IN THE COURT OF APPEAL OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

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

ON APPEAL FROM THE JUDGMENT OF
THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF AMICUS BEACON CENTER IN SUPPORT OF PLAINTIFF

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INTEREST OF AMICUS

The Beacon Center of Tennessee is a non-profit organization based in Nashville that advocates free market policy solutions to advance the success and prosperity of all Tennesseans. The Beacon Center operates as a 501(c)(3) organization and provides pro bono, public interest legal services to promote individual liberty and constitutional rights. To that end, the Beacon Center litigates First Amendment cases, and has participated in amicus efforts in various Tennessee and federal courts, including the Supreme Court of the United States. Beacon successfully represented the plaintiffs in a First Amendment challenge to short term rental restrictions in *Anderson v. Metro*, No. M2017-00190-COA-R3-CV, 2018 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 23, 2018) (later designated not for citation on other grounds). Beacon has also acted as

Amicus before the Sixth Circuit Court of Appeals in *Thomas v. Schroer* (No. 17-6238), and as Amicus before the Supreme Court of the United States at the certiorari stage in *Daleiden v. National Abortion Federation* 138 S. Ct. 1438 (2018), and at the merits stage in *Minnesota Voters Alliance v. Mansky* 138 S. Ct. 1876 (2018).

The Beacon Center is concerned about any local ordinance or state law that discriminates based on the content of speech or favors some speakers over others based on the viewpoint expressed. That problem is particularly nefarious when those burdens encompass political speech. Amicus respectfully submits this short brief to provide the Court with additional information on two important and relevant topics: why Tenn. Code Ann. § 2-10-117 must be examined under strict scrutiny standards and how – whether the Court applies strict scrutiny as required by recent Supreme Court precedent, or treats Tenn. Code Ann. § 2-10-117 as a simple campaign finance restriction – Tenn. Code Ann. § 2-10-117's blatant facial discriminations cannot survive any level of First Amendment inquiry.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tenn. Code Ann. § 2-10-117 provides:

> 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.

As a restriction that – on its face – discriminates based on the content of the implicated speech and on the viewpoint of the speaker, it must survive strict scrutiny to pass constitutional muster.

Contrary to Defendants' claims, Tenn. Code Ann. § 2-10-117 is not merely a neutral temporal restriction limiting campaign contributions such that it qualifies for *Buckley*'s slightly diminished standard of scrutiny. The requirement that government assert a "sufficiently important" purpose and illustrate that its interest is furthered by "closely drawn" means applies to provisions that do not invidiously discriminate in an attempt to control the content of speech as Tenn. Code Ann. § 2-10-117 does.

The trial court was correct to apply strict scrutiny on its way to determining that Tenn. Code Ann. § 2-10-117 is blatantly unconstitutional. And whether this Court elects to properly examine the statute under strict scrutiny – requiring proof of a compelling state interest and means narrowly tailored to advance that purpose – or decides to treat it as a mere limitation on campaign contributions – requiring only sufficiently important interests furthered by means closely drawn to advance them – Tenn. Code Ann. § 2-10-117 cannot survive. Not only are the means used to advance its stated purposes not tailored or closely drawn in any respect, but Defendant fails to cross the initial threshold of proving it has an important interest in discriminating among speakers and viewpoints as Tenn. Code Ann. § 2-10-117 does on its face.

ARGUMENT

I. Tenn. Code Ann. 2-10-117 is Subject to Strict Scrutiny Because it is Both Speaker and Content-Based.

As Plaintiff thoroughly addressed in its briefings before the trial court, Tenn. Code Ann. § 2-10-117 is properly subject to strict scrutiny as a provision that discriminates based on the content of the speech, and the viewpoint and political associations (or lack thereof) of the speaker. R. Vol. III, 302-303. As the Supreme Court recently affirmed in two important First Amendment cases, content-based restrictions of speech are especially insidious and courts must apply strict scrutiny to these specious varieties of government regulation. *See generally*, *Nat'l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). "Content-based regulations 'target speech based on its communicative content' … [and] such laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *NIFLA*, 138 S. Ct. at 2371 (2018) (quoting *Reed*, 135 S. Ct. at 2226). That intentionally high standard "reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *NIFLA*, 138 S. Ct. at 2371 (2018) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Tenn. Code Ann. § 2-10-117 creates a content-based restriction of speech by significantly burdening direct campaign contributions over other forms of political speech. And there is no doubt that Tenn. Code

