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.

VERSUS

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

VICTORY, Justice, dissenting,

I would declare our Louisiana statute constitutional, thus providing the citizens of Louisiana the same measure of protection from corruption and the appearance of corruption involving gambling interests and our public officials that has existed for the citizens of New Jersey, one of our nation's largest gambling states, for almost a quarter of a century. Therefore, I respectfully dissent.

For over one hundred years, the Louisiana Constitution has mandated that the Louisiana Legislature suppress gambling. Although I sometimes wonder what form of gambling the Legislature now suppresses, the statute at issue in this case is a serious first attempt by the Legislature to separate elected public officials from an industry that has been and is fraught with corruption. The history of corruption and the appearance of corruption in the gambling industry itself and with respect to public officials has been well documented for over a century and continues to this day.

Today, a narrow majority of this Court declares the Legislature's attempt unconstitutional, citing primarily the United States Supreme Court case of Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976), decided in 1976. This is certainly a startling result since the Buckley case, which struck down expenditure limits for candidates, specifically approved limits on campaign contributions enacted by Congress. Further, the Buckley case did not even involve the gambling industry, nor did it discuss or invalidate complete prohibitions on campaign contributions, as does

the majority today.

Since the Buckley case was decided in 1976, only two cases in the United States have reached the appellate level that speak directly to the issues presented in this case. Both cases upheld the constitutionality of the state statutes at issue. Yet, these cases are either completely ignored or hardly mentioned in the opinions of the Justices declaring our statute unconstitutional. Within a few months after Buckley was released, the Illinois Supreme Court decided Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61 (Ill. 1976). The issues in Schiller are very similar to the issues in the case sub judice. Liquor licensees challenged the constitutionality of an Illinois statute prohibiting a liquor licensee or any associate of such licensee from making any contribution to any political candidate. Relying on Buckley, the Illinois Supreme Court held the statute constitutional, stating that its purpose was to avoid corruption or the appearance of corruption in the political process.

In 1977, the New Jersey Legislature passed a law substantially similar to the Louisiana statute at issue here today, i.e. completely prohibiting key gambling officials from making campaign contributions. Significantly, this statute was enacted in the wake of Buckley. When the law was challenged, the trial court upheld the statute and the New Jersey appellate court affirmed in a lengthy opinion relying on Buckley. Petition of Soto, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989). After the New Jersey Supreme Court denied writs, opponents of the law filed writs with the United States Supreme Court. But the United States Supreme Court denied writs, leaving in place a constitutional statute enacted in 1977, much like the statute at issue here, that completely prohibits certain gambling officials from making any campaign contributions to public officials in New Jersey, one of the biggest gambling states in the country.

The concurring opinions misinterpret Buckley and its progeny. I agree that Buckley states the provisions at issue in this case operate in an area of the most fundamental First Amendment activities. Buckley, 424 U.S. at 14, 96 S.Ct. at 632. However, Buckley stated that "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." Id. at 25, 96 S.Ct. at 637 (citations omitted).

Although the Supreme Court recognized Buckley identified a "single narrow exception" to the rule that limits on political activity were contrary to the freedoms guaranteed by the First Amendment, that is, to limit actual corruption and the appearance of corruption that results from large individual financial contributions, this does not mean that no other "exceptions," or sufficiently important interests, exist to justify limits on political contributions to candidates. Since this sufficiently important interest was found in the federal act's primary purpose, the Buckley Court stated that it was unnecessary to look beyond the act's primary purpose in order to find additional constitutionally sufficient justifications and therefore, did not look to see if any other sufficiently important interests existed. Clearly, corruption and the appearance of corruption resulting from other areas, such as gambling, would qualify as an "exception," as it did in Soto.

Further, the Court found that the limitation of political contributions entails only a "marginal" restriction due to the fact that a contribution is only "symbolic expression." As one commentator stated,

> This is so because people who would otherwise give amounts greater than the statutory limits are hardly bottled up once they reach the ceiling. Many avenues of communication remain open to them, the Court states, they can "expend such funds on *direct political expression*." [Buckley] at 21-22 (emphasis added). In other words, the speaker could buy the newspaper ad or TV commercial or handbills directly, instead of giving the money to the candidate for the candidate to choose how to spend it. If he avoided collaboration with the candidate, his spending in this fashion would not count as a contribution. Id. at 46-47 & n.53.

J. Skelly Wright, Politics and Communication: Is Money Speech?, 85 Yale L.J. 1001, 1010 n.40 (1976). The Court stated that there is no communication of the underlying basis for the support since the contributor does not say why he is supporting a certain candidate or even that he agrees with everything that the candidate proposes. Furthermore, the limitation does not infringe on the freedom to discuss candidates and issues. Buckley, 424 U.S. at 20-21, 96 S.Ct. at 635-636. The contribution limits only restrict one means of associating with a candidate and still allows a contributor to become a member of a political association and to personally assist in the association's efforts on behalf of candidates. Id. at 22, 96 S.Ct. at 636. The Court stated that "the transformation of contributions into political debate involves speech by someone other than the contributor." Id. at 20. In a later case, the Supreme Court acknowledged that this type of "

'speech by proxy' ...is not the sort of political advocacy that [the] Court in Buckley found entitled to full First Amendment protection." California Medical Association v. Federal Election Commission, 453 U.S. 182, 196, 101 S.Ct. 2712, 2722 (1981).

