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Opinion No. 07-142

Restrictions on the Immediate Family of Registry Members

QUESTIONS

1. Are the restrictions on the political activities of the immediate family of members of the Tennessee Registry of Election Finance contained in Tenn. Code Ann. § 2-10-203 (h) constitutional?

2. Are the immediate family members of the Registry members that were appointed before the restrictions in Tenn. Code Ann. § 2-10-203(h) became effective subject to those restrictions or would these restrictions only apply to the immediate family of Registry members that are appointed after these restrictions became effective?

OPINIONS

1. It is the opinion of this Office that the prohibitions set forth in Tenn. Code Ann. § 2-10-203(h)(1) and (3) against holding or qualifying for elective office to any state or local public office and against being an officer in a political party or committee are constitutional. Further, we think that that the ban on employment by an elected officeholder contained in Tenn. Code Ann. § 2-10-203(h)(7) is rationally related to the State's interest in eliminating any appearance that the regulatory activities of the Registry are tainted by political favoritism and, therefore, is constitutional.

However, it is our opinion that the ban on public employment contained in subsection (2) of Tenn. Code Ann. § 2-10-203(h), as applied to the immediate family of the members of the Registry, is unconstitutional. Further, as currently written, the ban on participation in any way in any election campaign contained in Tenn. Code Ann. § 2-10-203(h)(5) unconstitutionally infringes on the First Amendment rights of the family members to whom it applies. Finally, the ban on lobbying or employing a lobbyist contained in Tenn. Code Ann. § 2-10-203(6) unconstitutionally infringes upon the First Amendment rights of the Registry's immediate family members to whom it applies.

2. The restrictions contained in Tenn. Code Ann. § 2-10-203(h), to the extent they are constitutional, would apply to the immediate family of all Registry members regardless of whether the members were appointed before or after the effective date of the restrictions.

ANALYSIS

1. During the 2006 extraordinary session, the Tennessee General Assembly enacted the Comprehensive Governmental Ethics Reform Act of 2006. This Act, among other things, amended Tenn. Code Ann. § 2-10-203(h) to provide as follows:

> (h) No member of the registry or such member's immediate family, as defined in § 3-6-301, shall during such membership:
>
> (1) Be allowed to hold or qualify for elective office to any state or local public office, as defined in §2-10-102;
>
> (2) Be an employee of the state or any political subdivision of the state;
>
> (3) Be an officer of any political party or political committee;
>
> (4) Permit such person's name to be used or make campaign contributions in support of or in opposition to any candidate or proposition, except that a member's immediate family may make campaign contributions in support of or in opposition to any candidate or proposition;
>
> (5) Participate in any way in any election campaign;
>
> (6) Lobby or employ a lobbyist; or
>
> (7) Be employed by any elected officeholder, either in an official capacity or as an individual, or be employed by any business in which an elected officeholder has any direct input concerning employment decisions.

"Immediate family" is defined as a spouse or minor child living in the household. Tenn. Code Ann. § 3-6-301(12).

You have asked whether these restrictions are constitutional as applied to the immediate family of the members of the Registry.[1] Subsections (1), (3) and (5) of Tenn. Code Ann. § 2-10-203(h) place limitations on the political activities of the immediate family of Registry members. Subsection (1) prohibits Registry members and their immediate family from holding or qualifying

[1]It should be noted that while subsection (4) prohibits Registry members from making campaign contributions in support of or in opposition to any candidate or proposition, that prohibition does not apply to the member's immediate family.

for elective office to any state or local public office. The United States Supreme Court has held that there is no fundamental right to run as a candidate for elective public office. *Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849, 855-56, 31 L.Ed.2d 92 (1972); *Zielasko v. Ohio*, 873 F.2d 957, 961 (6th Cir. 1989). Furthermore, a voter does not have an absolute right to vote for a specific candidate, or for a certain class of candidates. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998); *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th Cir. 1995).

Subsection (3) of Tenn. Code Ann. § 2-10-203(h) prohibits the immediate family of Registry members from being officers in any political party or political committee. It does not, however, prohibit immediate family members from otherwise participating in or becoming members of a political party or political committee. Subsection (5) prohibits an immediate family member from participating in any way in any election campaign.

