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Opinion No. 03-055

Limitations on Contributions by Major Lottery Contractors

QUESTIONS

1. May the General Assembly constitutionally prohibit the lottery management company and its employees from making political donations to gubernatorial candidates and members of the General Assembly?

2. May the General Assembly constitutionally prohibit the lottery advertising company and its employees from making political donations to gubernatorial candidates and members of the General Assembly?

OPINIONS

1. and 2. The ban would be constitutional if the State can demonstrate a sufficiently important interest and that the ban is closely drawn to avoid unnecessary abridgement of associational freedoms. A court could find that the ban is overbroad because it includes all employees, not merely officers and managerial staff. Such a complete ban would be more readily defensible if the General Assembly makes an express finding that its scope is justified by the State's important interest in maintaining the integrity of its political processes and in ensuring the honest operation of the state lottery, and if the legislative history includes evidence to support those conclusions.

ANALYSIS

This opinion concerns whether the General Assembly may constitutionally ban the lottery management company and its employees or the lottery advertising company and its employees from making political contributions to gubernatorial candidates and members of the General Assembly. We assume that the request refers to the privately owned company that the proposed Tennessee Lottery Education Corporation would select to operate the state lottery, and the advertising company that the Lottery Corporation would select to advertise and promote the state lottery.

State law already prohibits the use of any corporate funds to aid in the election or defeat of a candidate for state or local public office. Tenn. Code Ann. § 2-19-132. This provision is constitutional. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108

L.Ed.2d 652 (1990) (upholding as constitutional state law prohibiting corporations from making independent expenditures in connection with state elections out of corporate treasury funds).

A complete ban on political contributions by individuals, however, is more problematic. The United States Supreme Court has held that restrictions on campaign contributions implicate rights of free association protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). But a contribution limit involving "significant interference" with associational rights can survive if the government demonstrates that contribution regulation is "closely drawn" to match a "sufficiently important interest," although the dollar amount of the limit need not be "fine tun[ed]." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897, 904, 145 L.Ed.2d 886 (2000) (citations omitted; explaining *Buckley*). In *Shrink Missouri*, the Court upheld a Missouri state law that imposed contribution limits ranging from $250 to $1,000 for various state offices. Six members of the Court joined in the majority opinion. Of these six, two filed concurring opinions in which a third joined. The Court found that the limits were closely drawn to match the State's important interest in avoiding corruption or the appearance of corruption in government. 120 S.Ct. at 905-909. The Court rejected the challenge that the limits were void because there was insufficient empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions "must have been exerting a covertly corrosive influence." *Id.* at 906. The Court noted:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Id. The Court found that, while the record did not show that the Missouri legislature relied on the evidence and findings accepted in *Buckley*, the record had enough evidence to show that "the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* at 907. The Court cited an affidavit by a state senator and several newspaper articles inferring impropriety from large contributions. The Court also cited an earlier federal case citing other governmental scandals in Missouri connected with large political contributions. The Court noted that the limits had been overwhelmingly approved in a popular referendum. *Id.* at 908. The Court also pointed out that the challengers of the measure had made no showing that cast doubt on the implications of *Buckley*'s evidence and the record before the Court. The Court concluded that in spite of academic studies showing little evidence that candidates actually changed their positions as a result of large contributions, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.*

Finally, the Court rejected the argument that the Missouri contribution limits were "so different in kind as to raise essentially a new issue about the adequacy of the Missouri statute's tailoring to serve its purposes." *Id.* The Court stated:

> Here, as in *Buckley*, "[t]here is no indication . . . that the contribution limitations imposed by the [law] would have any dramatic[ally] adverse effect on the funding of campaigns and political associations," and thus no showing that "the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy."

Id. at 908-09 (citations omitted). The Court stated:

> In *Buckley*, we specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. . . . [w]e referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to "amas[s] the resources necessary for effective advocacy." We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.

Id. at 909.