Ann. § 2-10-117 intentionally discriminates based on the "idea or message expressed." *Reed*, 136 S. Ct., at 2226-27. Content-based regulations of speech such as those contained in Tenn. Code Ann. § 2-10-117 remain "presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992), despite attempts to categorize them as neutral restrictions or, in this case, as mere limits on campaign contributions. Courts must still "apply the *most* exacting scrutiny" to determine whether regulations that discriminate based on content are constitutional. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994).

While it is not necessary for a provision to discriminate based on viewpoint in addition to regulating speech based on content to warrant strict scrutiny, that is exactly what Tenn. Code Ann. § 2-10-117 manages to accomplish. As the Supreme Court recently affirmed, "Government discrimination among viewpoints – or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker' – is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 135 S. Ct., at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). By singling out certain types of PACs – those 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" – Tenn. Code Ann. § 2-10-117 unquestionably discriminates among viewpoints, effecting the most blatant and "egregious form of content discrimination." *Id.*

That Tenn. Code Ann. § 2-10-117 also functions as a limit on campaign spending does not save it from the most intense levels of

constitutional inquiry. "A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus towards the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228.

Because Tenn. Code Ann. restricts political speech, that speech which is at the zenith of protection, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), by excluding non-party PACs during what the Supreme Court has labeled the "crucial phase" immediately before elections, it must survive strict scrutiny in order to pass constitutional muster. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010). The standard announced in the seminal campaign finance case, *Buckley v. Valeo*, requiring "closely drawn" means to advance "sufficiently important state interests" is inapplicable here, where the restrictions go well beyond burdening associational freedoms through a blanket temporal restriction on contributions or a content neutral restriction that applies to all topics and parties. 424 U.S. 1, 25 (1976) ("Even 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 abridgment of associational freedoms.") (quotations and citations omitted). Tenn. Code Ann. § 2-10-117 unapologetically picks and chooses who may speak and who must remain silent. If Defendants want courts to determine that such a facially discriminatory measure is constitutional, then it must survive the highest levels of scrutiny.

II. Even if the Court Chooses to Apply *Buckley*'s "Exacting" Standards as Urged by Defendants, Tenn. Code Ann. § 2-10-117 Cannot Satisfy Constitutional Scrutiny.

Recent Supreme Court precedent has made clear that provisions such as Tenn. Code Ann. § 2-10-117 must be subject to strict scrutiny because they facially discriminate based on the content of the speech and the viewpoint of the speaker. *See generally*, *NIFLA*, 138 S. Ct. 2361; *Reed*, 135 S. Ct. 2218. But even if the Court elects to treat Tenn. Code Ann. § 2-10-117 as a mere restriction on campaign contributions, rather than as a provision that restricts speech based on content and viewpoint, as well as burdening associational freedoms, Tenn. Code Ann. § 2-10-117 still fails to survive *Buckley*'s standard. 424 U.S. at 25. Tennessee must illustrate that it has a sufficiently or substantially important interest in the discriminatory burdens Tenn. Code Ann. § 2-10-117 places on political speech, and it must prove that the means used to advance those interests, while not the *least restrictive* imaginable, are still closely drawn to effectuate those sufficiently important purposes. *Id.* Defendants fail to meet this standard because they do not articulate a legitimate purpose for the speaker-based distinctions, or show how Tenn. Code Ann. § 2-10-117 is tailored in *any* way.

A. Defendants Fail to Advance a Sufficiently Important Purpose for Tenn. Code Ann. § 2-10-117's Discrimination among Speakers.

