IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

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

DEFENDANTS' PRE-TRIAL BRIEF

Defendants, by and through their counsel of record, the Attorney General and Reporter for the State of Tennessee, pursuant to this Court's Order of September 4, 2018, hereby submit their pre-trial brief.

ARGUMENT

I. The District Attorney General Should Be Dismissed for Lack of Subject Matter Jurisdiction.

In addition to seeking an injunction permanently enjoining the Registry from civilly enforcing Tenn. Code Ann. § 2-10-117, Plaintiff also seeks to enjoin the Davidson County DA from criminally enforcing Tenn. Code Ann. § 2-10-117, pursuant to Tenn. Code Ann. § 2-19-102. Over one hundred years ago, the Tennessee Supreme Court recognized that chancery courts have no jurisdiction to enjoin pending or threatened prosecutions for violations of the criminal laws of

the state. *See J.W. Kelly & Co. v. Conner*, 123 S.W.622, 627 (Tenn. 1909). In that case, the Supreme Court first noted that the Constitution provides that the jurisdiction of the chancery court shall be as then established by law until changed by the Legislature. Id. (citing Const. art. 6, §§ 1, 8; *Jackson v. Nimmo*, 3 Lea 597). The Court then noted that no statute had been enacted conferring upon the chancery court the jurisdiction to enjoin criminal prosecutions, and therefore, looked to chancery court's "original and inherent jurisdiction" to determine if such authority rested there. *Id.* After conducting a thorough review of the applicable authorities, the Supreme Court declared that the "chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction," have any power or jurisdiction to enjoin threatened criminal proceedings under a statute enacted by the state in the exercise of the police power. *Id.* at 636.

Tennessee appellate courts have re-affirmed this holding on multiple occasions over the years, with the Supreme Court most recently affirming it in *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749 (Tenn. 2006), and the Court of Appeals affirming it in *Carter v. Slatery*, No. M201-00554-COA-R3-CV, 2016 WL 1268119, at *7 (Tenn. Ct. App. Feb. 19, 2016). In *Tennessee Downs, Inc. v. William L. Gibbons*, 15 S.W.3d 843 (Tenn. Ct. App. 1999), the Court of Appeals specifically held that "42 U.S.C. § 1983 did not bestow jurisdiction in Tennessee courts of equity to enjoin threatened criminal proceedings and that the jurisdiction of chancery courts in this regard remains as fixed by existing state law." *Id.* at 847. And in *Memphis Bonding Co., Inc. v. Criminal Court of Tennessee 30th Dist.*, 490 S.W.3d 458 (Tenn. Ct. App. 2015), the Court of Appeals held that because a plaintiff's underlying claim for injunctive relief could not be brought in chancery court, the chancery court could not exercise subject matter jurisdiction over the declaratory judgment aspect of the case either. *Id.* at 467.

In light of this clear authority, the Davidson County Chancery Court lacks jurisdiction to enjoin the District Attorney General for the 20th Judicial District from criminally enforcing Tenn. Code Ann. § 2-10-117. Accordingly, the District Attorney General for the 20th Judicial District should be dismissed in his entirety for lack of subject matter jurisdiction pursuant to Tenn. R. Civ. P. 12.02(1).

II. The Appropriate Standard of Review for Plaintiff's First Amendment Constitutional Challenge Is Not Strict Scrutiny, But Rather a Lesser Standard.

Plaintiff's complaint asserts that Tenn. Code Ann. § 2-10-117 violates the First Amendment in four different ways: (1) it discriminates on the basis of the speaker; (2) it imposes a temporal ban on campaign contributions; (3) it discriminates on the basis of content; and (4) it discriminates on the basis of political association. Regardless of how Plaintiff parses out its constitutional challenge, the simple fact is that Tenn. Code Ann. § 2-10-117 is a restriction on campaign contributions. The restriction is temporal rather than monetary, but that distinction does nothing to change the statute's root character. Beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court has developed a unique body of law analyzing the constitutionality of restrictions on campaign contributions and the appropriate standard of review to be applied.

