06/21/02 "See News Release 052 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 02-CA-0265

CASINO ASSOCIATION OF LOUISIANA & INDIVIDUAL MEMBERS

v.

STATE OF LOUISIANA, THROUGH THE HONORABLE MURPHY J. FOSTER, GOVERNOR, THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL

KIMBALL, Justice, dissenting

Because I continue to adhere to the view expressed in my concurrence in *Penn v. State*, 99-2337 (La. 10/29/99), 751 So.2d 823, 839 (Kimball, J. concurring), I dissent from the majority's conclusion that the provisions at issue are constitutional. Like the provisions held unconstitutional in *Penn*, the instant prohibitions illegally infringe on protected First Amendment rights.

In stark contrast to the laws at issue in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S.Ct. 897 (2000) and *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976) (per curiam), which dealt with limits on campaign contributions, the challenged provisions in the case at bar deal with absolute prohibitions on campaign contributions made by certain targeted persons. In *Shrink Missouri*, a case decided after this court rendered its decision in *Penn*, the U.S. Supreme Court quoted language from *Buckley* explaining that a contribution limit only marginally restricts a contributor's ability to engage in free communication because while a contribution serves as a general expression of support for the candidate and his views, it does not communicate the underlying basis for the support. *Shrink Missouri*, 528 U.S. at 386,

120 S.Ct. at 903. Further, the *Shrink Missouri* Court quoted *Buckley* for the proposition that

> [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Shrink Missouri, 528 U.S. at 386-87, 120 S.Ct. at 903-4 (quoting *Buckley*, 424 U.S. at 20-21, 96 S.Ct. at 635-36). Thus, a contribution limit leaves communication significantly unimpaired. *Shrink Missouri*, 528 U.S. at 387, 120 S.Ct. at 904. Clearly, the *Shrink Missouri* Court did not diminish the importance of the symbolic expression evidenced by a contribution of any amount.

Contribution limits also impinge on protected associational freedoms. *Shrink Missouri*, 528 U.S. at 387, 120 S.Ct. at 904; *Buckley*, 424 U.S. at 22, 96 S.Ct. at 636. Justice Breyer, joined in his concurrence by Justice Ginsburg, noted that the statute upheld by the Court did not impose an absolute ban on contributions. Rather, Justice Breyer stated, it "imposes restrictions of degree. It does not deny the contributor the opportunity to associate with the candidate through a contribution, though it limits a contribution's size." *Shrink Missouri*, 528 U.S. at 401, 120 S.Ct. at 912 (Breyer, J. concurring). Such a statement identifies the difference between a law that limits contributions and one that absolutely prohibits them. In my view, a prohibition against campaign contributions by certain persons allows neither the "symbolic expression" evidenced by a contribution nor the affiliation with a candidate that a contribution allows. This amounts to a "difference in kind" rather than a "distinction

in degree" when compared to the laws upheld in *Shrink Missouri* and *Buckley*. *See Penn*, 751 So.2d at 841 (Kimball, J. concurring).

The majority opinion treats in a cavalier manner the significance of the difference between laws that limit campaign contributions and those that prohibit such contributions. The majority notes that the parties prohibited from making contributions by the provisions at issue can still make unlimited political expenditures, personally assist in a political association's effort on behalf of candidates, urge their employees to support or oppose particular candidates, display yard signs, volunteer in political campaigns, and sponsor phone banks to encourage persons to vote. However, individuals might contribute funds to a candidate's campaign in part because they believe such a contribution is a more effective means of advocacy than spending the money on their own. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261, 107 S.Ct. 616, 629 (1986); *Beaumont v. FEC*, 278 F.3d 261, 274 (4th Cir. 2002). Moreover, given the complete ban on contributions at issue in this case, it seems worthwhile to address the Supreme Court's pronouncement that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Spence v. State of Washington*, 418 U.S. 405, 411 n.4, 94 S.Ct. 2727, 2731 n.4 (1974) (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 151 (1939)).

The majority correctly recites the standard of review to be used to determine whether the contribution limitations violate the contributor's First Amendment rights, *i.e.*, a contribution limit involving significant interference with associational rights can survive if the Government demonstrates that the contribution regulation is closely drawn to match a sufficiently important interest, but then fails to accurately apply it

to the facts at hand. Because the instant case involves a complete ban on contributions, the State's burden to show that the prohibitive laws are "closely drawn" becomes even more onerous. *Beaumont*, 278 F.3d at 276 ("Yet, when a limit becomes a ban, the burden of demonstrating that the regulation is closely drawn becomes that much more difficult."). In my opinion, the State fails to carry its burden, especially in light of the fact that persons subject to the contribution prohibition at issue are subject to the general contribution limits similar to those upheld in *Buckley* and *Shrink*. Additionally, the State has failed to show why a prohibition, rather than an even lower contribution cap than that allowed by the general law, is necessary.

For all the above reasons and for the reasons I expressed in my concurrence in *Penn*, I must dissent from the majority's holding that the contribution prohibitions at issue are valid.