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." The Fourteenth Amendment makes this guarantee of rights applicable to the states as well as the Congress. The United States Supreme Court has recognized that the rights of freedom of association and freedom of expression are fundamental First Amendment activities. *See Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612 (1976); *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684 (1983) (emphasizing "the Constitution's special concern with threats to the right of citizens to participate in political affairs"). The United States Supreme Court has further held 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, 611-12, 93 S.Ct. 2908 (1973). The Tennessee Supreme Court has recognized these principles 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 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed.2d 902 (1988).

Thus, in order to survive constitutional scrutiny, the limitations on the political activities of the members of the Registry and their immediate family contained in subsections (1), (3) and (5)

must be narrowly tailored to further a compelling state interest. Under the Campaign Financial Disclosure Act, candidates for state and local public office, as well as political campaign committees, including political parties, are required to file campaign financial disclosure reports disclosing contributions received and expenditures made during a reporting period. *See* Tenn. Code Ann. § 2-10-105(c) and (d). The Registry is authorized to impose civil penalties upon any candidate or committee that fails to file or to timely file any report required by the Act and, in the case of multicandidate political campaign committees, the treasurer of the committee is personally liable for any such penalty. *See* Tenn. Code Ann. §§ 2-10-110(a) and (d) and 2-10-207(6) and (7).[2]

The State of Tennessee certainly has a legitimate interest in maintaining and preserving the integrity of the Registry and eliminating any appearance that the regulatory activities of the Registry are tainted by political favoritism. Presumably the ban on being a candidate for any state or local public office or being an officer of a political party or committee is intended to prevent a conflict of interest or the appearance of a conflict of interest that might arise when such candidate or committee fails to file or timely file a campaign financial disclosure report required under the Act. Clearly a familial relationship could unduly influence the Registry member's judgment in administering and enforcing the provisions of the laws over which the Registry has jurisdiction. Thus, in light of the authority given to the members of the Commission to assess civil penalties for the failure to file or timely file disclosure reports against candidates, political parties and political committees, and in some instances against the treasurer of a political party or committee personally, it can be argued that the ban on being a candidate for state or local office and the ban on being an officer of a political party or political committee furthers a compelling state interest in preventing the appearance of a conflict of interest.

Additionally, it would appear that this limitation on the immediate family of Registry members may be the least restrictive method for avoiding any appearance of a conflict of interest. The Registry is composed of six members. If one Registry member, whose spouse or dependent child is a candidate for state or local public office or an officer of a political committee, is considering the assessment of civil penalties against either a candidate who is the spouse or dependent child of another Registry member, or against a political party or committee one of whose officers is the spouse or dependent child of a fellow Registry member, the first Registry member may well be more lenient with that candidate or political committee in hopes of the same treatment in return. Under these circumstances, the appearance of a conflict of interest is readily apparent and simply requiring a Registry member to recuse himself or herself from participating in any matter involving his or her own immediate family members would not effectively eliminate the appearance of impropriety. Accordingly, we think that a court would find that the prohibitions on the immediate family of Registry members from holding or qualifying for elective office to any state or local public office and from being an officer in a political party or committee contained in subsections (1) and (3) are constitutional.

Subsection (5) of the statute is more problematic. It prohibits immediate family members

[2]A multicandidate political campaign committee is defined as a "political campaign committee to support or oppose two (2) or more candidates for public office or two (2) or more measures." Tenn. Code Ann. § 2-10-102(9).

from participating in any way in any election campaign. The statute does not define, however, what constitutes "participating in any way" and thus, it is unclear whether the immediate family members would be prohibited in engaging in clearly protected activity such as individually exercising their right to vote and privately expressing their views about candidates. Consequently, we believe this could lead a court to find the legislation to be so vague that "men of common intelligence must necessarily guess at its meaning." *Randall v. City of Cookeville*, 991 F.2d 796 (6th Cir. 1993) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Furthermore, while the courts have upheld legislation prohibiting public employees from actively participating in *partisan* political campaigns, *see International Brotherhood of Electrical Workers v. St. Louis County*, 117 F.Supp.2d 922 (E.D.Mo. 2000) and cases cited therein, we have not found any instance where the courts have upheld legislation that absolutely prohibits a public employee, much less their immediate family members, from any participation in any election campaign. Thus, even if it can be successfully argued that this ban on participating in election campaigns furthers a compelling state interest in preventing the appearance of a conflict of interest, it is not narrowly tailored to further that interest. Subsection (5) is also not narrowly tailored to further that interest in that it prohibits participation in any election campaign, including federal election campaigns. However, the Registry has no authority to regulate candidates for federal office as that has been preempted by federal law. *See* Federal Election Campaign Act, 2 U.S.C. § 453. Accordingly, as currently written, subsection (5) of Tenn. Code Ann. § 2-10-203(h) unconstitutionally infringes on the First Amendment rights of the family members to whom it applies.

