RENDERED: NOVEMBER 9, 2000; 10:00 a.m.
TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-001367-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., SPECIAL JUDGE
INDICTMENT NOS. 98-CR-00136-001, 98-CR-00136-002,
98-CR-00136-003 AND 98-CR-00136-004

ANDREW J. "SKIPPER" MARTIN;
DANNY ROSS; LON FIELDS; and
ROBERT WINSTEAD — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON, McANULTY and SCHRODER, Judges.

HUDDLESTON, Judge: The Commonwealth of Kentucky appeals from a Franklin Circuit Court order declaring part of Kentucky's campaign finance law unconstitutional and dismissing indictments against Andrew J. "Skipper" Martin, Danny Ross, Lon Fields and Robert Winstead.

## I. FACTS AND PROCEDURAL HISTORY

The appellees were participants in the 1995 Paul Patton/Steve Henry gubernatorial campaign. The Patton/Henry slate chose to accept public financing pursuant to Kentucky Revised Statute (KRS) 121A.030,[1] which limited the campaign's spending to $1.8 million and prohibited coordination with others to influence the campaign's spending. Martin served as manager of the Patton/Henry campaign. Ross initially worked as labor liaison in then Lieutenant Governor Patton's office, but eventually worked as a political coordinator for Joint Council 94, a group comprised of representatives from various Teamster Union locals. Fields and Winstead — who were the President and Secretary/Treasurer, respectively, of Teamsters Local 89 — were members of Joint Council 94.

Following the successful election of Patton as Governor and Henry as Lieutenant Governor, both the Democratic and Republican Parties filed complaints with the Kentucky Registry of Election Finance, alleging campaign finance law violations. The Attorney General's office began a lengthy investigation, in

---

[1] Ky. Rev. Stat. (KRS) 121A.030 provides, in relevant part, that:

> A qualifying slate of candidates for Governor and Lieutenant Governor that receives transfers from the fund may make campaign expenditures which, in the aggregate, including the expenditure of transfers from the fund, shall not exceed one million eight hundred thousand dollars ($1,800,000) in connection with a primary election campaign and one million eight hundred thousand dollars ($1,800,000) in connection with a regular election campaign, subject to the provisions of KRS 121A.080(4) and (5) . . . .

KRS 121A.030(1) (1995). (The statute was amended in 1996).

conjunction with the Registry of Election Finance, into the activities of the 1995 Patton/Henry campaign. On September 24, 1998, a grand jury handed up indictments charging the appellees with various violations of state campaign finance laws.

The first count of the indictment charges that between June 1, 1995, and December 12, 1995, Martin, Ross, Fields and Winstead committed the offense of knowingly making or receiving a contribution of a thing of value that was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or treasurer of the Patton/Henry slate of candidates, in violation of KRS 121.150(1).[2] The indictment

---

[2] KRS 121.150(1) provides, in relevant part, that:

> No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure," to support inauguration activities or to support or defeat a candidate, a slate of candidates, constitutional amendment, or public question which will appear on the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. As used in this section, "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent. Any person making an "independent expenditure," as defined in this subsection, shall report these expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election, on forms provided by the [Kentucky Registry of Election Finance].

KRS 121.150(1) (1995) (amended 1996 and 1998). One who violates KRS 121.150(1) commits a Class D felony, which carries a penalty of one to five years' imprisonment. KRS 121.990(3) (1995) (amended 1996).

also alleges that they acted in complicity with others, violating KRS 502.020.[3]

Second, the indictments charge that between June 1, 1995, and December 12, 1995, the appellees knowingly made a payment, distribution, loan, advance, deposit or gift of money to another person to contribute to Patton and Henry or anyone on the appellees' behalf or knowingly accepted a contribution made by one who has received a payment, distribution, loan, advance, deposit or gift of money from another to contribute to candidates Patton and Henry or anyone on their behalf, in violation of KRS 121.150(12).[4]

---

[3] KRS 502.020 provides:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
>
> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
>
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or
>
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
>
> (c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

[4] In relevant part, KRS 121.150(12) provides:

> No person shall make a payment, distribution, loan, advance, deposit, or gift of money to another person to contribute to a candidate, committee, contributing organization, nor anyone on their behalf shall accept a contribution made by one (1) person who has received a payment, distribution, loan, advance, deposit or gift of money from another person to contribute to a candidate, committee, contributing
>
> (continued...)

