SUPREME COURT OF LOUISIANA

No. 99-CA-2337

CLAUDE M. PENN, JR., GLADNEY L. MANUEL, JR., FELICIANA VENTURES, INC., AND MANUEL'S I-10 AUTO & TRUCK STOP, INC.

v.

STATE OF LOUISIANA, THROUGH THE HONORABLE MURPHY J. FOSTER, JR., GOVERNOR, THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, THE SUPERVISORY COMMITTEE ON CAMPAIGN FINANCE DISCLOSURE AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, LOUISIANA GAMING CONTROL BOARD

ON APPEAL
FROM THE NINETEENTH JUDICIAL DISTRICT COURT,
FOR THE PARISH OF EAST BATON ROUGE,
HONORABLE JEWEL E. WELCH, JUDGE

KIMBALL, Justice, concurring

I concur in the judgment that the challenged provisions are unconstitutional. The laws[1] at issue, which prohibit certain persons from contributing to any political candidate, any political committee of any such candidate, or to any other political committee which supports or opposes any candidate, function in an area of the most fundamental First Amendment activities. *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976) (per curiam). "The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id*. (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 (1957)). A primary purpose of this Amendment is to protect unfettered discussions of government affairs, including those relating to candidates for political office. *Id*. This purpose reflects "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id*. (quoting *New York Times*

[1]This term is loosely used to encompass those portions of La. R.S. 18:1505.2 declared unconstitutional by the trial court as well as Rule 107 of Title 42 of the Louisiana Administrative Code, which was also declared unconstitutional by the trial court.

v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964)). The "fullest and most urgent" application of the constitutional guarantee embodied in the First Amendment is to political campaigns. *Id.* at 15, 96 S.Ct. at 632 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625 (1971)).

In additional to this protection of political expression, the First Amendment also protects political association. *Id.* Protection of the right of association is afforded by the Constitution because effective advocacy, particularly of controversial points of view, is enhanced by group association. *Id.* at 15, 96 S.Ct. at 633. Thus, the right to associate with others for the common advancement of political beliefs and ideas is protected by the First Amendment. *Id.*

In light of the broad protection afforded political expression and association by the First Amendment, which the *Buckley* Court recognized was offended by the even-handed imposition of mere limitations on campaign contributions, I cannot conclude that the absolute prohibitions on the exercise of protected rights by a targeted number of persons pass constitutional muster. I reach this conclusion for a number of reasons.

First, in upholding federal legislation that imposed a ceiling on the amount any one person or group could contribute to a candidate or political committee, the *Buckley* Court identified a "single narrow exception" to the rule that limits on political activity are contrary to the freedoms guaranteed by the First Amendment. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296-297, 102 S.Ct. 434, 437 (1981). There, the Court reasoned that although contribution limitations impinge upon First Amendment freedoms, such limitations only marginally restrict the contributor's ability to engage in protected communication. *Buckley*, 424 U.S. at 20, 96 S.Ct. at 635. The Court's characterization of the contribution as a "marginal restriction" stemmed from its recognition that a limitation on the amount of money a person may give to a candidate or campaign organization involves "little direct restraint" on his political communication because it permits the "symbolic expression of support evidenced by a contribution" and still allows the contributor to discuss candidates and issues. *Id.* at 21, 96 S.Ct. at 636. Additionally, the Court found that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id.* at 22, 96 S.Ct. at 636. Furthermore, contributions enable "like-minded persons to pool their resources in furtherance of common political goals." *Id.* For these reasons, the Court recognized that the Act's contribution ceilings limit one "important" means of associating with a

candidate or committee, although they do allow contributors to become a member of any political association and to personally assist in the association's efforts on behalf of candidates. *Id.* The Court concluded that the "limited effect[s]" the contribution ceilings had upon First Amendment freedoms were justified by the government's interest in preventing actual corruption or the appearance of corruption that large individual contributions can have on a candidate who is elected to office. *Id.* at 29, 96 S.Ct. at 640.[2]

The instant case, however, does not fall into the single narrow exception identified in *Buckley*. There, the Court recognized that marginal restrictions involving little direct restraint on protected First Amendment freedoms were imposed by the contribution <u>limits</u> at issue in that case because the limitations nevertheless allowed the symbolic expression of support a contribution evidences. In contrast, the laws at issue <u>absolutely prohibit</u> certain persons from contributing to any candidate, any political committee or any such candidate, or any other political committee which supports or opposes any candidate. This prohibition forbids certain specified persons from engaging in the symbolic expression of support the *Buckley* Court relied on in concluding that contribution limitations are not repugnant to our Constitution. The fact that the laws do not purport to restrict the freedom of the specified persons from engaging in other types of political expression or from associating in other ways does not serve to lessen the impingement the absolute prohibition produces on First Amendment freedoms. *See Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303 (1973) (holding that an Illinois law prohibiting a person from voting in the primary election of a political party if he had voted in the primary of any other party within the preceding twenty-three months unconstitutionally infringed upon the right of free political association even though it did not deprive persons of all opportunities to associate with the political party of their choice because it "absolutely preclude[d]"