Subsections (2) and (7) of Tenn. Code Ann. § 2-10-203(h) both place restrictions on employment opportunities of Registry members' immediate family. Subsection (2) prohibits the spouse or minor child of a member from being an employee of the state or any political subdivision of the state and subsection (7) prohibits immediate family members from being employed by any elected officeholder, either in an official capacity or as an individual, or from being employed by any business in which an elected officeholder has any direct input concerning employment decisions. The right to employment opportunity, although not a fundamental right, remains a fourteenth amendment liberty interest that is protected against arbitrary governmental interference. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03, 96 S.Ct. 1895, 1904-05, 48 L.Ed.2d 495 (1976); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796, 801-02 (1957); *Truax v. Raich*, 239 U.S. 33, 40-42, 36 S.Ct. 7, 10-11, 60 L.Ed. 131, 135 (1915). Notwithstanding that protection, the right to employment opportunity is subject to reasonable measures to promote the general welfare under the federal constitution. *Schware v. Board of Bar Examiners*, 353 U.S. at 2380-39, 77 S.Ct. at 755-56. Furthermore, the right to a particular job has never been regarded as fundamental. *Great American Sav. & Loan v. Novotny*, 442 U.S. 366, 380-81, 99 S.Ct. 2345, 2353-54, 60 L.Ed.2d 957, 969 (1979).

Thus, since the restrictions in subsections (2) and (7) do not involve a fundamental right, courts would apply rational basis review to test the constitutionality of these measures. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 524 (1976). Presumably, these restrictions on the employment opportunities of Registry members' immediate family are intended to ensure the integrity of the Registry and to avoid even the appearance of a conflict of interest. We fail to see, however, how a ban on being an employee of

the state or any political subdivision is rationally related to this interest. The Registry of Election Finance has the authority to administer the provisions of the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101, *et seq*. and the Campaign Contribution Limits Act, Tenn. Code Ann. §§ 2-10-301, *et seq*. Neither of these Acts authorize the Registry to regulate the conduct or activities of state or local public employees. As previously stated, the State of Tennessee has a legitimate interest in maintaining and preserving the integrity of the Registry and eliminating any appearance that the regulatory activities of the Registry are tainted by political favoritism. However, we see no rational connection between the blanket ban on all public employment and any legitimate regulatory interest of the Registry. *See, e.g., Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973), *rehearing denied* (1974) (municipal ordinance barring employment of veterans not having an honorable discharge not rationally related to city's interest in maintaining quality of its work force; *Furst v. New York City Transit Authority*, 631 F.Supp. 1331 (E.D.N.Y. 1986) (municipal policy barring employment of ex-felons not rationally related to city's interest in insuring that municipal jobs were filled by honest individuals and to preserve public trust in government); *Davis v. Bucher*, 451 F.Supp. 791 (E.D.Pa. 1978) (regulation which barred former drug users and addicts from city emloyment without any consideration of merits of each individual case bears no connection to city's interest in maintaining quality of its work force and assuring that its employees perform their tasks). Accordingly, it is our opinion that the ban on public employment contained in subsection (2), as applied to the immediate family of the members of the Registry, is unconstitutional.

We do think that a court would find that the ban on employment by an elected officeholder contained in subsection (7) is rationally related to the State's interest in maintaining the integrity of the Registry and avoiding the appearance of a conflict of interest. The primary purpose of the Registry is to ensure adequate financial disclosure by public officials and candidates for elected public office. *See* Tenn. Code Ann. § 2-10-202. Elected officeholders at the state and local level are subject to regulation by the Registry both as candidates for elected public office, as well as officeholders. As candidates, they are required to file campaign financial disclosure reports with the Registry with respect to campaign contributions and expenditures. As elected officials, they are required to file similar disclosure reports concerning contributions the purpose of which are to defray any ordinary and necessary expenses incurred in connection with the performance of the officeholder's duties, responsibilities, or constituent services. *See* Tenn. Code Ann. § 2-10-102(4) and § 2-10-114(a)(7). The Registry has the authority to impose civil penalties against these officials for failure to file or timely file these reports. In light of this authority, the ban on employment by elected officeholders of Registry family member is rationally related to the State's interest in eliminating any appearance that the regulatory activities of the Registry are tainted by political favoritism. *See, e.g., Greenberg v. Kimmelman*, 494 A.2d 294, 306 (N.J. 1985) (ban on casino employment of judicial spouse upheld as constitutional).