They also allegedly acted in complicity with others in violation of KRS 502.020.

Third, the indictments charge that between June 1, 1995, and March 31, 1996, the appellees knowingly participated in arranging or obtaining a gubernatorial appointive position, thus violating KRS 121.056(1).[5] They also allegedly acted in complicity with others, in violation of KRS 502.020.

Fourth, the indictments charge that between October 1, 1995, and November 7, 1995, Martin and Ross knowingly made or received a contribution of a thing of value that was neither an independent expenditure to support or defeat a candidate nor made to the duly appointed campaign manager or campaign treasurer of the Patton/Henry campaign, in violation of KRS 121.150. They also violated KRS 502.020, it is alleged, by acting in complicity with others.

Finally, the indictments charge that between January 1, 1995, and December 12, 1995, the appellees, with the intention of

---

[4] (...continued)
organization, or anyone on their behalf.

KRS 121.150(12) (1995) (amended 1996 and 1998). A violation of KRS 121.150(12) is a Class D felony, which carries a penalty of one to five years' imprisonment. KRS 121.990(3) (1995) (amended 1996).

[5] KRS 121.056(1) provides:

> No person who contributes more than four thousand dollars ($4,000) to a gubernatorial candidate shall hold any appointive state office or position, which shall be made by gubernatorial appointment, during the term of office following the campaign in which the contribution shall be made.

If convicted of violating KRS 121.056(1), a person can be sentenced to one to five years' imprisonment. KRS 121.990(9)-(12) (1995) (amended 1996).

promoting or facilitating the commission of a crime, agreed that one or more of them would engage in conduct constituting a crime by knowingly making or receiving a contribution of more than $500.00 in any one election to the Patton/Henry campaign after the slate had filed a statement of intent to accept transfers from the Kentucky state election campaign fund and abide by the maximum expenditure limit, which had not been rescinded, in violation of 121A.050(1).[6] In addition, they allegedly conspired to violate the contribution limitations, in violation of KRS 506.040.[7]

---

[6] KRS 121A.050(1) provides, in part:

> A slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded pursuant to KRS 121A.040(4) shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than five hundred dollars ($500) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than five hundred dollars ($500) in any one (1) election to a slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded.

KRS 121A.050(1) (1995) (amended 1996). If convicted of violating this statute, the penalty is one to five years' imprisonment. KRS 121.990(3)-(6) (1995) (amended 1996); KRS 121A.990(1), (3).

[7] KRS 506.040 provides, in relevant part:

> (1) A person having the intention of promoting or facilitating the commission of a crime is guilty of criminal conspiracy when he:
>
> (a) Agrees with one (1) or more persons that at least one (1) of them will engage in conduct constituting that crime or an attempt or solicitation to commit such a crime; or
>
> (b) Agrees to aid one or more persons in the planning or commission of that crime or an attempt or solicitation to commit such a crime.

(continued...)

A discussion of the purported facts is necessary to lay the groundwork for the legal analysis that follows. However, in contrast to most appeals to this Court, neither the circuit court nor a jury has conducted fact finding. In outlining the purported facts, we are relying on the grand jury testimony of numerous witnesses, including the appellees. When these cases proceed to trial, different or additional evidence may be presented. We wish to make it clear that we are not passing judgment on the guilt or innocence of the appellees; rather, we are addressing the merits of their constitutional claims.

According to the Commonwealth, Martin orchestrated efforts to evade the campaign spending limits beginning as early as 1992. At the time, Ross was the labor liaison in then Lieutenant Governor Patton's office. Martin purportedly felt that it was critical for Ross to work on the campaign without using campaign funds to pay Ross.

