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Opinion No. 06-025

Lobbyist Campaign Donations

QUESTION

Is an individual citizen who is employed in the lobbying profession prohibited from making donations to an individual, cause, or candidate?

OPINION

Under current law, lobbyists may not contribute to a gubernatorial or legislative candidate during the regular annual session of the General Assembly. This Office has concluded that this statute is unconstitutional when applied to non-incumbent candidates for Governor and membership in the General Assembly. Lobbyists must also disclose political contributions of more than one hundred dollars to candidates for state and local office, officials in the legislative branch, and officials in the executive branch.

The "Comprehensive Governmental Ethics Reform Act of 2006" (the "Reform Act") bans lobbyist contributions to any candidate to the General Assembly or to any gubernatorial candidate. We think a court would conclude, however, that the ban is unconstitutional because it is not narrowly tailored to further a compelling state interest.

ANALYSIS

This opinion concerns lobbyist donations to state candidates and referenda campaigns. The question is whether a citizen employed in the lobbying profession is prohibited from making such donations. We assume that your question addresses not only current law, but provisions governing these issues in the "Comprehensive Governmental Ethics Reform Act of 2006" (the "Reform Act"). Tenn. Code Ann. § 3-6-108(i) provides:

> No lobbyist, employer of a lobbyist or multicandidate political campaign committee controlled by a lobbyist or employer of a lobbyist shall make a contribution to a candidate for the office of governor or member of the general assembly during the time that the general assembly is in a regular annual legislative session.

Current law, therefore, prohibits a lobbyist from contributing to a gubernatorial or legislative candidate during the regular annual session of the General Assembly. This Office has concluded that this statute is unconstitutional when applied to non-incumbent candidates for Governor and membership in the General Assembly. Op. Tenn. Att'y Gen. 01-134 (August 29, 2001). This conclusion was based on the reasoning in *Emison v. Catalano,* 951 F.Supp. 714 (E.D. Tenn. 1996). That case has not been overruled or superseded within the jurisdiction of the United States Court of Appeals for the Sixth Circuit since that time. Lobbyists must also disclose political contributions of more than one hundred dollars to candidates for state and local office, officials in the legislative branch, and officials in the executive branch. Tenn. Code Ann. § 3-6-106(b)(2). Like all contributions, contributions by a lobbyist are also subject to the limits set forth in Tenn. Code Ann. § 2-10-302.

The Reform Act rewrites Tennessee statutes governing lobbyists. Under proposed Tenn. Code Ann. § 3-6-304(j):

> No lobbyist, or any person acting on behalf of a lobbyist, shall offer or make any campaign contribution to or on behalf of the governor or any member of the general assembly or any candidate for the office of governor, state senator or state representative.

The term "campaign contribution" means any contribution as defined by § 2-10-102(4). Proposed Tenn. Code Ann. § 3-6-301(5). The definition of "campaign contribution" under that statute includes a gift of money "or like thing of value," but excludes volunteer services on behalf of a candidate or campaign committee. Tenn. Code Ann. § 2-10-102(4)(A). The ban, therefore, would not prevent a lobbyist from volunteering his or her services to a legislative or gubernatorial candidate.

Under proposed Tenn. Code Ann. § 3-6-301(17), "lobbyist" means any person who engages in lobbying for compensation. "Lobby" means:

> to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action. "Lobby" does not mean communications with officials of the legislative or executive branches by an elected or appointed public official performing the duties of the office held; a duly licensed attorney at law acting in a representative capacity on behalf of a client appearing before an official of the executive branch for the purpose of determining or obtaining such person's legal rights or obligations in a contested case action, administrative proceeding, or rule making procedure; an editor or working member of the press, radio or television who in the ordinary course of business disseminates news or editorial comment to the general public; or an employee of a department, agency or entity of state, county or municipal government; provided, however,

> if the department, agency or entity employs, retains or otherwise arranges for lobbyist services by a contractor, subcontractor or other representative, who is not an employee of the department, agency or entity, then "lobby" includes communications by such representative.

Proposed Tenn. Code Ann. § 3-6-301(15). "Compensation" means "any salary, fee, payment, reimbursement or other valuable consideration, or any combination thereof, whether received or to be received." Proposed Tenn. Code Ann. § 3-6-301(7). "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.

Proposed Tenn. Code Ann. § 3-6-301(13).

These definitions are very broad. Under these definitions, for example, an individual who is reimbursed for parking expenses incurred visiting the General Assembly to support any kind of legislation would be a "lobbyist." That individual would be banned from making any political contribution in the gubernatorial or state legislative elections. The United States Supreme Court has stated that contribution limits are subject to a less rigorous standard of review than strict scrutiny. *McConnell v. Federal Election Commission,* 540 U.S. 93, 124 S.Ct. 619, 656, 157 L.Ed.2d 491 (2003). 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). But, in this case, the ban on lobbyist contributions also burdens the right of an individual to lobby for compensation. That activity is also protected by the First Amendment. Op. Tenn. Att'y Gen. 05-054 (April 20, 2005). The ban, therefore, must be narrowly tailored to further a compelling state interest.

