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AOR 1995-48
* LATE COMMENTS
OGC Draft
[Letter original of fax received late 1-24-96]

Ms. Marjorie Emmons
Commission Secretary
Federal Election Committee
999 E Street N.W.
Washington, D.C. 20463

Re: Comment on FEC Draft AO 1995-48: Preemption of Georgia Statute O.C.G.A. § 21-5-35.

Dear Ms. Emmons:

In response to a question from the Office of the Commission's General Counsel, I would like to clarify a point in my letter sent to you earlier today on behalf of the Attorney General. In that letter I had noted that there is no reported case touching on the issue of preemption of the particular Georgia statute.

However, as the Commission is aware, earlier this week the U.S. District Court here in Atlanta did issue a preliminary injunction in a case on this issue. Although I know that you already have a copy of the opinion, one is attached here for convenience.

The Court found that the Plaintiffs in that case presented a "more plausible interpretation of the FECA" after reviewing previous opinions of the Commission. As such, the Court found that there was a substantial likelihood of the Plaintiff's prevailing on the merits of their preemption claim when the merits of that claim were actually decided.

Our office is in the process of appealing that granting of the preliminary injunction to the Eleventh Circuit Court of Appeals

* Note the attachment which is clear copy of GA USDC opinion.

and will ask for a stay of the district court's order pending that appeal. The basis of our position is summarized in our previous letter.

In reaching its decision, as noted above, the district court did review prior opinions of the Commission and did give deference to those decisions. However, it is Georgia's position that the Commission should not conclude that the statute in question is preempted for those reasons previously outlined.

I hope this clarifies our position. If there is any further information our office can provide, please let me know.

Sincerely,

DENNIS R. DUNN
Senior Assistant Attorney General

DRD/me

cc: Office of the General Counsel
(By FAX - 202/219-3923)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOUG TEPER, LOUIS FEINGOLD, and ALAN ULMAN :

Plaintiffs, :

v. :

ZELL MILLER, in his official capacity as Governor of the State of Georgia, MICHAEL BOWERS, in his official capacity as Attorney General of the State of Georgia, MAX CLELAND, in his official capacity as Secretary of State of the State of Georgia, and STEVEN SCHEER, STEVEN WHITE, MICHAEL D. McRAE, and BRIAN FOSTER, in their official capacities as Members of the Georgia State Ethics Commission, :

Defendants.

CIVIL ACTION FILE

NO. 1:96-CV-0009-WBH

ORDER

Plaintiff Doug Teper is a member of the Georgia General Assembly who is contemplating a campaign for federal office. The remaining plaintiffs, Louis Feingold and Alan Ulman, are potential contributors to Teper's campaign. This matter is before the Court on plaintiffs' motion for a preliminary injunction. A hearing was held on this issue on January 9, 1996.

Plaintiffs seek an injunction prohibiting defendants from enforcing section 21-5-35 of the Official Code of Georgia, as it applies to federal elections. Section 21-5-35 prohibits members of the Georgia General Assembly from accepting campaign contributions during the legislative session, stating that "[n]o member of the General

Assembly or that member's campaign committee or public officer elected state wide or campaign committee of such public officer shall accept a contribution during a legislative session." O.C.G.A. § 21-5-35. Plaintiffs claim that section 21-5-35 is unconstitutional on the following three grounds: 1) it is preempted by federal law; 2) it violates the First and Fourteenth Amendments to the United States Constitution by infringing on plaintiffs' rights of freedom of expression and association; and 3) it violates the plaintiffs' equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

I. STANDING

Before reaching the merits of plaintiffs' motion, the Court addresses defendants' contention that plaintiffs lack standing to bring this action. Article III of the United States Constitution prohibits federal courts from adjudicating a matter that does not involve an actual case or controversy. Specifically, to invoke the federal courts' Article III authority and to establish standing, a plaintiff must show that he or she personally has suffered an actual or threatened injury, that the injury is caused by the challenged action, and that a favorable decision will redress the injury. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982).

To demonstrate standing, Teper explains that he must file a qualifying petition between the fourth Monday in April and the following Friday in order to qualify for party nomination in his party's primary. See O.C.G.A. § 21-2-153. Teper contends that his ability to accept campaign contributions between now and the qualifying period is an important factor in his decision whether to become a federal candidate. The Georgia

General Assembly began its current session on January 8, 1996, and although the session can last for a period of no more than forty days, due to adjournments and scheduling changes, the session may reasonably be expected to last into late March or early April. Because section 21-5-35 prevents him from accepting contributions during the session, Teper will have little time to accept contributions before he must qualify for the federal election. He argues that this situation would place him in a disadvantage and would make it unlikely that he would choose to run for federal office. Defendants maintain, however, that because Teper has not definitively declared his federal candidacy, plaintiffs have not been harmed by defendants, and their injury is merely hypothetical.