To pay Ross's salary when he left Lieutenant Governor Patton's office and began working for Joint Council 94, Fields and Winstead obtained half of the funding from the International Brotherhood of Teamsters' Democratic, Republican, Independent Voter Education Committee (IBT D.R.I.V.E.), the national Teamsters' political action committee (PAC). In March 1995, Martin and Winstead traveled to Washington, D.C., to meet with IBT D.R.I.V.E.

---

[7] (...continued)

(2) Except as provided in a specific statute to the contrary, a criminal conspiracy is a:

. . . .

(d) Class A misdemeanor when the object of the conspiratorial agreement is a Class C or D felony[.]

director Bill Hamilton to secure the funding. Martin maintains that the purpose of the meeting was to obtain the Teamsters' endorsement of the Patton/Henry candidacy. After the trip, Hamilton approved the expenditure of $10,000.00 of IBT D.R.I.V.E.'s funds for Ross's salary.

In June 1995, Ross left the Lieutenant Governor's office and began working for Joint Council 94, a group made up of representatives from various Teamster local unions, including Fields and Winstead. Fields and Winstead purportedly proposed that Joint Council 94 employ Ross as a political coordinator. Despite some opposition, Joint Council 94 hired Ross. With his new employer, Ross filled the newly created position of political coordinator for a period of twenty weeks for a salary of $20,000.00. At the end of the campaign, the Teamsters had spent some $61,000.00.

Subsequently, Joint Council 94 assigned Ross to the AFL-CIO, but Ross remained in frequent contact with the campaign. Martin's campaign assistant purportedly returned calls from Ross to Martin. In addition, Ross was the only AFL-CIO coordinator who regularly communicated with the campaign. Ross also allegedly followed orders from Martin while Martin and Alice McDonald were at Patton/Henry headquarters. The campaign also kept in frequent contact with Fields and Winstead. Despite Martin's practice of not taking telephone calls, Martin would speak to Fields when he called. According to telephone records, the Commonwealth claims, there were 134 phone calls from Teamsters Local 89 to the

Lieutenant Governor's Office and Mansion between July and October, 1995. Ross claims that there were only four to six calls.

As part of its campaign effort, the Patton/Henry campaign created a "board of directors," whose membership included union officials. These individuals were privy to campaign strategy and financial information. Martin directed Ross to have Jerry Vincent implement monthly breakfast meetings at which campaign workers ate at no cost. Martin and Ross frequently attended the breakfast meetings, which allowed the campaign and labor unions to exchange information to promote the effective expenditure of funds. Ross, it is claimed, set the agendas for the breakfast meetings, conveyed the campaign's message to the meetings' attendees, and controlled the message relayed via union-funded telephone banks. Martin and Ross also purportedly influenced the telephone banks' location and length of operation.

The Commonwealth contends that Ross's position with the AFL-CIO allowed Martin to influence the organization's spending of funds. In October 1995, Clarence Frost, another of the AFL-CIO's political coordinators, dined with Martin and Ross and their spouses and discussed the AFL-CIO's election plans. During the campaign, the AFL-CIO spent approximately $247,000.00.

In October 1995, the National Council of Senior Citizens contacted Frost, indicating its desire to spend $10,000.00 on pro-Patton radio advertisements. It requested that Frost obtain a script. Frost purportedly contacted Martin, who in turn referred Frost to the campaign's advertising firm. Frost contacted the firm, which drafted two ads. The firm faxed the completed ads to

the Patton/Henry campaign and then to Frost. Frost forwarded the ads to the Council, which spent $8,197.34 running them.

It is also alleged that Martin and Frost orchestrated the spending of Democratic Party funds for a flight involving Richard Trumka, the former president of the United Mine Workers and later secretary-treasurer of the AFL-CIO. Martin purportedly told Steve Earle, the director of the United Mine Workers of America PAC, to beg Trumka to come. On November 5, 1995, two days prior to the election, Trumka participated in a fly-around with Patton. No other candidates participated, and the Commonwealth alleges that the rallies were exclusively in support of Patton. Martin purportedly knew that the campaign should have paid for part of the expense, but the campaign did not count it towards the $1.8 million limitation, in violation of an emergency regulation, 32 Kentucky Administrative Regulation (KAR) 1:150E.

