IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

TENNESSEEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff-Appellee,	)	
v.	)	**M2018-01967-COA-R3-CV**
TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE,	)	**Chancery Ct. No. 18-821 Part III**
Defendant-Appellant	)	

ON APPEAL FROM THE JUDGMENT OF
THE DAVIDSON COUNTY CHANCERY COURT

REPLY BRIEF OF THE APPELLANT

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Defendant, the Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance ('the State"), is appealing the chancery-court judgment holding two campaign-finance statutes unconstitutional. The chancery court awarded Plaintiff what amounted to a default judgment as a sanction for the perceived failure of the State to follow procedural rules. The State has previously explained why the chancery court abused its discretion in excluding all of the State's proffered evidence (Br. Appellant, 17-24), why a recent amendment to Tenn. Code Ann. § 2-10-121 renders Plaintiff's challenge to that statute moot (Br. Appellant 25-27), and why Tenn. Code Ann. § 2-10-117 is constitutional under the applicable standard of review (Br. Appellant, 27-38). Some of the specific points Plaintiff raises in response are further addressed as follows.

I. Strict Scrutiny Is Not the Appropriate Constitutional Standard.

Plaintiff argues that strict scrutiny is properly applied in assessing the constitutionality of Tenn. Code Ann. § 2-10-117, because the statute engenders speaker-based, political-association-based, and content-based discrimination. (Br. Appellee, 37, 39, 41.) But in support of its strict-scrutiny argument, Plaintiff cites mostly First Amendment cases concerning speech rights in general, such as public demonstrations or voting rights. In the specific context of limitations on campaign contributions, however, federal precedent demonstrates that strict scrutiny does not apply.

As the State has discussed, there is a unique body of case law surrounding campaign finance regulations that establishes different

standards of review depending on the type of regulation. (Br. Appellant, 27-28.) And under *Buckley v. Valeo*, 424 U.S. 1 (1976), the standard for reviewing a limit on campaign contributions under the First Amendment is the "closely drawn" test.

Indeed, in *Schickel v. Dilger*, __ F.3d __, 2019 WL 2295994 (6th Cir. May 30, 2019), the Sixth Circuit Court of Appeals recently upheld a *total ban* on contributions by lobbyists to legislators and a *temporal* ban on contributions by employers of lobbyists *or PACs*[1] during a legislative session. Specific groups of speakers were singled out by these bans. Under Plaintiffs' argument, this type of "speaker-based discrimination" would be subject to strict scrutiny. But the Sixth Circuit applied *Buckley*'s "closely drawn" test, noting that the roles of some speakers "sharpen" the risk of corruption and its appearance. *Schickel*, 2019 WL 2295994, at *9. Indeed, the court pointed out that lobbyists and PACs are "two of the 'most ubiquitous and powerful players in the political arena.'" *Id.* at *10 (citing *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999).

The Plaintiff here is a multicandidate PAC, and multicandidate PACs, like the lobbyists and PACs in *Schickel*, "sharpen" the risk of corruption or its appearance. While the specific incidents of corruption that gave rise to the enactment of the contribution limits in Tenn. Code

[1] The statute at issue in *Schickel* refers to a PAC as a "permanent committee," which is defined as "a group of individuals, including an association, committee, or organization, *other than* a campaign committee, political issues committee, inaugural committee, caucus campaign committee, or party executive committee." Ky. Rev. Stat. Ann. § 121.015 (emphasis added).

Ann. § 2-10-117 occurred over two decades ago (Br. Appellant, 36), "[c]ourts do not require a recent scandal; indeed, the Supreme Court views contribution limits as *preventative* measures" *Schickel*, 2019 WL 2295994, at *10 (emphasis in original) (internal citations omitted).

The Sixth Circuit held that even the *total* ban on contributions at issue in *Schickel* satisfied the "closely drawn" test:

> Yes, a total ban presents a significant restriction. But under the closely drawn standard, "[e]ven a 'significant interference with protected rights' of political association may be sustained." While this ban dispenses with one means a legislator has to gather funds, it leaves open others less susceptible to the same risk of corruption or its appearance, and thus survives closely drawn scrutiny.
>
> *Id.* (internal citations omitted).

Similarly, Tenn. Code Ann. § 2-10-117 "leaves open" numerous means for candidates to amass the funds needed to launch a successful campaign. Section 117 is also significantly less broad than the bans upheld in *Schickel*; it provides much greater opportunity for PACs to make contributions, limiting only problematic "stealth" contributions, which carry increased risks of corruption or its appearance. *Schickel* thus compels the conclusion that § 2-10-117 passes constitutional muster under the "closely drawn" standard.