Defendants recite the traditional government interest in combatting "corruption or the appearance of corruption" and ensuring a fully informed electorate as justification for Tenn. Code Ann. § 2-10-117's

blatant content, viewpoint, and associational discriminations. *Buckley*, 424 U.S. at 25 ("The primary purpose of the limitations … is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."). While Tennessee certainly has an interest in combatting corruption – both in actuality and in appearance – it has no substantial or sufficiently important interest in discriminating between speakers and viewpoints in the manner Tenn. Code Ann. § 2-10-117 does by prohibiting non-party affiliated PACs from making contributions during the crucial time before elections while party affiliated PACs are simultaneously free to continue their political speech. Tenn. Code Ann. § 2-10-117.

Campaign finance schemes blessed by the Supreme Court as surviving *Buckley's* closely drawn standards involve neutral government interests and generally applicable restrictions affecting all contributions in similar fashion. *See*, *e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (upholding $1,075 limit on contributions for Missouri state auditor under *Buckley*); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (using *Buckley*'s "closely drawn" test to uphold limits on political party coordinated expenditures); *California Medical Assn v. Fed. Election Comm'n*, 453 U.S. 182 (1981) (using *Buckley's* standard to uphold a $5,000 limit on contributions to multicandidate political committees).

Even *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987), upon which defendants rely for the idea that "ensuring a fair, open, and public election process" is an important state interest, undercuts

Defendants' stated interest in distinguishing between speakers. Br. of Appellant at 32. Not only, as Defendants acknowledged, did the Court apply strict scrutiny in *Bemis*, *id.* at 32, n. 11, but the Court emphasized that the challenged Campaign Financial Disclosure Act survived constitutional inquiry in part due to its wholly neutral application. *Bemis*, 731 S.W.2d at 907 ("[T]he Campaign Financial Disclosure Act does not and cannot control the quality or content of speech; it does not limit contributions or expenditures made during a campaign; it is *neutral in all respects as regards the groups to whom it applies and the types of activities at which it is specifically aimed*.") (emphasis added).

The question, in other words, is not whether Defendants have an interest in "combatting corruption," but whether Defendants have an interest in censoring PACs who are not controlled by a political party while leaving party-controlled PACs entirely unregulated. Even where the Supreme Court has determined that under *Buckley*'s standard a statute is motivated by an important interest in combatting corruption, they have also recognized that the means used to achieve that interest may actually undermine, rather than advance it.

The analysis in *Randall v. Sorrell*, 548 U.S. 230 (2006), in which the Court considered the constitutionality of Vermont's $200 gubernatorial campaign contribution limit, is illustrative. The Court acknowledged that restrictions "might *sometimes* work more harm to protected First Amendment interests than their anti-corruption objective could justify," *Sorrell*, 548 U.S. at 247-48 (emphasis in original), and expressed concerns about otherwise neutral restrictions magnifying "the advantages of incumbency to the point where they put challengers to a

significant disadvantage." *Id.* at 248. The Court emphasized that *Buckley* permitted restrictions because "preventing corruption and the appearance of corruption directly implicate the integrity of our electoral process," *id.*, but some restrictions actually undermine that integrity and may "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 249. The Supreme Court was concerned about a neutral restriction that may have the effect of acting as "an obstacle to the very electoral fairness it seeks to promote" by inadvertently favoring incumbents and established candidates over upstart challengers.

Especially in light of the concerns expressed in *Sorrell*, the more one examines the Defendants' stated interests in Tenn. Code Ann. § 2-10-117, the less substantial and important those interests appear. To the contrary, the stated reasons directly undermine the very purpose for allowing attempts to reduce corruption or the appearance of corruption by restricting First Amendment rights. Rather than ensuring a sound electoral process, Tenn. Code Ann. § 2-10-117 interferes with the democratic process and serves to hobble electoral freedom by favoring political party-controlled speech over political speech from other sources.

Along with recitation of the standard interest in limiting corruption, Defendants explained further that favoring certain speakers was necessary because Defendants would then have a better idea where money is being spent – in other words, predictability in contributions is sufficient to discriminate against some speakers while leaving others unfettered to express themselves politically. R. Vol. II, 165-66.