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[2]The Court concluded that when large contributions are given to current and potential holders of political office in the hopes of securing a political quid pro quo, "the integrity of our system of representative democracy is undermined." *Id.* at 26-27, 96 S.Ct. at 638. This type of corruption has also been characterized as "a subversion of the political process." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459 (1985). This is because elected officials may act contrary to their obligations of office if faced with the prospect of personal financial gain or infusions of large sums of money into their campaigns. *Id.* "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *Id.* Similarly, the government was also justifiably concerned with limiting the appearance of corruption so that confidence in our system of representative government is not eroded. *Buckley*, 424 U.S. at 27, 96 S.Ct. at 638-639. Subsequent to *Buckley*, the Court has stated that preserving the integrity of the electoral process and preventing corruption are interests of the "highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, 1422 (1978).

them from voting in a chosen party's primary election).

The complete ban on campaign contributions imposed by the laws at issue amounts to a "difference in kind" rather than a "distinction in degree" when compared to the contribution limitations upheld in *Buckley*. This is significant because *Buckley* instructs that courts should not invalidate such limitations on the basis that a $2,000 limit on contributions, for example, will not serve as well as a $1,000 limitation since these "distinctions in degree" are more properly drawn by the legislature than by the judiciary. *Buckley*, 424 U.S. at 30, 96 S.Ct. at 640 ("While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . [I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind.") (footnote omitted) (internal quotations omitted); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616 (1986) (Rehnquist, C.J., concurring in part and dissenting in part). Such deference, however, is not accorded legislative determinations when they can be said to "differ in kind" from those approved in *Buckley*. As noted above, the laws challenged in this case absolutely prohibit certain persons from contributing to political campaigns while the law upheld in *Buckley* allowed those wishing to express their political views by contributing to a political candidate to do so, at least symbolically. It was the federal law's allowance of this symbolic expression that permitted the Court in *Buckley* to conclude that the challenged law imposed only a marginal restriction on protected First Amendment rights. Unlike the limitations considered in *Buckley*, the prohibitions at issue completely silence political expression in the form of contributions by a small segment of our society who are licensed by the State to conduct gaming-related business. The fact that the laws at issue totally silence such expression cause it to be "different in kind" from the contribution ceilings approved in *Buckley*.[3] Thus, the deference given to Congress' determination

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[3]In *Buckley*, the Court cited two cases to illustrate the concept of "different in kind." In one of the cases, *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245 (1973), the Court addressed the constitutionality of a New York law that required a voter to enroll in the political party of his choice at least 30 days before the general election in November in order to vote in the next subsequent party primary. If a voter failed to meet this deadline, he could not vote in a party primary until after the following general election. In upholding the constitutionality of the challenged law, the Court held that New York did not prohibit petitioners from voting in the primary election or from associating with the political party of their choice; rather, it merely

of the suitability of the particular limitations upheld in *Buckley* is not mandated in the instant case.

An additional reason the challenged laws are, in my view, unconstitutional deals with the fact that the State's ban against certain persons involved in the gaming industry from voicing their political ideas by way of campaign contributions, while allowing anti-gambling forces to fully voice their ideas, in part through campaign contributions, is contrary to the design of the First Amendment. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791, 98 S.Ct. 1407, 1423 (1978); *Buckley*, 424 U.S. at 48-49, 96 S.Ct. at 649. In supporting its prohibition, the State points out that, for the fiscal year ending June 30, 1998, truck stops with video poker devices received over $205,000,000 in net device revenues. It then argues that revenues of this magnitude would, in the absence of the challenged prohibitions, allow the gaming industry to disproportionately affect the political process if they are allowed to contribute to candidates and committees supporting or opposing candidates. *Buckley* makes it clear, however, that "contributors cannot be protected from the possibility that others will make larger contributions." *Citizens Against Rent Control*, 454 U.S. at 295, 102 S.Ct. at 437. Therefore, that certain persons with substantial ties to the gaming industry may, in fact, personally possess greater

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imposed a legitimate time limitation on their enrollment, which they voluntarily disregarded. The Court noted that a person could vote in a different party primary each year as long as he enrolled in a new party between the prior primary and the cutoff date. Thus, it concluded, the law did not "lock a voter into an unwanted pre-existing party affiliation from one primary to the next." Because the law was tied to a legitimate purpose and was "in no sense invidious or arbitrary," the Court upheld the challenged law.

