

COPY

IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

TENNESSEANS FOR SENSIBLE)
ELECTION LAWS,)
)
Plaintiff,)
)
v.)
)
TENNESSEE BUREAU OF ETHICS)
AND CAMPAIGN FINANCE,)
REGISTRY OF ELECTION FINANCE,)
)
and)
)
DAVIDSON COUNTY DISTRICT)
ATTORNEY GENERAL,)
)
Defendants.)

Case No.: 18-821-III

FILED
2018 JUL 26 PM 3:39
FILED AND MASTER
DAVIDSON CO. CHANCERY CT.
DC&M

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION

Comes now the Plaintiff, Tennesseans for Sensible Election Laws, and pursuant to Tenn. R. Civ. P. 65.04(2), respectfully applies to this Court for a preliminary (temporary) injunction enjoining Defendants from enforcing Tenn. Code Ann. § 2-10-117 against the Plaintiff in advance of the August 2, 2018 election. As grounds for this application, the Plaintiff respectfully states as follows:

I. INTRODUCTION

This case involves the constitutionality of a state statute that prohibits the Plaintiff from engaging in core political speech during the most critical period of an election under threat of both criminal and civil sanction. Compounding the constitutional violation, the statute at issue expressly discriminates on the basis of a speaker's identity and political

affiliation—permitting PACs that are “controlled by a political party” to speak during the critical ten-day period before an election, but denying that same right to non-party political speakers like the Plaintiff. *See* Tenn. Code Ann. § 2-10-117 (“No multicandidate political campaign committee other than a committee controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly shall make a contribution to any candidate after the tenth day before an election until the day of the election.”).

For these reasons, and for the additional reasons set forth below, Tenn. Code Ann. § 2-10-117 suffers from several egregious constitutional infirmities. Further, If the Plaintiff cannot make its desired campaign contribution in advance of the August 2, 2018 election, then its contribution will be purposeless. Accordingly, the Defendants should be preliminarily enjoined from enforcing Tenn. Code Ann. § 2-10-117 against the Plaintiff before the August 2, 2018 election pending a final adjudication of this action on its merits.

II. FACTUAL SUMMARY

The Plaintiff is a non-partisan, non-profit group of concerned citizens who care about protecting Tennessee’s democratic process. It is registered as a multi-candidate political campaign committee—commonly known as a “PAC”—with the Defendant Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance. *See* Plaintiff’s Complaint, **Exhibit #11**. The Plaintiff’s organizational mission is to ensure that Tennessee’s election laws protect the rights of all Tennesseans to participate in democracy and support candidates of their choosing without unreasonable governmental interference.

In furtherance of its mission, the Plaintiff wishes to make an immediate \$500.00 campaign contribution to Joseph Williams, a candidate for Tennessee House District 56

whom the Plaintiff has endorsed for election. See Plaintiff's Complaint, **Collective Exhibit #8** (Letter of Endorsement, Campaign Contribution, and Public Endorsement). Traditionally, making such a contribution would be a lawful—indeed, celebrated—effort to participate in democracy. Because the Plaintiff's contribution would be made during the critical ten-day period before Mr. Williams' upcoming August 2, 2018 election, however—and because the Plaintiff is not “controlled by a political party”—the contribution is both criminally and civilly forbidden. See Tenn. Code Ann. § 2-10-117; Tenn. Code Ann. § 2-19-102; Tenn. Code Ann. § 40-35-111(e)(3).

Surprisingly, Tennessee's law prohibiting non-partisan speakers—but not partisan speakers—from making desired campaign contributions during the most critical period before an election is not some dead letter from a bygone era. To the contrary, the Defendant Bureau of Ethics and Campaign Finance, Registry of Election Finance actively enforces it. See, e.g., Plaintiff's Complaint, **Exhibit #10** (Stand for Children Show Cause Order), ¶ 13(b)-(c). As a result, if Tennesseans for Sensible Election Laws makes its desired campaign contribution to Mr. Williams, then it will be subject to criminal prosecution carrying a sentence of up to thirty days in jail, and it could also face an additional civil penalty of up to \$10,000.00. See Tenn. Code Ann. § 2-19-102 (“A person commits a Class C misdemeanor if such person knowingly does any act prohibited by this title”); Tenn. Code Ann. § 40-35-111(e)(3) (“The authorized terms of imprisonment and fines for misdemeanors are: . . . Class C misdemeanor, not greater than thirty (30) days or a fine not to exceed fifty dollars (\$50.00), or both, unless otherwise provided by statute.”); Tenn. Code Ann. § 2-10-110(a)(2) (“A Class 2 offense is punishable by a maximum civil penalty of not more than ten thousand dollars”).