Defendants specifically assert: "It is intuitive and self-evident that PACs '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' will make contributions to their respective party's candidates. By contrast, it is entirely unclear which candidates will receive support from any given non-political party PAC." *Id.* at 166. As evidence supporting this proposition, Defendants offer up the example of an incumbent being unseated almost 30 years ago as well as related media coverage and legislators' concerns. Br. of Appellant at 11-15. Defendants' "evidence" included statements by a non-party PAC that their contributions had "tilted" outcomes in the following 1994 election cycle, *id.* at 12; but this is hardly surprising since the very purpose of all campaign contributions is to "tilt" elections. Not only is Defendants' reasoning that this should suffice to blatantly pick and choose between speakers troubling – Tennesseans have cause for concern if their Government truly sees itself as having a significant interest in helping incumbent politicians retain their elected positions – but it also flies in the face of *Buckley*, which Defendant relies on to support its position. *Id.* at 27-28 ("… contribution restrictions are subject to a lesser but still rigorous standard of review … 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.") (quotations and citations omitted).

In *Buckley* the Court considered a variety of provisions, relevant here was its examination of campaign finance restrictions that limited annual contributions to candidates for federal office. 424 U.S. at 12-13.

The asserted interest in combatting corruption was sufficiently important because it was possible to see how large contributions could sway legislators, or at least create the public impression that they would be beholden to large contributors once elected to office. *Id.* at 26-27 ("It is unnecessary to look beyond the Act's primary purpose – to limit the actuality and appearance of corruption resulting from large individual financial contributions – in order to find a constitutionally sufficient justification for the $1,000 contribution limitation … To the extent that large contributions are given to secure political quid pro quos from current and potential office holders, the integrity of our system of representative democracy is undermined.") Thus, the proffered interest in preventing corruption was significant enough to allow for a neutral restriction that applied evenly across groups and contributors. *Id.* at 12-13 ("The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restriction on political contributions and expenditures that apply broadly to all phases of and *all participants* in the elections process.") (emphasis added).

Here, Defendants insist that they have an interest in combatting financial influence, or its appearance, by non-party PACs, but that the interest does not also exist relative to traditional party-controlled PACs. R. Vol. II, 166 (Regarding the concern that voters may be denied an accurate portrait of a candidate's support before voting: "This concern does not exist with PACs controlled by a political party.") That reasoning is nonsense. If there is an interest in combatting corruption and the appearance of corruption, then – absent extraordinary evidence of corruption attributable to spending by PACs not controlled by political

parties – that desire must be a generalized one pertaining to all PAC contributions, furthered by generally applicable means. Tenn. Code Ann. § 2-10-117 falls far short of this requirement.

The same applies to Defendants' asserted interest in ensuring a fully informed electorate. Br. of Appellant at 37. If it is vital that the public know the source and level of *any* contributions immediately preceding an election, then it is equally essential they have the same access to information about *all* contributions made during that period.

Tennessee simply has no legitimate interest in discriminating between traditional, party-controlled PACs, and those wishing to associate with different political groups, or with none at all.

B. Far from narrowly tailored, Tenn. Code Ann. § 2-10-117 also falls short of the requirement that the means employed be closely drawn to advance Defendant's stated purposes; Tenn. Code Ann. § 2-10-117 cannot survive any level of First Amendment scrutiny.

Rather than state how Tenn. Code Ann. § 2-10-117 is tailored – or in *Buckley*'s terms, "closely drawn" – to achieve its stated interests, Defendants rely on a smattering of conclusory statements simply asserting that it is appropriately tailored. R. Vol. II, 165 ("Section 2-10-117 serves compelling government interests of ensuring a fully informed electorate and preventing corruption or its appearance, and it is narrowly tailored to achieve its goals. The state easily clears not only the exacting scrutiny standard, but also strict scrutiny's high bar."); *id.* ("In fact, Section 2-10-117's limits survive even strict scrutiny."); Br. of Appellant at 37-38 ("Because Tenn. Code Ann. § 2-10-117 serves 'sufficiently important,' if not compelling, state interests and 'employs means closely