Unfortunately, the Eleventh Circuit has not decided whether a plaintiff who is discouraged from running for federal office has sustained an injury sufficient to confer standing. It is clear, however, that a plaintiff need not wait until a challenged law is enforced against him or her before bringing suit. ACLU v. Florida Bar, 999 F.2d 1486, 1492 (11th Cir. 1993). Other courts have analyzed standing in the election law context. For example, the District Court for the Western District of Kentucky held that a potential candidate had standing to challenge a statute that "hindered" his choice to run for election and that the plaintiff "need not pronounce to a certainty that he will run for office if he obtains the requested relief." Wilkinson v. Jones, 876 F. Supp. 916, 924 (W.D. Ky. 1995). Also, the First Circuit has held that a candidate had standing to challenge a campaign finance law which impacted his campaign strategy. Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993).

The Court carefully has considered the parties' arguments and concludes that

plaintiffs' concerns are not speculative. In reaching this conclusion, the Court notes that, at the preliminary injunction hearing, the parties indicated that the another member of the Georgia Assembly, Senator Clinton M. Day, asked the Attorney General if section 21-5-35 prohibited him from accepting pledges for contributions during the legislative session. The Attorney General answered affirmatively. Senator Clinton M. Day, Unofficial Op. Att'y Gen. (December 11, 1995). In light of this history, plaintiffs have been sufficiently threatened with an injury; the prohibition on receiving contributions strongly influences Teper's decision to seek federal office. The injury is caused by the challenged statute, and a preliminary injunction would remove the harm suffered by plaintiffs. Accordingly, plaintiffs have standing to bring this action and the Court can address the merits of their motion.

II. PRELIMINARY INJUNCTION

The Court cannot grant a preliminary injunction enjoining the enforcement of section 21-5-35 unless plaintiffs demonstrate the following four factors: 1) substantial likelihood of success on the merits of their claim; 2) that the injunction is necessary to prevent an irreparable injury; 3) that the threatened injury to the plaintiffs outweighs the harm that the injunction would inflict on the defendants; and 4) that granting the injunction would not harm the public interest. Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994). Plaintiffs have the burden of proof as to all four of these prerequisites. Id. As the Court discussed when concluding that plaintiffs have standing to bring this action, plaintiffs have demonstrated an irreparable injury. The Court is also satisfied that the threatened injury to the plaintiffs outweighs any harm that an injunction would inflict

on the defendants and that a preliminary injunction would not harm the public interest. Therefore, the Court focuses, as did the parties at oral argument, on the first prong of the preliminary injunction analysis to determine whether plaintiffs have a substantial likelihood of success on the merits of their claim.

Plaintiffs allege that, as to federal campaigns, section 21-5-35 violates the Article VI of the United States Constitution because it is preempted by the Federal Election Campaign Act ("FECA") and the regulations adopted by the Federal Election Commission ("FEC"). See U.S. Const. art. VI (declaring that the laws of the United Sates "shall be the supreme law of the land"). The FECA, 2 U.S.C. § 431 et seq., is a federal statute governing matters relating to campaign contributions and expenditures in connection with federal elections. In 1974, Congress created the FEC and gave the commission "primary and substantial responsibility for administering and enforcing the [FECA]." Buckley v. Valeo, 424 U.S. 1, 109, 96 S. Ct. 612, 677-78 (1976). The FEC is authorized to prescribe rules and regulations necessary to carry out the provisions of the FECA. Id. at 110, 96 S. Ct. at 678.

State laws can be preempted by federal laws under three circumstances: 1) Congress can explicitly define the extent to which state law is preempted; 2) if there is no explicit preemption clause, a state law that regulates conduct in a field that Congress intended to be regulated exclusively by federal law is preempted; and 3) state law is preempted to the extent that it actually conflicts with federal law. Myrick v. Frehauf Corp., 13 F.3d 1516, 1519 (11th Cir. 1994), aff'd Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995). In this instance, plaintiffs maintain that the state statute is explicitly

preempted. The FECA's preemption provision provides that "[t]he provisions of this Act. and of rules prescribed under this Act, supersede and preempt any provision of state law with respect to election to Federal office." 2 U.S.C. § 453. Although broad, the FECA preemption provision does not preempt all state regulations which address political campaigns. In fact, a more circumscribed preemption provision is found in the regulations issued by the FEC. The pertinent regulation explains that "Federal law supersedes State law concerning [l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7(b)(3). The FEC provides further guidance by distinguishing between areas preempted by federal law and areas left for state regulation. According to the regulations, the areas left for state regulation include the "1) [m]anner of qualifying as a candidate or political party organization; 2) [d]ates and places of elections; 3) [v]oter registration; 4) [p]rohibition of false registration, voting fraud, theft of ballots, and similar offenses; [and] 5) [c]andidate's personal financial disclosure." 11 C.F.R. § 108.7(b)(c).

