

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE)	
ELECTION LAWS,)	
)	
Plaintiff,)	
)	
vs.)	No. 18-821-III
)	
TENNESSEE BUREAU OF ETHICS)	
AND CAMPAIGN FINANCE,)	
REGISTRY OF ELECTION FINANCE,)	
and DAVIDSON COUNTY DISTRICT)	
ATTORNEY GENERAL,)	
)	
Defendants.)	

**MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFF’S COMPLAINT
FOR INJUNCTIVE AND DECLARATORY RELIEF AND
(2) SCHEDULING DISPOSITION OF ATTORNEYS FEES**

On September 26, 2018, a limited bench trial was convened to provide the State Defendants an opportunity to present evidence in defense of the constitutionality of a restriction on speech contained in Tenn. Code Ann. sections 2-10-117 and 121 as challenged by the Plaintiff.

Motions in limine filed by the Plaintiff and argued at the outset of the trial established that the State Defendants had inexplicably failed to comply with orders to give the Plaintiff fair notice of Defendants’ proof. The Court found that the State’s noncompliance with the orders prevented the Plaintiff a meaningful opportunity to engage in the trial. Normally a continuance and possibly a sanction of attorneys fees would be

appropriate, but a continuance was not possible in this case. The State had consented to an expedited bench trial given that the statutes in issue have a bearing on the upcoming November 6, 2018 election. The Court granted the Plaintiff's motions in limine which had the effect of the State not being permitted to present proof and the Plaintiff prevailing.

It is therefore ORDERED as follows.

1. The Plaintiff's First, Second, Third, and Fourth Motions in Limine are granted.

2. The State Defendants having failed to introduce any evidence at the trial of this matter, the Court finds that the State has insufficient facts of record to withstand the Plaintiff's claims. Thus, the Court concludes as follows from the September 26, 2018 bench trial.

a. The State Defendants failed to meet their burden of proof as to Tenn. Code Ann. § 2-10-117's and Tenn. Code Ann. § 2-10-121's constitutionality, and accordingly, judgment in favor of the Plaintiff is granted.

b. A declaratory judgment that Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121, both facially and as applied, violate the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Tennessee Constitution is entered.

c. The Defendant Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance is permanently enjoined from enforcing Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121.

d. With respect to the standard of review that governs each of the Plaintiff's claims the Court concludes as follows.

- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's speaker-based discrimination is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's temporal restriction on political speech is subject to *Buckley*'s "closely-drawn" test;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's discrimination based on political association is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-121's discrimination based on political association is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's content discrimination is subject to strict scrutiny; and
- The Plaintiff's challenge to the statutes in issue under Tenn. Const. art. I, § 19 is subject to strict scrutiny.

3. The Defendant Davidson County District Attorney General is dismissed from this action without prejudice pending the conclusion of appellate review.

4. The Plaintiff shall file a petition for attorney's fees and discretionary costs by October 12, 2018.

5. The State Defendants shall respond to the Plaintiff's petition for attorney's fees and discretionary costs by October 24, 2018.

6. The Plaintiff's petition for attorney's fees and discretionary costs pursuant to 42 U.S.C. section 1988(b) shall be adjudicated by the Court on the papers and a final order entered at that time.

The findings and conclusions of law on which these rulings are based are as follows.

First, the transcript of the Court's ruling during the September 26, 2018 hearing and the arguments of Counsel therein is attached hereto as Exhibit A and is incorporated herein by reference as part of the findings of fact and conclusions of law.

In addition, the Court finds that during the Parties' July 31, 2018 hearing on the Plaintiff's Application for a Temporary Injunction, the State Defendants, through counsel, stated that they would not and did not need to present evidence in this matter. Accordingly, the parties mutually agreed to submit this case for immediate decision on the merits without additional evidence beyond the exhibits introduced into the record by the parties in advance of the July 31, 2018 hearing.

The Court accepted this agreement and began drafting the Order. In doing so, the Court came upon case law which indicated that an evidentiary hearing was required. It was the Court's conclusion that to decide the case on the record at the point of an application for an injunction by the Plaintiff and requested dismissal by the State Defendants without evidence as to the government risks at stake in restricting the speech would constitute an error and result in a remand. Accordingly, on August 24, 2018, the Court entered a *Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues* and provided that, based on the Court's research, this case could not be decided without an evidentiary hearing.

“[I]n studying and researching the law to issue a final ruling in this case, the Court came upon law from which it has concluded that an evidentiary record on limited issues is needed to inform the questions of law. The case law

revealed to the Court that because the Statutes at issue restrict speech, the Defendants bear the burden of proof as to the constitutionality of the challenged Statutes and this burden can not be met by “mere speculation or conjecture” as to the government interests at stake in restricting the speech.

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S., at 816, 120 S.Ct. 1878. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

* * *

And—importantly—we “have never accepted mere conjecture as adequate to carry a First Amendment burden.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014). Moreover, the case law establishes that when a temporal ban is involved, as in this case, and unlike the apparent corruption with a certain dollar amount, the Government must show “evidence of actual corruption or its appearance” and “sufficient,” “specific,” “distinct” evidence to justify the temporal limitation. *Zimmerman v. City of Austin, Texas*, 881 F.3d 378 (5th Cir. 2018) (temporal restriction, prohibiting all contributions before the six months leading up to an election, struck down, in part, as unconstitutional).

Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues, pp. 3-4 (Aug. 24, 2018). Based upon this law, the Court vacated its previous ruling that the case would be decided on the papers alone without presentation of evidence by the State Defendants and proposed an expedited schedule to complete a bench trial.

However, in the August 24, 2018 *Memorandum And Order*, the Court specifically provided each party with an opportunity to seek modification of the proposed expedited schedule.

Lastly, in providing the above proposed expedited schedule, it is the Court's impression from the July 31, 2018 temporary injunction hearing that both parties, in consenting to have the entire case decided on the temporary injunction record alone, wanted this matter decided in an expeditious manner. ***If, however, now that the parties know that the Court cannot decide the case on the temporary injunction record alone, the parties may have a different perspective as to the timing and disposition of this case. It is therefore ORDERED that if any party seeks a modification of the schedule proposed above, it shall file a Notice by Friday, August 31, 2018 stating its position on the timing and/or disposition of this case and any relief they request.***

Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues, pp. 10 (Aug. 24, 2018) (emphasis added).

Following this ruling, the State Defendants did not seek to modify the Court's schedule. Rather, in response to the Plaintiff's request for the Court to decide this case on the merits instead of a bench trial, the State Defendants responded that the Court's decision to require an evidentiary record in this type of case was "consistent with federal court precedent" and that the State was "fully prepared to go forward with the proposed schedule set forth in the August 24, 2018 Order."

This Court did not give any such 'clear and unambiguous notice' that it intends to consolidate the injunction hearing with a trial on the merits. Instead, it has done the exact opposite and determined that a brief trial on limited fact issues is necessary to resolve the legal issues – a determination that is consistent with federal court precedent. The issue in this case is whether Tenn. Code Ann. § 2-10-117 is an unconstitutional campaign finance restriction. The United States Supreme Court, in evaluating the constitutionality of campaign finance restrictions, has typically relied upon a full evidentiary record developed in the trial court to determine whether the law served a compelling governmental objective. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (finding Vermont's contributions limits to be too restrictive based on the District Court record); *McConnell v. Federal Election Com'n*, 540 U.S. 93, 147-154 (2003) (upholding federal restrictions on soft money by drawing on an extensive District Court record); *Federal*

Election Com'n v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 457-465 (2001) (upholding federal limits on coordinated expenditures between parties and candidates on the basis of a summary judgment record); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000) (upholding Missouri's contribution limits on the basis of the lower court record).

Given this Court's determination that there is a need to have a fully-developed evidentiary record, Defendants should be allowed every opportunity to present evidence in support of the constitutionality of Tenn. Code Ann. § 2-10-117.

* * *

This Court was well within its authority under Rule 54.02 to revise its own order to reflect the Court's determination that an evidentiary trial on limited issues is necessary in order to rule on the legal issues.

* * *

For these reasons, Defendants respectfully request that this Court deny Plaintiff's request that it reinstate the August 1, 2018 order in full. While Defendants have no objection to rescheduling the September 10, 2018 scheduling conference, Defendants are otherwise fully prepared to go forward with the proposed schedule set forth in the August 24, 2018 Order.

Defendants' Response To Plaintiff's Notice Seeking Modification Of August 24, 2018 Order, pp. 6-7; 8; 9 (Aug. 31, 2018).

The Order providing the parties with an opportunity to seek modification of the Court's proposed expedited schedule was filed over 30 days before the trial date set for September 26, 2018. At no time did the State Defendants ever seek to modify and/or change the expedited schedule.

It was not until oral argument in defense of the Plaintiff's multiple *Motions In Limine* that the State Defendants argued for the first time that certain witness testimony was impossible to present in court because of (1) the expedited schedule in this case; (2)

the various schedules of their witnesses' and (3) the distance for which some of the State's witnesses would have to travel. None of these arguments were ever raised with the Court or opposing Counsel prior to the September 26, 2018 trial date despite the previous *Memorandum and Order* – over 30 days earlier – providing the State Defendants with an opportunity to seek modification of the proposed expedited schedule or any other relief a party needed.

Upon review of the Plaintiff's Motions in Limine filed in advance of the September 26, 2018 bench trial, and after considering the arguments of counsel regarding the Plaintiff's Motions in Limine, the Court finds that the State Defendants inexplicably failed to comply with the measures that the Court included in its September 4, 2018 Order to regulate and provide structure and fair notice in advance of the September 26, 2018 bench trial.

The Court finds that the State Defendants did not comply with the Court's September 4, 2018 Order and the Local Rules of Court. The Defendants did not provide a description of the testimony that would be given by their witnesses at trial, and they did not timely provide the Plaintiff the State Defendants' trial exhibits.

The Court finds that the State Defendants never came forward and asked for any additional time or measures in which to put their evidence on before the Court.

The Court finds that the way that the State has proceeded, it has the effect of a trial by ambush, and it does not provide a fair opportunity for the Plaintiff to defend against the proof that the Defendants seek to offer.

For these reasons, and for the additional reasons set forth in the Plaintiff's Motions in Limine and advanced by Plaintiff's counsel during oral argument on the Plaintiff's Motions in Limine, the transcript of which is incorporated herein by reference, the Court has issued the above rulings.

With respect to the reasoning and authorities for the ruling stated in paragraph 2(d) above on the standards of review, the Court adopts pages 6-15 of the *Plaintiff's Pre-Trial Brief and Memorandum in Support of Plaintiff's Motion for Summary Judgment*, filed September 21, 2018.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efile as applicable to:

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