There being no conceivably constitutional basis for enforcing Tenn. Code Ann. § 2-

10-117, the Plaintiff has applied for a preliminary injunction prohibiting the enforcement of Tenn. Code Ann. § 2-10-117. Further, because Plaintiff's application satisfies every factor of the preliminary injunction inquiry, this instant application should be granted.

III. FACTORS JUSTIFYING A PRELIMINARY INJUNCTION

The Plaintiff qualifies as a “[m]ulticandidate political campaign committee” under Tennessee law under any conceivable definition of that term. *See* Plaintiff's Complaint, ¶¶ 23-30. As a consequence, the Plaintiff is subject to Tenn. Code Ann. § 2-10-117's political speech penalty. As such, unlike favored political speakers, the Plaintiff is prohibited by law from making campaign contributions within 10 days of an election. The injury that Tenn. Code Ann. § 2-10-117's speech penalty inflicts upon the Plaintiff also necessitates a preliminary injunction.

Pursuant to Tenn. R. Civ. P. 65.04(2), courts consider the following four factors when determining whether a preliminary (temporary) injunction should issue:

- (1) The threat of irreparable harm to the plaintiff if the injunction is not granted;
- (2) The balance between this harm and the injury that granting the injunction would inflict on defendant;
- (3) The probability that plaintiff will succeed on the merits; and
- (4) The public interest.

Moody v. Hutchinson, 247 S.W.3d 187, 199-200 (Tenn. App. 2007). *See also Flight Options, LLC v. Int'l Bhd. of Teamsters, Local 1108*, 863 F.3d 529, 539-40 (6th Cir. 2017).¹

¹ Because Tennessee's Rules of Civil Procedure were based on the federal rules, Tennessee courts “look to the interpretation of comparable federal rules for guidance.” *Thomas v. Oldfield*, 279 S.W.3d 259, 262, n. 3 (Tenn. 2009).

Additionally, where, as here, “a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor.” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir.2009)).

In the instant case, all four factors militate in favor of issuing a preliminary injunction enjoining the enforcement of Tenn. Code Ann. § 2-10-117 pending the final resolution of this case on its merits. In particular, there is an overwhelmingly likelihood of success on the merits, because “[g]ranting waivers to favored speakers (or, more precisely, denying them to disfavored speakers)”—which is precisely what Tenn. Code Ann. § 2-10-117 does—“would of course be unconstitutional.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002). A preliminary injunction should issue accordingly.

IV. ARGUMENT

1. The Plaintiff is highly likely to succeed on the merits.

Several claims are raised in the instant litigation with respect to Tenn. Code Ann. § 2-10-117.² The Plaintiff is highly likely to succeed on all of them.

A. Speaker Discrimination

Tenn. Code Ann. § 2-10-117 contains an explicit speaker preference for favored speakers (party-controlled PACs) and discriminates against disfavored speakers (non-party PACs). More specifically, PACs that are “controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly” receive a waiver permitting them to speak during

² The Plaintiff has also challenged the constitutionality of Tenn. Code Ann. § 2-10-121. Because an injunction prohibiting the enforcement of Tenn. Code Ann. § 2-10-121 is not urgent, however, Plaintiff has not sought to enjoin its enforcement on a preliminary basis.

the ten days prior to election. *Id.* By contrast, PACs like the Plaintiff that are not party-controlled may not. *Id.*

A wealth of directly applicable U.S. Supreme Court precedent dictates that such speaker-based discrimination is flagrantly and obviously unconstitutional. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”); *Thomas*, 534 U.S. at 325 (“Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional”); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“we have frequently condemned such discrimination among different users of the same medium for expression.”). *See also Juzwick v. Borough of Dormont, Pennsylvania*, No. CIV.A. 01-310, 2001 WL 34369467, at *3 (W.D. Pa. Dec. 12, 2001) (“‘Speaker’ discrimination lies at the intersection of the First and Fourteenth Amendments. The Supreme Court, on numerous occasions, has condemned government actions that have discriminated based upon the identity of the speaker.”) (internal citation omitted).