Whether section 21-5-35 falls under the domain of these preemption provisions depends upon the area that the statute attempts to regulate. Plaintiffs argue that the statute limits contributions for federal campaigns and is therefore preempted under the FECA and the FEC regulations. Defendants, on the other hand, note that the statute is designed to prevent the appearance of impropriety among Georgia's state politicians. They claim it is more accurately characterized as a voting fraud statute. Pursuant to the FEC regulations, states are free to regulate voting fraud.

Several FEC advisory opinions support plaintiffs' position. One such advisory

opinion analyzes a Washington statute which prevented public officials from retiring election campaign debts during the legislative session. Senator Tim Erwin, Washington State Senate, Op. FEC No. 1992-43 (January 28, 1993). The legislator was a state senator who previously had run for federal office. The FEC explained that "[r]egulation of finance issues such as the receipt of contributions for the payment of Federal campaign debts is at the heart of the sweeping preemptive power granted by Congress." Id. at 3. Similarly, in a situation which closely resembles the facts before this Court, a member of the Wisconsin legislature and a candidate for the United States Senate questioned a Wisconsin statute which prevented him from accepting campaign contributions from lobbyists until a specific date. The FEC issued an advisory opinion explaining that the statute "places restrictions on the time period when contributions may be made to Federal candidates, an area to be regulated solely by federal law." Robert T. Welch, Wisconsin State Representative, Op. FEC No. 1993-25, 2 (January 31, 1994). The FEC also held that a Minnesota statute regulating political contributions by lobbyists to the campaigns of state legislators was preempted by the FECA when applied to federal candidates. Kim Isenberg, Campaign Manager, Linda Berglin for United States Senate, Op. FEC No. 1994-2 (March 15, 1994).

In the FECA, Congress explicitly confers upon the FEC the power "to make, amend, and repeal such rules, . . . as are necessary to carry out the provisions of this Act," 2 U.S.C. § 437(d)(8), and authorizes the commission to issue advisory opinions, 2 U.S.C. § 437(d)(7). Yet, in response to the advisory opinions cited by plaintiffs, defendants maintain that the FEC has overstepped its authority by adopting an overly broad

interpretation of the FECA. The Court, however, reads the FEC regulations as narrowing the broad preemption language found in the FECA. The FECA preemption clause states that the Act preempts any state law "with respect to election to federal office." 2 U.S.C. § 453. The Court finds that, when applied to federal candidates, section 21-5-35 regulates the contributions that candidates may receive when running for federal office. As such, it reasonably falls under the scope of the FECA preemption clause.

Defendants argue further that section 21-5-35 does not limit contributions to federal campaigns; rather, according to defendants, the statute prevents the appearance of impropriety by requiring members of the Georgia Assembly to forego accepting contributions during the legislative session. Members of the Assembly are free to accept contributions when the session ends. The Court, however, notes that the relevant FEC regulation, 11 C.F.R. § 108.7(b)(3), does not state that federal law preempts state law only as to limitations on the *amount* of contributions. The regulation refers to "limitations." A restriction on when a potential candidate may accept contributions is simply another type of limitation. The Court is cognizant that it is not bound by the FEC advisory opinions, but also recognizes that "[j]udicial deference to an agency's interpretation of ambiguous provisions of the statues it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches." Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696, 111 S. Ct. 2524, 2533 (1991).

In further support of their motion, plaintiffs rely on the Eighth Circuit decision in Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993). In Weber, the court held that a Minnesota statute which allowed federal congressional candidates to limit their campaign

expenditures and receive supplemental state funds was preempted explicitly by the FECA. The court found that the Minnesota statute was preempted "under every plausible reading" of the FECA preemption provision.

Similarly, after giving defendants' interpretation of the preemption provisions careful consideration, the Court concludes that plaintiffs present a more plausible interpretation of the FECA. Consequently, plaintiffs have a substantial likelihood of success on the merits, and plaintiffs' motion for a preliminary injunction is GRANTED.[1] Defendants are enjoined from enforcing section 21-5-35, as it relates to federal elections, until further ordered.

It is so ORDERED this 16 day of January, 1996.

Willis B. Hunt, Jr.
Judge, United States District Court

[1] The Court acknowledges that plaintiffs also argue that section 21-5-35 violates the First and Fourteenth Amendments to the United States Constitution. However, because plaintiff is likely to prove successfully at trial that the statute is preempted by federal law, it is not necessary for the Court to consider all arguments presented by the plaintiffs at this time.