Two days after the election, Ross returned to the Lieutenant Governor's office after resigning his position with the Teamsters. In return for hiring Ross, Winstead and Fields were purportedly rewarded with gubernatorial appointments. Winstead applied for appointment to the Kentucky Occupational Safety & Health Review Commission. Ross personally recommended the appointment, and Winstead received it at a salary of $19,400.00 per year. In March 1996, Fields received a coveted appointment to the Kentucky Racing Commission. Vincent, who did not support Ross's hiring, did not receive an appointment despite the submission of an application.

* * * * *

Following their indictment, the appellees moved to dismiss the indictments on the grounds that (1) they contain irregularities; and (2) KRS 121.056(1), 121.150(1) and 121.150(12) are unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Sections 2, 3, 27 and 28 of the Kentucky Constitution. The circuit court denied the motion on the first ground but granted the motion on the second.

In granting the motion, the circuit court concluded that KRS 121.015(6), 121.015(10) and 121.150(1) are unconstitutional. Relying on Buckley v. Valeo[8] and its progeny, the court noted that the United States Supreme Court has made it clear that the legislative branch should exercise caution to avoid impinging upon individuals' First Amendment right to spend money in support of candidates for public office. Without outlining its analysis in detail, the court concluded that the definitions of "contribution" and "independent expenditure" in KRS 121.015(6) and 121.150(1), respectively, are overbroad. As a result of this conclusion, the court declared all statutes depending on those definitions unconstitutional. The court also concluded that "knowingly," as defined in KRS 121.015(10), is unconstitutionally vague. This appeal followed.

## II. MOOTNESS

On appeal, the Commonwealth avers that the circuit court's conclusion that the statutes are unconstitutional is now moot because the General Assembly amended Kentucky's campaign

[8] 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam).

finance laws in 1996. In support of its position, the Commonwealth cites cases from various jurisdictions. However, the Commonwealth's reliance on these cases is misplaced.

In contrast to the cases cited by the Commonwealth, this case involves people who were indicted for violating Kentucky's campaign finance laws. The cases relied on by the Commonwealth are cases where the parties raised facial challenges to laws before the parties were criminally charged. Regardless of the safe harbor provisions of the law, "[i]t is our sworn duty, to decide such questions when they are before us by applying the constitution."[9] The appellees clearly have standing to challenge the laws because they have been impacted by the laws' application.

As a majority of the United States Supreme Court said in Massachusetts v. Oakes,[10] "a defendant's overbreadth challenge cannot be rendered moot by narrowing the statute after the conduct for which he has been indicted occurred . . . ."[11] In addition, as

---

[9] Rose v. Council for Better Educ., Inc., Ky., 790 S.W.2d 186, 209 (1989). See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60, 73 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[10] 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).

[11] Id. at 585-86, 591 n. 1, 109 S. Ct. at 2639, 2642 n. 1, 105 L. Ed. 2d at 503, 506 n. 1 (Scalia, J., concurring in part and dissenting in part) (Brennan, J., dissenting). See also Bigelow v. Virginia, 421 U.S. 809, 815-16, 95 S. Ct. 2222, 2229, 44 L. Ed. 2d 600, 608 (1975) ("This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'") (quoting Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22, 28 (continued...)

the U.S. Supreme Court explained in Secretary of State of Maryland v. J.H. Munson Co.:[12]

> The requirement that a statute be "substantially overbroad" before it will be struck down on its face is a "standing" question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has not "standing" to allege that, as applied to others, the statute might be unconstitutional.[13]

To avoid exposing the appellees to an ex post facto law, we must consider the pre-1996 version of the law, without contemplating the law's prospective application.[14] We need not consider in this appeal the constitutionality of the law as amended after the indictments of the appellees.

---

[11] (...continued)
(1965)).