Consequently, because speech restrictions discriminating between different speakers—allowing speech by some but not others—violate the First Amendment, the Plaintiff is highly likely to succeed on the merits of this claim. *Id.*

B. Temporal Restrictions on Freedom of Speech

The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, (1971). Accordingly, political speech represents “an area in which the importance of First Amendment protections is ‘at its zenith.’” *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

“When [a state] restricts speech, [it] bears the burden of proving the

constitutionality of its actions.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014) (plurality opinion), quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000). “Generally, [l]aws that burden political speech are subject to strict scrutiny” *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012) (internal quotation marks omitted) (alteration in original) (quoting *Citizens United*, 558 U.S. at 340). Relatedly, “temporal limits on contributions are subject to *Buckley’s* ‘closely-drawn’ test.” *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 391 (5th Cir. 2018).

Here, Tenn. Code Ann. § 2-10-117 imposes a categorical ban on the Plaintiff’s contributions to candidates during what the U.S. Supreme Court has recognized as the most “crucial phase” before an election. *Citizens United*, 558 U.S. at 337. As far as campaigns are concerned, being able to speak during the days leading up to an election is widely recognized as indispensable. *See, e.g., id.* at 334 (“[T]he public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.”); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (“timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all.”); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007) (“groups . . . cannot predict what issues will be matters of public concern”); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010) (recognizing “the unique importance of the temporal window immediately preceding a vote.”).

Given the importance of the period preceding an election, an abundance of authority reflects that imposing temporal restrictions on campaign activity during the critical period before election day is unconstitutional. *See, e.g., Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 431 (5th Cir. 2014) (“the 60–day limit ‘places a severe burden on speech because it may even preclude expression necessary to provide an immediate response to late-breaking events.’”) (quoting *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003)); *Family PAC v. McKenna*, 685 F.3d 800, 812 (9th Cir. 2012) (“Washington’s limit nonetheless imposes a significant burden, because it limits contributions during the critical three-week period before the election, when political committees may want to respond to developing events.”); *Emison v. Catalano*, 951 F. Supp. 714, 723 (E.D. Tenn. 1996) (“black-out provisions like the one challenged here do not provide the least intrusive means of achieving the elimination of political corruption”); *State v. Dodd*, 561 So. 2d 263, 266 (Fla. 1990) (“The statute at issue here prohibits *all* contributions and solicitations during a crucial portion of an election year. As a result, the present case is vastly different from *Buckley*.”); *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 391 (5th Cir. 2018) (striking down temporal limit as unconstitutional); *Missourians for Fiscal Accountability v. Klahr*, 892 F.3d 944 (8th Cir. 2018) (holding that 30-day formation deadline for campaign committees violated First Amendment).

Because Tenn. Code Ann. § 2-10-117 unconstitutionally proscribes core political speech during the most critical period before an election, the Plaintiff is highly likely to prevail on the merits of this claim, too. *Id.*

C. Discrimination Based on Political Association

Similarly, Tenn. Code Ann. § 2-10-117 expressly discriminates on the basis of

political association. Here, the Plaintiff is not forbidden from contributing to its favored candidate because it is a PAC; instead it is prohibited from contributing to its favored candidate because it is a non-partisan PAC that is not “controlled by a political party on the national, state, or local level or by a caucus of such political party established by members of either house of the general assembly” *Id.*

This requirement, too, fatally offends the First Amendment. The Plaintiff’s “right to select its members is protected by the freedom of association guaranteed by the First Amendment.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). Further, “[f]reedom of association therefore plainly presupposes a freedom not to associate.” *Id.* at 623. As such, it is plainly unlawful to punish the Plaintiff with a significant speech penalty for the “transgression” of exercising its First Amendment right not to associate with either a political party or the elected members of Tennessee’s General Assembly. *Id.* As such, the Plaintiff is highly likely to prevail on the merits of this claim as well.

D. Content Discrimination

“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226. *See also Citizens United*, 558 U.S. at 340 (“political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”) (quotations omitted).

By imposing restrictions only on direct campaign contributions, but not on other forms of speech, Tenn. Code Ann. § 2-10-117 requires the Plaintiff to submit to unlawful content-based suppression of a single, quintessential, and uniquely important form of political speech and association: direct campaign contributions. “Making a contribution, like joining a political party, serves to affiliate a person with a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Consequently, Tenn. Code Ann. § 2-10-117’s categorical prohibition against all direct campaign contributions—but not other forms of political speech, such as coordinated or independent expenditures—by non-party PACs during the most crucial period before an election impermissibly undermines this cherished right.

Further, Tenn. Code Ann. § 2-10-117 is not narrowly tailored to achieve any compelling governmental interest. In fact, Tenn. Code Ann. § 2-10-117 does not meaningfully advance any legitimate governmental interest at all.³ Consequently, the Plaintiff is highly likely to succeed on the merits of this claim as well.