In contrast, the Court in *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303 (1973), addressed the constitutionality of an Illinois law which prohibited a person from voting in the primary of a political party if he had voted in the primary of any other party within the preceding 23 months. Appellee had voted in a Republican primary in February, 1971 and wanted to vote in a Democratic primary in March, 1972, but was barred from doing so by the 23-month rule. In striking down the law, the Court first observed that the law "substantially restricts" an Illinois voter's freedom to change his political party affiliation. This is because one who wanted to change his party was forced to wait almost two years before his choice would be given effect. The effect of this law was to "lock" the voter into his pre-existing party affiliation for a substantial period of time following his participation in any primary election. The Court noted that although the law did not deprive voters of all opportunities to associate with the political party of his choice, it did absolutely preclude appellant from voting in the Democratic 1972 primary.

In what was later characterized as constituting a case "different in kind" from *Rosario*, the Court found that unlike the situation presented in *Rosario*, there was no action appellant could have taken to make herself eligible to vote in the 1972 Democratic primary. This law therefore significantly infringed upon appellant's right of free political association and did not employ the least drastic means to further the state's legitimate interest. Accordingly, the law was declared unconstitutional by the Court.

wealth or control a larger bank account than the average citizen cannot justify the instant infringement on protected First Amendment rights. This is especially true in light of the fact that persons with substantial ties to the gaming industry, as well as all other persons, are subject to Louisiana's general contribution limits similar to the ones upheld in *Buckley*. *See* La. R.S. 18:1505.2(H).

In a related vein, the fact that gambling may be characterized as a "vice" does not serve to lessen the First Amendment rights of those involved in its operation. As the Court stated in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495 (1996):

> Moreover, the scope of any "vice" exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

Id. at 514, 116 S.Ct. at 1513-14 (internal quotations omitted).[4] In other words, the State cannot justify an infringement on protected First Amendment rights by alleging that the protected rights relate to a "vice" activity when the State itself allows the so-called "vice" to legally exist. Such a result would be contradictory to the decision of this State, and, indeed, that of almost every state in the nation, to confer legal status upon certain gaming activities. *See Greater New Orleans Broadcasting Ass'n., Inc. v. United States*, 527 U.S. __, 119 S.Ct. 1923 (1999) (noting that some form of gambling is legal in nearly every State and that "in the judgment of both the Congress and

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[4]Although *44 Liquormart* is a commercial speech case which deals with a ban on the advertisement of the retail price of alcoholic beverages and, as such, is not directly controlling in a political speech case such as the one before us, I find its rejection of a "vice" exception to First Amendment protections instructive in the instant situation. This is particularly true in light of the fact that basic First Amendment principles, such as the fact that government may not suppress speech as easily as it may suppress conduct, clearly apply to commercial speech, *44 Liquormart*, 517 U.S. at 512, 116 S.Ct. at 1512, that a "less than strict standard" is generally applied in commercial speech cases, *Id.* at 507, 116 S.Ct. at 1510, and that the State may regulate some types of commercial advertising more freely than other types of protected speech. *Id.* at 498, 116 S.Ct. at 1505. Because the "vice" exception is not allowed in the commercial speech arena, which utilizes a less than rigorous standard of review, I believe such an exception would similarly be disallowed in a case where protected political speech is severely restricted, which must generally withstand more rigorous scrutiny.

many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits"). Once a state confers the benefit of legalization upon the gaming industry, it cannot require that industry to surrender its First Amendment rights. *44 Liquormart*, 517 U.S. at 513, 116 S.Ct. at 1513 ("Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.").

Finally, even if I were to accept the correctness of the State's argument that the laws at issue are necessary to combat the perception of corruption associated with gambling interests and to foster confidence in the electoral process, a point I do not necessarily concede, I would be constrained to conclude the laws at issue are overbroad in their scope. The challenged provisions absolutely prohibit specified persons connected with the gaming industry from contributing to any candidate, any political committee of any candidate, or any other political committee which supports or opposes any candidate. Thus, for example, the owner of a truck stop is prohibited from contributing any amount of money to his local school board candidate or to a candidate seeking to become coroner. I fail to see how such offices could favorably affect gaming interests such that there exists the possibility for a political quid pro quo. Consequently, the laws, as presently written, seem overbroad.[5]

For all the above reasons, I conclude the challenged laws are unconstitutional. To uphold these laws, which single out a group of persons who operate legal businesses in our State because their political expressions are assumed by some to be harmful, is to begin a descent down a slippery slope. We know not where that slope ends. At any time, our own protected views may be deemed harmful or may become unpopular and we may find ourselves wishing we never started down that path.

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[5]These concerns regarding the scope of the laws at issue, combined with the fact that the challenged provisions prohibit only a small segment of persons from expressing their political views through campaign contributions, also raise complex equal protection issues. I leave the resolution of these difficult issues for another day, however, because the conclusion that the laws at issue impermissibly infringe upon protected First Amendment rights is sufficient grounds upon which to invalidate the challenged provisions.