Contribution restrictions are distinct from expenditure restrictions. The *Buckley* court recognized that both "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," but it distinguished expenditure limits from contribution limitations based on the degree to which each encroached upon protected First Amendment activities. *Id.* at 14. Because expenditure limits "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id.*, at 19, the Supreme Court held that expenditure limits are subject to "the

exacting scrutiny available to limitations on core First Amendment rights of political expression." *Id.* at 44-45. Under this standard, an expenditure limitation can only be upheld if it promotes a compelling interest and is the least restrictive means to further the articulated interest. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

With respect to contribution limits, however, the Court found that such limitations imposed a lesser restraint on political speech because they "permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. Accordingly, the Court held that contribution restrictions are subject to a lesser but still "rigorous standard of review." *Id.* at 29. Under that lesser standard, "[e]ven a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *Id.* at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)).

Since *Buckley*, the Supreme Court has consistently applied this lesser standard of review with respect to restrictions on campaign contributions—even restrictions that impose a complete ban. For example, in *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003), which involved a constitutional challenge to a ban on direct corporate contributions in federal elections, the Court noted its guiding premise that the level of scrutiny applied to political financial restrictions is based on the importance of the "political activity at issue" to effective speech or political association:

> Going back to *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), restrictions on political contributions have been treated as merely "marginal speech" restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. "While contributions may result in political expression if spent by a candidate or an association . . ., the transformation of contributions into political debate involves speech by someone other

> than the contributor." *Buckley, supra*, at 20-21, 96 S.Ct. 612. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involved 'significant interference' with associational rights" passes muster if it satisfies the lesser demand of being "'closely drawn' to match a 'sufficiently important interest'".

Id. at 161-62 (internal citations omitted). And, in its most recent case analyzing the constitutionality of a political financial restriction, the Supreme Court expressly declined to revisit "*Buckley*'s distinction between contributions and expenditures and corollary distinction in the applicable standards of review." *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014).

Additionally, the lower federal courts, including the Sixth Circuit Court of Appeals, have consistently applied the *Buckley* standard of review when analyzing challenges to state campaign finance laws, including monetary and temporal restrictions on contributions. *See, e.g., Gable v. Patton*, 142 F.3d 940, 950-51 (6th Cir. 1998) (upholding a 28-day ban on external contributions to candidates); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645-46 (6th Cir. 1997) (upholding a ban on direct candidate contributions from nonprofit corporations); *see also Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 6 (D.C. Cir. 2015); *United States v. Danielczyk*, 683 F.3d 611, 617-18 (4th Cir. 2012); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 198 (2d. Cir. 2010); *Ognibene v. Parkes*, 671 F.3d 174, 182-83 (2d Cir. 2011); *Protect My Check, Inc. v. Dilger*, 176 F.Supp.3d 685, 694-95 (E.D. Ky. 2016); *Yamada v. Weaver*, 872 F.Supp.3d 1023, 1056-57 (D. Haw. 2012).

In light of this well-established federal precedent, Defendants submit that the appropriate standard of review to apply to Plaintiff's First Amendment[1] challenge to the constitutionality of

[1] Plaintiff has not asserted a challenge to the constitutionality of Tenn. Code Ann. § 2-10-117 under the Equal Protection Clause of the Fourteenth Amendment—only a challenge under the First Amendment.

Tenn. Code Ann. § 2-10-117 is the standard first articulated in *Buckley*: it must be "closely drawn" to match a "sufficiently important interest." 424 U.S. at 25. Restrictions on campaign contributions are "closely drawn" if they "(a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." *Lair v. Bullock*, 798 F.3d 736, 741-42 (9th Cir. 2015); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000) (courts should determine outer limits of contribution regulation by asking whether there was any showing that the limits "impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy'"). Thus, as the Supreme Court has held, what the law requires is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)); *see also Americans for Prosperity v. Becerra*, 2018 WL 4320193, at *5, 8 (9th Cir. Sept. 11, 2018) (applying "exacting scrutiny" test and holding that, while Attorney General could achieve his goals through other means, nothing under this test requires him to forgo the most efficient and effective means of doing so absent a showing of a significant burden on First Amendment rights) The facts presented at trial will show that Tenn. Code Ann. § 2-10-117 satisfies this standard.

