S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 07-160

Constitutionality of temporal limitation on expenditures

QUESTION

Whether a state law placing a time limitation on when a candidate for elected office may make expenditures out of his or her campaign account would be constitutional?

OPINION

Such a law would be unconstitutional.

ANALYSIS

You have asked whether a state law which establishes a beginning date for when expenditures could be made from a campaign account would be constitutional. The example you provide is a law which would prohibit a candidate for elected office in November 2008 from spending any money from his or her campaign account until January 31, 2008.

Any consideration of the constitutionality of campaign finance legislation must begin with the United States Supreme Court's comprehensive decision in *Buckley v. Valeo*. In that case, the Supreme Court found, among other things, that limitations on campaign expenditures directly and acutely impinged upon political expression protected by the First Amendment and are, therefore, subject to "exacting scrutiny." 424 U.S. 1, 19, 44-45, 96 S.Ct. 612, 634-35, 644-45, 46 L.Ed.2d 659 (1976). Accordingly, restrictions burdening political speech can survive a constitutional attack only if justified by a compelling state interest, *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52, 107 S.Ct. 616, 624-25, 93 L.Ed.2d 539 (1986), and narrowly tailored to serve that interest. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496, 105 S.Ct. 1459, 1468, 84 L.E.2d 455 (1985).

While the proposed statute would not place a restriction on the dollar amount of campaign expenditures, it would place a limitation on campaign expenditures, in that it limits the time period

in which a candidate for elective office may make expenditures from his or her campaign account. Thus, in order to survive constitutional scrutiny, such a statute would have to be narrowly tailored to further a compelling state interest. To date, the Supreme Court has identified only one "legitimate and compelling" governmental interest that may justify some forms of restrictions on campaign financing: the prevention of corruption or the appearance of corruption. *See Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 2489-91, 165 L.Ed.2d 482 (2006); *Buckley*, 424 U.S. at 26-29, 96 S.Ct. at 638-40. In *Buckley*, the Court held that

> the governmental interest in preventing real and perceived *quid pro quo* corruption provides a "constitutionally sufficient justification" to sustain limitations on contributions by individuals and groups to candidates and campaign committees.

Kruse v. City of Cincinnati, 142 F.3d 907, 913 (6th Cir. 1998) (citing *Buckley*, 424 U.S. at 26-29, 96 S.Ct. at 638-40).

However, the *Buckley* Court also found that the interest in preventing corruption and the appearance of corruption in the political system was inadequate to sustain limitations on campaign expenditures. *Buckley*, 424 U.S. at 55-56, 96 S.Ct. at 652-53. The Supreme Court recently reaffirmed this holding in a case challenging the constitutionality of Vermont's campaign finance statutes. In that case, the Court held that a Vermont statute limiting the amount candidates for state office could spend on their campaigns as unconstitutional based upon their holding in *Buckley* and its progeny. *Randall v. Sorrell*, 129 S.Ct. at 2490-91. The Supreme Court also specifically rejected a new justification for the expenditure limits advanced by Vermont, namely that the limits help to protect candidates from spending too much time raising money rather than devoting time to campaigning among ordinary voters. *Id*. at 489. The Court noted that the *Buckley* Court was clearly aware of the connection between expenditure limits and a reduction in fundraising time and found that it was "highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*'s result." *Id*. at 490.

Given that the Supreme Court has recently reaffirmed its position that any governmental interest in avoiding corruption or the appearance of corruption is not sufficient to justify placing limitations on campaign expenditures and that the Court has failed to recognize any other governmental interest as being constitutionally sufficient, we think that a statute placing a temporal limitation on when a candidate for elected office may commence making expenditures out of his or her campaign account would be unconstitutional as it would not be narrowly tailored to further a compelling state interest.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

The Honorable Beth Harwell
State Representative
107 War Memorial Building
Nashville, TN 37243-0156