S T A T E O F T E N N E S S E E
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Opinion No. 07-113

Prohibition of Candidate Paying for Endorsement

QUESTIONS

1. Does it violate any state statute for a candidate for public office to pay a fee to a group or individual in exchange for their endorsement?

2. Does it violate any state statute for a group or individual to request that a candidate for public office pay a fee to the group or individual in exchange for their endorsement?

3. Is a law prohibiting these actions constitutional?

OPINIONS

1. Paying a fee to a group or individual in exchange for their endorsement would violate Tenn. Code. Ann. § 2-19-121, which bars a candidate from bargaining for support.

2. While there is no statute that expressly prohibits a group or individual from requesting a fee for a political endorsement, Tenn. Code. Ann. § 39-12-102 criminalizes intentionally asking another person to commit a crime with the intent that the crime be committed.

3. Tenn. Code. Ann. § 2-19-121 is constitutional.

ANALYSIS

1. Tenn. Code Ann. § 2-19-121 provides:

> It is unlawful for any candidate for nomination or election in any state, county, city or district office, to expend, pay, promise, or loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, or to agree to enter into any contract with any person to vote for or support any particular policy or measure, in consideration of the vote or support, moral or financial, of such person. A violation of this section shall be punished as provided in § 2-19-123.[1]

[1]Tenn. Code Ann. § 2-19-123 makes a violation of Tenn. Code Ann. § 2-19-121 a Class C misdemeanor.

While the statute is densely drafted, the fair import of its language is to prohibit a candidate for state or local office from paying or promising to pay money or another thing of value in exchange for political support, either moral or financial. Despite its complex wording, we do not think that the statute is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

It is further the opinion of this office that an endorsement would qualify as moral support within the meaning of the statute. Tenn. Code Ann. § 2-19-121, therefore, forbids a candidate from paying a fee to a group or individual in exchange for their endorsement.

2. Tenn. Code Ann. § 39-12-102(a) describes the crime of solicitation:

> Whoever, by means of oral, written or electronic communication, directly or through another, intentionally commands, requests or hires another to commit a criminal offense, or attempts to command, request or hire another to commit a criminal offense, with the intent that the criminal offense be committed, is guilty of the offense of solicitation.

It is the opinion of this office that because it is a crime for a candidate to pay a fee in exchange for an endorsement, it would constitute criminal solicitation for a group or individual intentionally to request that a candidate pay them a fee in exchange for an endorsement, with the intent that the candidate pay such a fee.

3. It is the opinion of this office that the Tennessee statute prohibiting a candidate from paying a fee in exchange for an endorsement is constitutional. In *Brown v. Hartlage*, the United States Supreme Court considered the constitutionality of a Kentucky statute that prohibited a candidate for public office from paying any person for their vote or financial or moral support.[2] 456 U.S. 45, 47 (1982). The Court set out "the standards by which we might distinguish between those 'private arrangements' that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system." *Id.* at 56. While the Court found the particular application of the law in *Brown* to be a violation of the First Amendment,[3] the Court acknowledged "that the States have a legitimate interest in preserving the integrity of the electoral process." *Id.* at 52. Writing for the majority, Justice Brennan stated, "[n]o body politic

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[2]Ky. Rev. Stat. Ann. § 121.055 states "[n]o candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person."

[3]In *Brown*, a candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law" — an act that under Kentucky law was considered to be an offer to purchase voter support. 456 U.S. at 50; *Sparks v. Boggs*, 339 S.W.2d 480, 484 (Ky. 1960). The statements were found to be distinguishable from those private corrupting agreements that a state has a compelling interest in avoiding. *Brown*, 456 U.S. at 58. The statements were made openly, subject to the scrutiny of political opponents and the voters, and in good faith. *Id.* at 56-57. The statements did not offer a private payment or *quid pro quo* arrangement, but offered a benefit to the undifferentiated public. *Id.* at 58.

worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter" and "a State may prohibit the giving of money or other things of value to a voter in exchange for his support." *Id.* at 54.

The rationale of Brennan's opinion in *Brown* applies with equal force to the buying of political endorsements. The state's interest in prohibiting a candidate from buying endorsements is the same as the state's interest in prohibiting a candidate from buying votes: preserving the integrity of the electoral process against exchanges for private profit that corrupt the political arena. *Id.* at 54-55. For this reason, Tennessee may prohibit a candidate from paying a fee to a group or individual in exchange for their endorsement.

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