III. The Florida State Court Decision in *Worley v. Detzner* Does Not Control the Outcome in this Case.

At the July 31, 2018 hearing, this Court questioned the parties about the possibility of an online disclosure system after the State distinguished the present case from *Worley v. Detzner*, 4:10cv423-RH/CAS, 2012 WL 12897964 (N.D. Fl. July 2, 2012). In *Worley*, the statute at issue mandated that all funds a PAC received within the five days prior to an election could not be

expended until after that election. Five days prior to an election was the applicable deadline for PACs to file disclosures stating their sources of funding. *Id.* at * 6. The State of Florida argued that the temporal restriction was necessary to prevent PACs from making expenditures when the PACs' sources of those expended funds would not be reported until after the election. The court found that with the availability of online filings, PACs could disclose their expenditures in real-time; therefore, the ban was struck down. *Id.* at *6. The Plaintiff here similarly argues that any method of "overnight" disclosure would be sufficient to meet Tennessee's interests in transparency. Pl.'s Not. Seeking Modification of Ord. at 10-11.

But *Worley* is distinct from the present challenge in two decisive ways. First, as the evidence will demonstrate at trial, a similar online disclosure system is neither available nor feasible statewide in Tennessee. Second, and more importantly, *Worley* dealt with a restriction on *expenditures not contributions*. The statute at issue read:

> Any contribution received by the chair, campaign treasurer, or deputy campaign treasurer of a political committee supporting or opposing a candidate with opposition in an election or supporting or opposing an issue on the ballot in an election on the day of that election or less than 5 days before the day of that election may not be *obligated or expended* by the committee until after the date of the election.

Fl. Stat. § 106.08(4) (emphasis added). As explained in Part II, above, limitations on expenditures are subject to higher scrutiny than limitations on contributions because, "[t]he absence of prearrangement and coordination…alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. Also, while limitations on contributions, "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," and "involve[] little direct restraint on his political communication," limits on expenditures impose "significantly more severe restrictions on protected freedoms of political expression and association." *Id.* at 20-21, 23.

As further evidence of the constitutionally significant distinctions between expenditures and contributions, the statute at issue in *Worley* also contains a limit on contributions that remains unchallenged and on the books:

> Any contribution received by a candidate with opposition in an election or by the campaign treasurer or a deputy campaign treasurer of such a candidate on the day of that election or less than 5 days [2] before the day of that election must be returned by him or her to the person or committee contributing it and may not be used or expended by or on behalf of the candidate.

Fl. Stat.§ 106.08(3)(a).

In fact, the Florida Supreme Court ordered the public reprimand of a judge and affirmed the removal of another for, among other things, violations of this part. [3]

The Tennessee statute at issue here is more similar to Florida's limit on contributions, which is still in effect. Additionally, PACs are free to make any independent expenditures they wish on any day leading up to the election, granting them a more robust method of communication to support or oppose candidates or measures. Because *Worley* dealt with a different type of limit and a different level of scrutiny, *Worley's* reasoning does not apply here.

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[2] Candidates' last disclosure report prior to an election is due the 5th day before the election. *See* Fl. Stat. § 106.07(1)(a)

[3] *See In re Gooding*, 905 So. 2d.121 (Fla. 2005), *In re Turner*, 76 So.3d. 898 (Fla. 2011)

CONCLUSION

For the reasons set forth above, Plaintiff's claims against the Davidson County DA should be dismissed for lack of subject matter jurisdiction; the Court should determine that the relevant standard of review requires that Tenn. Code Ann. § 2-10-117 be closely drawn to match a sufficiently important interest; and the *Worley* decision should not affect the outcome in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Pre-Trial Brief has been sent by electronic transmission and/or U.S. Mail, postage prepaid, to:

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this 14th day of September, 2018.

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