[12] 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

[13] Id. at 959, 104 S. Ct. at 2848, 81 L. Ed. 2d at 797 (citing Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439, 460 (1974); United States v. Raines, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529 (1960)).

[14] See Commonwealth v. Foley, Ky., 798 S.W.2d 947, 948-49 (1990) ("The statute must be tested on the basis of what is said rather than what might have been said.") (citing Coates v. Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); Musselman v. Commonwealth, Ky., 705 S.W.2d 476, 478 (1986)).

## III. WHETHER THE DEFINITIONS OF "CONTRIBUTION" AND "INDEPENDENT EXPENDITURE" IN KENTUCKY'S CAMPAIGN FINANCE LAW ARE UNCONSTITUTIONALLY OVERBROAD

The Commonwealth claims that the circuit court erred in considering whether the statutes defining "contribution" and "independent expenditure" are unconstitutionally overbroad. The Commonwealth asserts that the ability of a person to obtain an advisory opinion from the Kentucky Registry of Finance cures any potential facial overbreadth by permitting anyone to request a clarification of the election laws.

### A. AVAILABILITY OF AN ADVISORY OPINION

Under KRS 121.135, an individual can request an advisory opinion from the Kentucky Registry of Finance. Within thirty days of the request, the Registry will issue an opinion.[15] The statute also applies to candidates and requires the Registry to release an advisory opinion within a shorter period of time — twenty days.[16]

In order to provide a safe harbor for recipients of an advisory opinion, the statute provides:

> (a) Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered.
>
> (b) Notwithstanding any other provision of law, any person or committee to whom a written advisory opinion

[15] KRS 121.135(1).

[16] KRS 121.135(2).

> has been rendered who relies upon any provision or finding of the advisory opinion and who acts in good faith in accordance with the provisions and findings of the advisory opinion shall not, as a result of any act with respect to a transaction or activity addressed by the advisory opinion, be subject to any sanction provided by this chapter or any administrative regulation promulgated by the registry.[17]

Relying on this statute, the Commonwealth asserts that the appellees could have obtained an advisory opinion if they were concerned about the legality of their conduct.

While the appellees would have been able to avail themselves of the safe harbor if they had sought an advisory opinion, we believe that the advisory opinion mechanism cannot cure constitutional infirmities.[18] In addition, as the U.S. Supreme Court has recognized:

> [A] defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate

[17] KRS 121.135(4).

[18] Supra n. 9 and accompanying text.

that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[19]

Thus, we must determine if the statutes, as the circuit court concluded, violate any constitutional provision.

B. WHETHER KRS 121.015(6) AND 121.150(1) ARE UNCONSTITUTIONALITY OVERBROAD

Even if we do consider the constitutionality of the statutes, the Commonwealth maintains that we should consider whether the definitions of "contribution" and "independent expenditure" are substantially overbroad before invalidating the statutes. The appellees respond that any statute attempting to regulate independent political activity cannot be upheld unless "it advances a compelling state interest, and is narrowly tailored to serve that interest," quoting Eu v. San Francisco County Democratic Central Committee.[20]

In Colten v. Commonwealth,[21] Kentucky's highest court noted that "[o]verbreadth is claimed to exist in that the statute employs means that stifle or chill the exercise of constitutionally protected freedoms when the end could be more narrowly achieved."[22]

---

[19] Bigelow v. Virginia, 421 U.S. 809, 815, 95 S. Ct. 2222, 2229, 44 L. Ed. 2d 600, 608 (1975) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22, 28 (1965)).

[20] 489 U.S. 214, 222, 109 S. Ct. 1013, 1019, 103 L. Ed. 2d 271, 281 (1989) (internal citations omitted).

[21] Ky., 467 S.W.2d 374 (1971).

[22] Id. at 377 (citing Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); Griswold v. Connecticut, (continued...)