The ban in the Reform Act may be found unconstitutionally overbroad on several different grounds. First, it extends to contributions to candidates, as well as to officials in office. In *Emison v. Catalano,* 951 F.Supp. 714 (E.D. Tenn. 1996), the United States District Court for the Eastern District of Tennessee found that a ban on campaign contributions during a legislative session was unconstitutional to the extent it applied to non-incumbent candidates for the legislature. The Court found the statute did not provide the least intrusive means of achieving the elimination of political corruption, "because [it] deprive[s] 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.'" 951 F.Supp. at 723 (citations omitted).

Since *Emison* was decided, at least three courts have upheld statutory schemes limiting lobbyist contributions to both officeholders and candidates for those offices. For example, the United States Court of Appeals for the Fourth Circuit has upheld a state statute preventing members of and candidates for the General Assembly and the Council of State from soliciting lobbyists or political committees employing lobbyists while the General Assembly was in session. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S.Ct. 1156 (2000). In that case, however, the Court accepted the argument that lobbyists might attempt to influence current officeholders by making contributions to their challengers. The Court in *Emison* expressly rejected that argument.

Two other opinions are partly based on the reasoning that the ban prevents lobbyists from appearing to purchase the interest of candidates before they are elected to office. But, each of these bans is narrower in scope than that imposed by the Reform Act. The United States District Court for the Eastern District of California upheld a statute prohibiting contributions by certain lobbyists to state officeholders or candidates if the lobbyist is registered to lobby the agency for which the officeholder works or for which the candidate seeks election. *Institute of Governmental Advocates v. Fair Political Practices Commission*, 164 F. Supp.2d 1183 (E.D. Cal. 2001). The Court rejected the argument that the ban was overly broad because it banned contributions to candidates. The Court pointed out that the statute prohibited contributions by lobbyists, if the lobbyist is registered to lobby the office for which the candidate seeks election, "that is, to those persons the lobbyist *will* be paid to lobby." 164 F.Supp.2d at 1190 (emphasis in original). The Court also emphasized that the ban was not overly broad because state regulations narrowed the term "lobbyist" to include an individual who in any calendar month spent one third of the time for which he or she was compensated in direct communication with qualifying officials. The Court distinguished its earlier ruling finding a similar ban unconstitutional because it noted that regulations in effect at that time included a broader definition of "lobbyist." 164 F.Supp. at 1190. The Court concluded that the state had a legitimate interest in avoiding the potential for corruption and the appearance of corruption "that could occur if lobbyists, whose continued employment depends on their success in influencing legislative action, are allowed to make campaign contributions to the very persons whose decisions they hope to influence." *Id.* at 1194-95.

The Supreme Court of Alaska has also upheld a statute barring registered lobbyists from contributing to legislative candidates in districts outside the district in which the lobbyist is eligible to vote. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153, 120 S.Ct. 1156, 145 L.Ed.2d 1069 (2000). The statute in that case defined lobbyists to include a person "if a substantial or regular portion of the activities for which the person receives consideration is for the purpose of influencing legislative or administrative action," as well as any person representing himself or herself as engaging in influencing legislative or administrative action as a profession. 978 P.2d at 617. The Court cited evidence that lobbyist contributions corrupted or appeared to corrupt the legislative process. The Court also found that, by contributing the maximum amount allowed to many different legislative campaigns, a lobbyist could create "a very real perception of influence-buying." *Id.* at 619. The Court found that the out-of district ban "draws a logical compromise between lobbyists' private rights and their professional obligations." *Id.*

In light of *Emison*, it is not clear whether a court in Tennessee would agree with the arguments advanced in Alaska and California to support a ban on contributions to candidates. Further, the ban imposed under the Reform Act applies to a larger class of individuals than any of the bans upheld in these cases. The Reform Act ban applies to any individual who receives *any* compensation to influence state legislative or administrative action. The ban, therefore, includes a broad range of individuals who do not earn a living from lobbying and whose financial stake in "influence-buying" may be negligible. Yet these individuals are completely banned from contributing money to any Tennessee legislative or gubernatorial candidate. By contrast, the California and Alaska bans included only lobbyists who received a substantial amount of their full compensation for lobbying activities, or who held themselves out as professional lobbyists. For this reason, we think a court would find that the ban under the Reform Act is unconstitutional because it is not narrowly tailored to further a compelling state interest.

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