drawn to avoid unnecessary abridgement of associational freedoms,' it satisfies *Buckley*'s intermediate state of review.") (citing *Buckley*, 424 U.S. at 25). The wealth of conclusory statements and lack of explanation or any attempt to illustrate how Tenn. Code Ann. § 2-10-117's discriminations further the stated interests (beyond making last minute contributions more predictable and propping up incumbent candidates) is revealing. Because Tenn. Code Ann. § 2-10-117 accomplishes being both woefully underinclusive *and* overinclusive at advancing Tennessee's interests in preventing corruption or the appearance of corruption and ensuring a fully informed electorate, and because the statute facially discriminates among speakers and viewpoints, it is neither narrowly tailored nor closely drawn to advance any of Defendant's asserted justifications.

A provision implicating First Amendment rights is underinclusive when it fails to include all speech necessary to further the government's stated interests. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 801-802 (2011) (finding a provision meant to prevent children's access to violent videogames without permission of a parent or guardian figure "'wildly underinclusive' when judged against its asserted justification[s]" of protecting children from portrayals of violence and aiding in parental control.) Indeed, "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a specific speaker or viewpoint." *Id.* at 802. Here it is unnecessary to guess at whether Tenn. Code Ann. § 2-10-117 actually aims to disfavor "a specific speaker or viewpoint" because it facially and explicitly discriminates between speakers.

That it is also "wildly underinclusive" is also self-evident in that it exempts multicandidate political campaign committees 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" from its prohibition on multicandidate political campaign committee contributions "after the tenth day before an election until the day of the election." Tenn. Code Ann. § 2-10-117. Defendants fail to offer evidence as to why control by a political party or caucus of such political party means that contributions in the final days of an election would have no bearing on corruption, real or perceived. While spending may be more predictable, predictability does not equate to a lack of corruption or its appearance. Likewise, if access to information by the electorate is a related concern, it is hard to see why information about contributions in the final days leading up to an election would be any less relevant to a concerned public because the contributions come from party-controlled PACs. Any attempt to ensure the public's right to know where contributions are coming from, or to limit corruption or its appearance in campaign financing, would apply with equal measure to all contributors, regardless of their affiliation – if Defendants were sincere about the stated justifications. That Tenn. Code Ann. § 2-10-117 does not apply to all PAC contributions evidences that the true motive is disfavoring certain viewpoints.

Similarly, Tenn. Code Ann. § 2-10-117 is significantly overinclusive in that it prohibits more speech than is necessary to combat corruption or the appearance of corruption. Overinclusivity occurs when a statute "encompasses more protected conduct than is necessary to achieve its

goal" in such situations, "the broad scope of the statute is unnecessary to serve the interest." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring in the judgment). It could hardly be suggested that *all* contributions, no matter the amount, further corruption or its appearance. Non-party PACs come in many shapes and sizes, and various among them may want to make small contributions in the final days of an election. Relatively small contributions that are publicized after an election has concluded are unlikely to undermine the public's confidence in the electoral process by creating an impression that some political quid pro quo is afoot. That Tenn. Code Ann. § 2-10-117 sweeps up all speech by non-party PACs during the final period before an election illustrates that it is not closely drawn to advance Defendants' stated purposes of combatting corruption and ensuring a fully informed electorate.

"The First Amendment does not permit the State to sacrifice speech for efficiency," *NIFLA*, 138 St. Ct. at 2376 (quotations and citations omitted), if Defendants hope to restrict political speech in such an egregious and viewpoint discriminatory manner, attempts to do so must be accomplished through means much more closely drawn to advance the stated purposes.

CONCLUSION

For the foregoing reasons, and those addressed by Plaintiff, the Court should affirm the lower court's finding that Tenn. Code Ann. § 2-10-117 is an unconstitutional violation of Tennesseans' First Amendment rights.

DATED: June 14, 2019.

Respectfully submitted,

s/ B.H. Boucek

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, by filing the foregoing with the Court's electronic filing system, I caused it to be served on all registered users participating in the case. I also sent copies of the foregoing in the following manner.

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