"A challenge to a statute on the basis that it is overbroad is essentially an argument that in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible."[23] As we have noted, "[i]t has been held that if an enactment does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail."[24] In addition, "[b]ecause the overbreadth doctrine allows challenges from one whose own conduct may be clearly unprotected, that doctrine has been used only as a last resort by the federal courts."[25]

The seminal case on the issue of campaign finance and free speech is Buckley v. Valeo.[26] In that case, the U.S. Supreme Court considered a challenge to the constitutionality of the Federal Election Campaign Act. In particular, the Court addressed

---

[22] (...continued)
381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)).

[23] Commonwealth v. Ashcraft, Ky. App., 691 S.W.2d 229, 232 (1985) (citing Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). See also Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 742, 84 L. Ed. 1093, ____ (1940) (A law is facially void if it "does not aim specifically at evils within the allowable area of State control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech . . . .").

[24] Ashcraft, supra, n. 23, at 232 (citing Hoffman Estates, 455 U.S. at 494, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369; New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113, 1129 (1982)).

[25] Id. at 232-33 (Ferber, 458 U.S. at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130).

[26] 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam).

whether the regulation of contributions and independent expenditures violated individuals' and organizations' right to free speech. The Court upheld a federal law that regulated the amount of contributions because it found that "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.'"[27] Regarding contributions, the Court said:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. * * * A limitation on the amount of money a person may give a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by the

---

[27] Id. at 29, 96 S. Ct. at 639, 46 L. Ed. 2d at 692 (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565, 93 S. Ct. 2880, 2890, 37 L. Ed. 2d 796, 809 (1973)). See also Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439, 460 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'") (quoting National Ass'n of Letter Carriers, 413 U.S. at 580-81, 93 S. Ct. at 2898, 37 L. Ed. 2d at 817).

> contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.[28]

In its most recent application of Buckley, the Court considered the constitutionality of state campaign contribution limitations in Nixon v. Shrink Missouri Government PAC.[29] In Nixon, the Court upheld a state's right to adopt "comparable state regulation[s]" pursuant to Buckley.[30]

Applying these principles to this case, we first must consider whether the definition of "contribution" in KRS 121.015 is overbroad. At the time of the alleged acts, KRS 121.015, in relevant part, provided that:

> (6) "Contribution" means any:
>
> (a) Payment, distribution, loan, deposit, or gift of money or other thing of value, to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security

---

[28] Buckley, supra, n. 26, at 20-21, 96 S. Ct. at 635-36, 46 L. Ed. 2d at 688-89.

[29] 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000).

[30] Id. at ___, 120 S. Ct. at 901, 145 L. Ed. 2d at 895.

where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, candidate, slate of candidates, or other primary obligor. No person shall become liable as surety, endorser, or guarantor for any sum in any one (1) election which, when combined with all other contributions the individual makes to a candidate, his agent, a slate of candidates, its agent, a committee, or a contributing organization, exceeds the contribution limits provided in KRS 121A.050 or KRS 121.150;

(b) Payment by any person other than the candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or a contributing organization, of compensation for the personal services of another person which are rendered to a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities;

(c) Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services;

(d) Payment by any person other than a candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities; or

(e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;

(7) Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include:

(a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, committee, or contributing organization; or

(b) A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business[.][31]

[31] KRS 121.015(6)-(7).

In reaching its conclusion that the definition of "contribution" is unconstitutional, the circuit court simply found that the definition did not permit constitutionally protected political activities.

In Hendricks v. Commonwealth,[32] the Kentucky Supreme Court noted that the U.S. Supreme Court has recognized that "almost any law could be applied in such a way as to infringe upon some form of protected speech or conduct" and that "[t]his potential application and extreme application of laws [must be] halted by [] [courts]."[33] Stated a different way, it would be impossible for the General Assembly to draft a statute that would specifically address all circumstances. As a result, it was necessary to use imprecise language.[34] When a law, such as the one in this case, is challenged as being unconstitutional, we must not be led astray to accept unreasonable interpretations of the statutes.

The definition of contribution in this case is consistent with the constitutional standards articulated in Buckley. The law regulates the amount of contributions when the slate of candidates elects to receive public financing, thus requiring the candidates to obtain funding from a greater number of sources. However, the Buckley court specifically sanctioned this type of restriction on

---

[32] Ky., 865 S.W.2d 332 (1993).