Plaintiff' also relies for its strict-scrutiny argument on Tenn. Const. art. I, § 19, which Plaintiff says is more protective than the First Amendment. (Br. Appellee, 45.) But Tennessee courts have yet to articulate "a substantial difference in protection of speech" between the state and federal constitutions. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000). And Tennessee state courts

have *never* reviewed the constitutionality of a limit on campaign contributions under Tenn. Const. art. I, § 19.

Plaintiff cites *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905 (Tenn. 1996), in support of its position that a challenge under Article I, Section 19, demands strict scrutiny. But the statute at issue in *Smoky Mountain* regulated speech based on its content. 937 S.W.2d at 910. Under the First Amendment, strict scrutiny clearly applies to content-based limitations on non-commercial speech. But as discussed above, speaker preference is not the same as content preference. And contrary to Plaintiff's assertion, Tenn. Code Ann. § 2-10-117 is not a content-based restriction on speech.

A limit on contributions is a limit on contributions. Nothing more. *See Schickel,* 2019 WL 2295994, at *13. And Section 117 is a limit on contributions. It is a neutral speaker preference that "serves purposes unrelated to the content of the expression." *Schickel*, 2019 WL 2295994 at *11 (citing *McCullen v. Coakley*, 573 U.S. 464, 480 (2014)). As the State has explained, those purposes are avoiding corruption or its appearance and fully informing the electorate prior to election day. (Br. Appellant, 31-33.) "Such purpose[s] reflect[] a preference for a state legislature that maintains the trust of its citizens, not for the expression of certain content." *Schickel,* 2019 WL 2295994, at *11.

II. Plaintiff's Challenge to Tenn. Code Ann. § 2-10-121 Is Moot.

In response to the State's assertion that a recent amendment to Tenn. Code Ann. § 2-10-121 has rendered moot Plaintiff's challenge to that statute, Plaintiff asserts that "even as amended, § 2-10-121 remains

discriminatory." (Br. Appellee, 55.) However, the constitutionality of the amended version of Section 121 was not before the chancery court. The chancery court ruled the statute unconstitutional based on a distinction between non-political-party PACs and political-party PACs. (R. Vol. I, 20-21.) That distinction has now been removed. So Plaintiff's challenge to the statute on this basis *has* been rendered moot.

This Court is not a court of original jurisdiction. *See* Tenn. Code Ann. § 16-4-108(a)(1). And, "as a general rule, appellate courts do not 'consider issues not dealt with in the trial court and not properly developed in the proof.'" *Reid v. State*, 9 S.W.3d 788, 796 (Tenn. Ct. App. 1999) (quoting *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn. Ct. App. 1990)). Plaintiff's contention that it may still challenge the amended version of the statute should therefore be left to the chancery court to address on remand.

III. Plaintiff's Issues for "Cross Appeal" Are Without Merit

Plaintiff raises two "issues" of its own as a "cross-appellant." But neither involves any actual appeal of an order by the chancery court. First, Plaintiff requests that this Court remand with instructions that the chancery court enter an injunction against the Davidson County District Attorney's Office preventing it from enforcing Tenn. Code Ann. §§ 2-10-117 and -121. (Br. Appellee, 56.) But the request is predicated on this Court's affirming the chancery-court judgment, and as the State has discussed, that judgment should be *reversed*, not affirmed. Furthermore, and in any event, Plaintiff acknowledges that the District Attorney's Office was dismissed as a defendant "without prejudice pending the conclusion of appellate review." (*Id.*) So whether the District

Attorney should be restored as a party and what if any judgment should be entered against that office are matters for the chancery court to address on remand.

Second, Plaintiff, raises the matter of attorneys' fees on appeal. (Br. Appellee, 57.) But this request, too, is predicated on this Court's affirming the chancery-court judgment and, in any event, is a matter for the chancery court to address on remand.

CONCLUSION

For the reasons stated here and in the State's opening brief, that part of the trial court's judgment relating to the constitutionality of Tenn. Code Ann. § 2-10-121 should be vacated, and that part of the trial court's judgment relating to the constitutionality of Tenn. Code Ann. § 2-10-117 should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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this the 28 day of June, 2019.

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Certificate of Compliance

I hereby certify that this brief consists of 1,432 words, in compliance with Tenn. Sup. Ct. R. 46.

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