The Louisiana Supreme Court recently upheld the constitutionality of a state law that banned campaign contributions to candidates by individuals involved in legalized gambling, including those licensed to conduct riverboat gambling or to distribute or manufacture gambling equipment, owners of boats where riverboat gambling was conducted, and casino owners. The ban included any person with a direct or indirect interest of more than ten percent in an entity conducting the activity as well as officers, directors, partners, senior management level employees, and key employees of the businesses or their holdings, intermediaries, or subsidiary companies. *Casino Association of Louisiana v. Foster,* 820 So.2d 494 (La. 2002), *cert. denied* __ U. S. __, 123 S.Ct. 1252, 154 L.Ed.2d 1087 (2003). The Court declined to follow its earlier decision in *Penn v. State ex rel. Foster,* 751 So.2d 823 (La. 1999), *rehearing denied* (1999), *cert. denied,* 529 U.S. 1109, 120 S.Ct. 1962, 146 L.Ed.2d 793 (2000) (overturning a similar ban on video poker licensees). The Court concluded that *Penn* incorrectly interpreted *Buckley*, the ruling in which had since been clarified in *Shrink Missouri.*

The Court reasoned that the ban on contributions, because it affected only a limited number of contributions, would have a minimal effect on candidates' ability to "amass the resources necessary for effective advocacy." 820 So.2d at 503 (citing *Buckley* and *Shrink Missouri*). The Court found, therefore, that the ban would be permissible under *Buckley* and *Shrink Missouri* so long as it was closely drawn to match a sufficiently important interest. The Court cited the history of gambling in Louisiana and its important role in state politics as well as the public interest in regulating gambling and limiting the involvement of gaming interests in the legislative process. The Court cited affidavits outlining the public perception that gaming is associated with political corruption, information that nine states had prosecuted governmental officials in gaming cases in the last ten years, and statistics showing the "staggering sum of money" collected by those in the gaming industry to support the ban. The Court stated: "Given the history of the gaming industry and its connection to public corruption and the appearance of public corruption, it is completely plausible, and not at all novel, for the Louisiana legislature to have concluded that it was necessary to distance gaming interests from the ability to contribute to candidates and political committees which support candidates." 820 So.2d at 508. *See also Petition of Soto*, 236 N.J. Super. 303, 565 A.2d 1088 (1989), *cert. denied*, 121 N.J. 608, 583 A.2d 310 (1990), *cert. denied*, 496 U.S. 937, 110 S.Ct. 31216, 110 L.Ed.2d 664 (1990) (upholding a statute prohibiting political contributions by key casino employees); *Schiller Park Colonial Inn, Inc. v. Berz*, 63 Ill.2d 499, 349 N.E.2d 61 (1976), *rehearing denied* (1976) (upholding a statute banning political contributions by liquor licensees).

Unlike the bans upheld in *Casino Association* and *Soto*, the proposed ban would apply to all employees of a lottery contractor hired to manage the Tennessee lottery or an advertising agency that obtains the contract to advertise and promote the Tennessee lottery. This is a broad ban. A court could find that the ban is not closely drawn and, therefore, unconstitutional because it is not confined to officers and managerial employees. On the other hand, the ban would apply only to contributions to gubernatorial and legislative candidates. It would not apply to contributions to political parties or to candidates for other offices, and it would not prevent these individuals from making independent expenditures to support a gubernatorial or legislative candidate. Further, given the history of gambling in Tennessee, we think the legislature could legitimately conclude that the ban would further the State's important interest in ensuring governmental integrity and honest operation of the lottery. In 1995, this Office concluded that, in the light of factual findings made by a United States District Court regarding corrupt practices in the Public Service Commission, the General Assembly could constitutionally prohibit a Public Service Commissioner or candidate from accepting political contributions from any employee, owner, major stockholder, or officer of a company or business entity regulated or seeking regulation by the Public Service Commission. Op. Tenn. Atty. Gen. 95-53 (May 15, 1995). While evidence regarding the possibility of corruption in the gaming industry is not so tangible, we think a similar ban on businesses with major lottery contracts is constitutionally defensible, for the same reasons. The ban would be more readily defensible, however, if it is confined to officers and managerial employees of either business. The ban would also be more readily defensible if it contains a finding regarding its purpose and if the legislative history includes evidence to support the General Assembly's intent to prevent corruption or the appearance of corruption from political contributions in these circumstances.

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