Finally, subsection (6) of Tenn. Code Ann. § 2-10-203(h) prohibits the spouse or minor child of a Registry member from lobbying or employing a lobbyist. Lobbying unquestionably concerns core political speech that "implicates First Amendment guarantees of petition, expression and assembly." *United States v. Harris*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954)*; Kimbell v. Hooper*, 164 Vt. 80, 83, 665 A.2d 44, 45 (Vt. 1995). This Office has previously opined that the General Assembly 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. *See* Op. Tenn. Atty. Gen. 89-87 (May 22, 1989) (copy attached). We have also previously opined that a ban on lobbying by the spouse of a legislator, legislator-elect, the Governor, a Governor's staff member, the Secretary of State, the Treasurer, or the Comptroller would unconstitutionally infringe on the First Amendment rights of the spouses to whom it applied. *See* Op. Tenn. Atty. Gen. 05-054 (April 20, 2005) (copy attached). In that opinion, we noted that, while the State has an interest in preventing political corruption and the appearance of corruption, no court has ever recognized that rationale as a basis for such a broad ban on paid lobbying. Research on developments since the release of these earlier opinions has not disclosed any decision where a court has held that the State's interest in preventing political corruption justifies a complete ban on lobbying. Accordingly, it is our opinion that the ban on lobbying by the Registry members' immediate family would unconstitutionally burden their First Amendment rights.

Subsection (6) also prohibits the spouse or minor child of a Registry member from employing a lobbyist. The right to petition the government under the First Amendment includes the right to employ a lobbyist to petition on one's behalf. *See, e.g., Citizens Energy Coalition of Indiana v. Sendak*, 459 F.Supp. 248 (S.D.Ind. 1978), *aff'd*, 595 F.2d 1158 (7th Cir. 1979), *cert. denied*, 444 U.S. 842, 1003 S.Ct. 83, 62 L.Ed.2d 54 (1979) (a policy of refusing grants to consumer groups who employed lobbyists unconstitutionally infringed on the First Amendment rights of consumer groups). Thus, this ban may only be upheld if it is narrowly tailored to further a compelling state interest. It is hard to discern the compelling state interest this ban is intended to further. Petitioning the government, either directly or indirectly through a paid lobbyist, is an activity protected by the First Amendment. It is not clear why a member's appointment to the Registry of Election Finance should result in a ban on the ability of the member's spouse or minor child to hire a lobbyist to represent their interests, particularly as lobbyists and employers of lobbyists are not regulated by the Registry, but by the Tennessee Ethics Commission. *See* Tenn. Code Ann. § 3-6-308(a). Accordingly, we conclude that the ban on employing a lobbyist by a Registry member's immediate family unconstitutionally infringes upon the First Amendment rights of those immediate family members.

2. You have also asked whether the restrictions in Tenn. Code Ann. § 2-10-203(h) apply to the immediate family of Registry members at the time those restrictions became effective or, instead, whether they would only apply to the immediate family of Registry members that are appointed after these restrictions became effective. There is nothing in the language of the Act indicating that the legislature intended the restrictions in Tenn. Code Ann. § 2-10-203(h) to apply only to the immediate family of members who are appointed to the Registry after the Act went into effect. Furthermore, we think such a "grandfathering" provision would raise equal protection problems as it would result in two classes of individuals: spouses and minor children of individuals who were Registry members on the effective date and spouses and minor children of individuals who were not. While the first group would be free to continue to engage in the activities prohibited by Tenn. Code Ann. § 2-10-203(h), the second group would not. Such a classification would serve no discernible compelling state interest. Accordingly, the restrictions contained in Tenn. Code Ann. § 2-10-203(h), to the extent they are constitutional, would apply to the immediate family of all

Registry members regardless of whether they were appointed before or after the effective date of the restrictions.

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