United States Supreme Court had found that a clergyman does not forfeit his freedom of religion or change the nature of his religious pursuit simply because his livelihood is derived in whole or in part from the exercise of that freedom, *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); and that booksellers and motion picture distributors do not lose First Amendment rights just because they make a profit on the exercise of them, *Smith v. California,* 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959) and *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-502, 72 S.Ct. 777, 96 L.Ed. 1098(1952). *See also Vermont Society of Association Executives v. Milne,* 172 Vt. 375, 779 A.2d 20 (Vt. 2001) (state tax on lobbying expenditures singled out and burdened the exercise of First Amendment rights and, therefore, was subject to strict scrutiny); *Liberty Lobby, Inc. v. Person,* 390 F.2d 489, 491 (D.C.Cir 1968) ("While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); *United States v. Sawyer,* 85 F.3d 713, 731 n. 15 (1st Cir. 1996) (paid lobbyist's employment goal of attempting to persuade and influence legislators was guaranteed by the First Amendment); *Fidanque v. Oregon Government Standards and Practices Commission,* 969 P.2d 376 (Ore. 1998) (fee violated state constitution; "Lobbying is

political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects." 969 P.2d *at* 379).

At the same time, the United States Supreme Court has acknowledged that governments have a legitimate interest in regulating lobbyists. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20, 115 S.Ct. 1511, 1523 n. 20, 131 L.Ed.2d 426 (1995) ("The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."). As such, courts have upheld laws regulating and monitoring the activities of lobbyists. *See, e.g., United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (holding that federal lobbying act does not violate lobbyists' constitutional guarantees of freedom of speech and petitioning the government).

However, the United States Supreme Court has also long recognized 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, 611-612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citations omitted). 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 264 (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 must be narrowly tailored to further a compelling state interest. Presumably, the ban is intended to prevent corruption or the appearance of corruption that might arise when the spouse of a legislator or other highly placed government official is paid to lobby state agencies on behalf of non-governmental entities. Such fees could unduly influence the official's judgment. The lobbying relationship with the official's spouse could give him or her a financial interest in making an official decision. Presumably this is the basis for the ban, because it also includes minor children living in the official's home. Assuming the household mingles assets, the lobbying income of a spouse or a minor child would directly benefit the official. Courts have recognized that allowing large campaign contributions undermines the public's confidence in the integrity of the officials and gives the impression that candidates may be unduly influenced by large campaign contributions. Thus, 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, 656l, 157 L.Ed.2d 491 (2003). But the Court acknowledged that the standard of review for such limits was not the more rigorous standard of strict scrutiny. *Id.* at 657. Further, in the case of the spousal ban on paid lobbying for any private entity, the appearance of corruption is more remote. No court has recognized this rationale as a basis for this broad a ban on paid lobbying.

We have found no case that directly addresses the constitutionality of a ban on lobbying. This Office has concluded that the legislature may not constitutionally prohibit a legislative or executive official or a member of their staff or family from soliciting employment from a lobbyist, or a lobbyist from soliciting employment from the same individuals. Op. Tenn. Att'y Gen. 89-87 (May 22, 1989). The Office of the Iowa Attorney General has concluded that a two year ban on lobbying by all former officials and employees would probably be ruled unconstitutional because it was not closely drawn in furtherance of a compelling state interest. Op. Iowa Att'y Gen. 93-1-4 (January 19, 1993). The opinion noted that federal law limitations at 18 U.S.C. § 207 on lobbying by former employees and officials were more narrowly drawn to target matters in which the employee was personally involved, or more general matters that a more highly placed official might be in a position to influence. In *United States v. Sawyer*, 85 F.3d 713, 731 n. 15 (1st Cir. 1996), the Court cautioned against subjecting protected lobbying activities to criminal liability under the federal mail and wire fraud statutes.

Even if it can be successfully argued that the ban furthers a compelling state interest in preventing the appearance of corruption, it is not narrowly tailored to further that interest. The bill bans the spouses of several state officials from being paid to lobby by any person or entity besides the State, a county, or a city. Thus, the bill bans a spouse from being paid to lobby on behalf of any private business or entity, including non-profit corporations.

There are clearly less restrictive ways of targeting the situations where spousal lobbying might give rise to corruption. For example, state law already prohibits a lobbyist or an employer of a lobbyist from making a gift, directly or indirectly, to a broad range of state officials. Tenn. Code Ann. § 3-6-114. Thus, it is already illegal for an employer of a lobbyist to overpay an official's spouse or minor child for lobbying services. Further, it is a state crime for an official to accept a bribe to influence his or her official decisions. Tenn. Code Ann. § 39-16-102. A defensible law might require an official to recuse himself or herself from voting on a decision on which his or spouse is lobbying, or prevent a spouse from lobbying the executive agency the official controls. As currently drafted, however, the ban unconstitutionally infringes on the First Amendment rights of the spouses to whom it applies.

2. Effect of Grandfathering Provision

The second question is whether the grandfathering provision in the proposed section 2-10-123 changes the constitutional analysis. It does not. The grandfathering provision states:

> Provided, the provisions of this section shall not apply to such persons' immediate family members who are providing consulting services upon the effective date of this act.

This provision does not make the ban constitutional. In fact, it presents separate equal protection problems. This is because, as a result of the grandfathering provision, the same activity taking place at the same time will be criminal for some of the spouses of the listed state officials, but not others. The difference will turn on whether the spouse in question was providing consulting services on the date the act becomes effective. It has long been established that "equal protection analysis requires strict scrutiny of a legislative classification when the classification impermissibly interferes with the exercise of a fundamental right." *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968) (only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedom). In this case, the grandfathering provision creates two classes of individuals: spouses who were providing consulting services on the effective date of the act and spouses who were not. While the first group is free to continue to engage in paid lobbying for private entities, the second group may not. This classification serves no discernible compelling state interest. For this reason and the reasons discussed above, the ban is unconstitutional with or without the grandfather provision.

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