2. The Plaintiff will suffer irreparable injury without a preliminary injunction.

This is a First Amendment political speech case. Put simply: Tenn. Code Ann. § 2-10-117 forbids the Plaintiff—but not other speakers—from making a contribution to its favored candidate on pain of severe criminal and civil sanction. *See* Tenn. Code Ann. § 2-19-102 (“A person commits a Class C misdemeanor if such person knowingly does any act prohibited by this title”); Tenn. Code Ann. § 40-35-111(e)(3) (“The authorized terms of

³ The Supreme Court “has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.” *McCutcheon*, 134 S.Ct. at 1450. Tenn. Code Ann. § 2-10-117 has no bearing on corruption or its appearance. Further, favoring speech by parties and elected officials over others plainly is not a legitimate governmental interest. *See, e.g., Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”).

imprisonment and fines for misdemeanors are: . . . Class C misdemeanor, not greater than thirty (30) days or a fine not to exceed fifty dollars (\$50.00), or both, unless otherwise provided by statute.”); Tenn. Code Ann. § 2-10-110(a)(2) (“A Class 2 offense is punishable by a maximum civil penalty of not more than ten thousand dollars”). *See also* Plaintiff’s Complaint, **Exhibit #10**, ¶ 13(b)-(c) (threatening sanctions for violating Tenn. Code Ann. § 2-10-117).

If a preliminary injunction is not granted, then the Plaintiff will forever lose the opportunity to make a meaningful campaign contribution to support its favored candidate in advance of the candidate’s election. Accordingly, if the Plaintiff is correct that Tenn. Code Ann. § 2-10-117 is unconstitutional for any one of the reasons previously advanced, then the “irreparable harm” factor of the preliminary injunction inquiry is necessarily satisfied. *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (“[I]t is well-settled that ‘loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.”). *See also Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 465 (M.D. Tenn. 2015) (“Under case law applicable to free speech claims, the loss of First Amendment freedoms, for even minimal periods of time, is presumed to constitute irreparable harm.”) (quotation omitted).

Because the likelihood of Plaintiff’s success on the merits is high, *see* Section IV-1, *supra*, this factor of the preliminary injunction inquiry favors the Plaintiff as well.

3. A preliminary injunction would not cause substantial harm to others.

Issuing a preliminary injunction would not cause substantial (or any) plausible harm to others. Further, “[n]o substantial harm can be shown in the enjoinder of an unconstitutional policy.” *Chabad of S. Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 987 (S.D. Ohio 2002), *aff’d sub nom. Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004). Accordingly, this factor militates in favor of issuing a preliminary injunction as well. *Id.*

4. The public interest will be served by a preliminary injunction.

The public interest will be well-served by issuing a preliminary injunction. *See Chabad*, 363 F.3d at 436 (“The public interest is served by preventing the violation of constitutional rights.”). Joseph Williams, the Plaintiff’s favored candidate, would immediately benefit from a \$500.00 campaign contribution, which he has also stated by affidavit that he will happily accept. *See Exhibit #9* (Affidavit of Joseph Williams). The public at large, too, would benefit from the additional political speech and associational endorsement that Plaintiff’s desired campaign contribution would introduce into the marketplace of political thought. *See, e.g. Citizens United*, 558 U.S. at 339 (“The right of citizens to inquire, **to hear**, to speak, **and to use information to reach consensus** is a precondition to enlightened self-government and a necessary means to protect it.”) (emphasis added). Further, “[i]t is always in the public’s interest to prevent the violation of constitutional rights.” *Chabad*, 233 F. Supp. 2d at 987.


Consequently, “[e]njoining the enforcement of this regulation is clearly in the public’s interest” as well. *Id.*

VI. CONCLUSION

For the foregoing reasons, all four factors of the preliminary injunction inquiry favor the Plaintiff. Accordingly, this Court should grant the instant application for a preliminary injunction, and a preliminary injunction enjoining the Defendants from enforcing Tenn. Code Ann. § 2-10-117 should issue pending a final adjudication of this action on its merits.

Respectfully submitted,

By:



Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Jamie R. Hollin, BPR #025460
511 Rosebank Avenue
Nashville, TN 37206
(615) 870-4650
j.hollin@me.com

*Counsel for Plaintiff Tennesseans for
Sensible Election Laws*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2018, a copy of the foregoing was served via USPS mail, postage prepaid, and/or hand-delivered to the following parties:

Attorney General and Reporter for the State of Tennessee
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

Counsel for Defendants

By:


Daniel A. Horwitz, Esq.