[33] Id. at 337 (citing Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

[34] "Because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'" Hill v. Colorado, 530 U.S. ____, ____, 120 S. Ct. 2480, 2498, 147 L. Ed. 2d 597, 622 (2000) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110, 92 St. Ct. 2294, 33 L. Ed. 2d 222 (1972).

free speech. Like the Federal Election Campaign Act at issue in Buckley, the overall effect of the limitation on contributions in Kentucky's law

> is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.[35]

In Nixon, the U.S. Supreme Court noted that states have a legitimate interest in preventing both actual and apparent corruption by regulating campaign contributions.[36]

In addition, an important distinction between this case and Buckley and Nixon is that the 1995 Patton/Henry campaign elected to accept state funding, thereby imposing the contribution limitations upon their campaign; the provisions of the law at issue do not unilaterally apply to all campaigns. Because the appellees have failed to persuade us that the definition of "contribution" is contrary to the Court's holding in Buckley and its progeny, we conclude that KRS 121.015(6) is constitutional.

---

[35] Buckley, 424 U.S. at 22, 96 S. Ct. at 636, 46 L. Ed. 2d at 689.

[36] Nixon, 528 U.S. at ___, 120 S. Ct. at 905, 145 L. Ed. 2d at 900.

Next, we examine the term "independent expenditure" as defined in KRS 121.150(1). The version of the statute in effect in 1995 provided that:

> "[I]ndependent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent.

In Buckley, the Court also addressed legislative efforts to regulate expenditures, saying:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[37]

[37] Buckley, 424 U.S. at 19, 96 S. Ct. at 634-35, 46 L. Ed. 2d at 687-88 (footnote omitted).

The Court concluded that it is within an individual's discretion to determine how much of his or her own money to spend to support his or her candidacy or another person's.[38]

In this case, the definition of "independent expenditure" prohibits the spending of money in, inter alia, an election in which the expenditure was "made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent."[39] From this language, and with the underlying premise of the law in mind — preventing actual and apparent corruption, it is clear that the General Assembly attempted to prohibit the coordination of expenditures with a campaign in order to circumvent the limitations on contributions.[40] As the U.S. Court of Appeals for the Fourth Circuit observed in Adventure Communications, Inc. v.

---

[38] Id. at 18, 96 S. Ct. at 634, 46 L. Ed. 2d at 687 ("[I]t is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication alleged integral to the conduct is itself thought to be harmful.'") (quoting United States v. O'Brien, 391 U.S. 367, 382, 88 S. Ct. 1673, 1682, 20 L. Ed. 2d 672, 683 (1968)).

[39] KRS 121.150(1).

[40] See Buckley, 424 U.S. at 26-27, 96 S. Ct. at 638, 46 L. Ed. 2d at 692. As the Buckley court noted:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of democracy is undermined.

Kentucky Registry of Election Finance,[41] "[d]uring the past decade, the Commonwealth of Kentucky has suffered a number of high-profile political campaign scandals, culminating in the indictment of various public officials and lobbyists. In 1992, in an effort to curb further corruption, Kentucky passed extensive campaign finance reform legislation . . . ."[42]

Kentucky's campaign finance law allows independent expenditures. In defining the term "independent expenditure," the General Assembly has simply outlawed contributions that a contributor alleges are independent expenditures, but which in fact, are not. We are unpersuaded that the definition in KRS 121.150(1) impinges on constitutionally protected activity. Contrary to the appellees' suggestion, the statute does not prohibit individuals or organizations from communicating with a campaign. Rather, in enacting the law, the legislature attempted to prevent circumvention of the restriction on contributions after a slate, like the 1995 Patton/Henry slate, elects to accept state funds for running its campaign.

In concluding that the statutes are constitutional, we are only addressing whether the statutes are constitutional as applied

---

[41] 191 F.3d 429 (4th Cir. 1999).