The prohibition of political contributions is of the marginal type referred to by the Supreme Court in Buckley because the prohibition only eliminates "symbolic expression." There is no limitation to speak out on public issues, to support a particular candidate through expression of views, or to join and participate in a political party. Basically, the persons prohibited from making contributions can support candidates of their choice in virtually every other way. This prohibition is the more limited type of limitation on First Amendment freedoms, as recognized in Buckley.

The question then becomes whether the State has asserted a sufficiently important interest in prohibiting contributions from certain persons in the gambling industry. The "exception" in Buckley related to the perception of undue influence of large contributors to a candidate. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 297, 102 S.Ct. 434, 437-438. The Court stated,

> Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical...if confidence in the system of representative Government is not to be eroded to a disastrous extent." [citations omitted].

Buckley, 424 U.S. at 26-27, 96 S.Ct. at 638. Here, given the history of corruption in gambling and the political process in this State, the perception of undue influence by would-be contributors in the gambling industry to candidates is a far more important State interest than the possible undue influence by large contributors.

The two cases previously discussed, dealing directly with the issues in this case, are particularly persuasive as to the issue of prohibiting certain persons from contributing to political candidates. In Petition of Soto, a casino employee challenged the constitutionality of a New Jersey statute that prohibited any casino key employee from contributing any money or thing of value to any political candidate or committee of any political party. In holding the statute constitutional, the court found a compelling state interest in preventing the appearance of impropriety given the "acknowledged vulnerability of the casino industry to organized crime and

the compelling interest in maintaining the public trust, not only in the casino industry but also the governmental process which so closely regulates it." Petition of Soto, 565 A.2d at 1098. In addition, the court found that the statute had been narrowly drawn and precisely tailored. The court commented that gambling "is an activity rife with evil" and that it was the pronounced policy of the State "to regulate and control the casino industry with the utmost strictness." The New Jersey Supreme Court and the United States Supreme Court refused to review the Soto case.

Schiller Park Colonial Inn, Inc. v. Berz was decided two months after the decision by the Supreme Court in Buckley. In Schiller, liquor licensees challenged the constitutionality of an Illinois statute prohibiting a liquor licensee or any associate of such licensee from making any contribution to any political candidate. In holding the statute constitutional, the Illinois Supreme Court stated that in view of the substantial state interest involved and the fact that the statute imposed relatively minor limitations upon the licensees' rights, the statute did not violate rights of free speech or association. The court noted that the statute did not prohibit them from engaging in pure speech and the licensees remained free to express their opinions to anyone who would listen, announce their support for candidates, express their political opinions by exercising their voting rights, join political parties, and volunteer services to those parties or groups. The same is true under our statute at issue today.

Here, the State's interest in preventing corruption or the appearance of corruption by people in the gambling industry with regard to public officials is even more important than the prevention of corruption or the appearance of corruption by large contributors at issue in Buckley. As previously noted, the Louisiana Constitution specifically provides that the legislature shall suppress gambling. La. Const. of 1974 art. XII, Sec. 6. During the debate on the legalization of gambling in this State, citizens voiced apprehensions of government corruption. Gambling was only approved after assurances of stringent regulation by the government. La. Rev. Stat. 27:2(A). Clearly, the State has asserted a sufficiently important interest in preventing corruption and the perception of undue influence by people in the gambling industry on candidates for public office given the long history of gambling and corruption of public officials in this State,

as shown in Justice Knoll's dissent.

Therefore, the analysis of our statute must focus on whether the ban on political contributions is closely drawn to prevent corruption and the appearance of corruption in the political process. Our statute targets individuals who play a pivotal role in the gambling industry and exercise substantial power in the gambling industry in this State. Merely because some others involved in gambling are not covered by the statute does not defeat the requirement that the statute be "narrowly drawn." As the New Jersey court stated, "[a] public perception that any improper influence has infiltrated the [regulatory] processes, however slightly, would undermine the trust that is essential to continued confidence in the industry and, what is more important, in state government." Petition of Soto, 565 A.2d at 321.

In addition, our statute is not overbroad in scope. As a practical matter, the legislature would have a difficult and probably impossible task of determining exactly which elected officials "will be in a position to exercise influence in the area of [gambling] regulation." Schiller Park Colonial Inn, Inc., 349 N.E.2d at 67. As the Illinois Supreme Court stated,

> The nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties. In attempting to prevent [persons interested in gambling] from obtaining influence in the area of [gambling] regulation, therefore, the legislature acted reasonably in proscribing the giving of campaign contributions by [persons interested in gambling] to any candidate. (emphasis added).

Id.

Lastly, it is argued that the prohibition does not further the State's interest in preventing corruption or the appearance of corruption since Louisiana law already provides disclosure requirements for candidates and limitations on contributions that an individual can give a candidate. Yet, the United States Supreme Court has stated that the courts shall not "second-guess a legislative determination as to the need for prophylatic measures where corruption is the evil feared." FEC v. National Right to Work Committee, 459 U.S. 197, 210, 103 S.Ct. 522, 561 (1982). The Legislature obviously believed that a complete ban on contributions, along with a requirement of complete disclosure, was needed to further the State's interest of preventing corruption or the appearance of corruption in the gambling industry.

For the reasons stated and also for the excellent reasons stated in the opinion of Justice Knoll, I respectfully dissent.