[42] Id. at 432. To the same effect, see Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 639 (1997). See also Nixon, 528 U.S. at ___, 120 S. Ct. at 905, 145 L. Ed. 2d at 900 ("In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of its that flows from munificent campaign contributions. Even without the authority of Buckley, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes.").

to the appellees. We decline to address whether the statutes would be constitutional in all circumstances because

> [e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.[43]

## IV. WHETHER THE DEFINITION OF THE TERM "KNOWINGLY" IS UNCONSTITUTIONALLY VAGUE

The Commonwealth also asserts that the circuit court erred in concluding that the definition of "knowingly" in KRS 121.015(10) is unconstitutionally vague. The Commonwealth believes that the appellees clearly knew that the statutes applied to their conduct.

[43] Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 2915, 37 L. Ed. 2d 830, 839 (1973)(citations omitted).

A basic legal premise is that "criminal statutes must be sufficiently specific that an individual has fair notice of what conduct is forbidden."[44] Under the void-for-vagueness doctrine, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[45] As we noted in Commonwealth v. Kash:

> To assert a facial challenge to a statute as impermissibly vague, a complainant must show that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. Moreover, the United States Supreme Court has consistently held that a person to whose conduct a statute clearly applies cannot "successfully challenge it for vagueness" as applied to the conduct of others.[46]

In considering whether the statutes are unconstitutionally

---

[44] Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 43 (1997) (citing United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954)).

[45] Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983). See also Foley, 798 S.W.2d at 951; Hardin v. Commonwealth, Ky., 573 S.W.2d 657, 660 (1978); Kash, 967 S.W.2d at 43 (quoting Kolender).

[46] Commonwealth v. Kash, supra, n. 44, at 43 (internal citations omitted).

vague, we must keep basic principles of statutory construction at the forefront. We must carry out the intent of the legislature.[47] In doing so, we must consider "the purpose which the statute is intended to accomplish — the reason and spirit of the statute — the mischief intended to be remedied."[48] We should reject any statutory construction that is "unreasonable, and absurd, in preference for one that is 'reasonable, rational, sensible and intelligent' . . . ."[49] As the Supreme Court noted in Diemer v. Commonwealth, Transportation Cabinet[50] regarding the function of courts:

> It is our responsibility to read the statutes of the General Assembly so as to save their constitutionality whenever such can be done consistent with reason and common sense, although we cannot go so far as to add

---

[47] See Reed v. Greene, Ky., 243 S.W.2d 892, 893 (1951) ("The primary purpose of judicial construction of statutes is to determine the intent and purpose thereof . . . .") (citing City of Mayfield v. Reed, 278 Ky. 5, 127 S.W.2d 847 (1939); Gilbert v. Greene, 185 Ky. 817, 216 S.W. 105 (1919)); Hardin County Fiscal Court v. Hardin County Bd. of Health, Ky. App., 899 S.W.2d 859, 861 (1995) ("The rules of statutory construction require that we construe this statute to carry out the intent of the legislature.") (citing KRS 446.080). See also KRS 446.080(1) ("All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . .").

[48] City of Louisville v. Helman, Ky., 253 S.W.2d 598, 600 (1952) (citations omitted).

[49] Johnson v. Frankfort & Cincinnati R.R., 303 Ky. 256, 197 S.W.2d 432, 434 (1946) (citation omitted).

[50] Ky., 786 S.W.2d 861 (1990), superseded by statute according to Commonwealth, Transp. Cabinet v. Wayfara, Inc., Ky. App., 840 S.W.2d 211 (1992).

> additional words to give constitutionally permissible meaning where none would otherwise exist.[51]

As we noted in Kash, "under the doctrine of in pari materia, statutes having a common purpose or subject matter must be construed together."[52]

We must then apply these basic principles to the statute involved. At the time of the alleged acts, KRS 121.015(10) provided that "'[k]nowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists . . . ."

The appellees focus their argument against the KRS 121.015(10)'s constitutionality on the definition's language of "should have been aware." However, the indictment charges that the appellees knowingly engaged in prohibited acts; it does not state that they "should have been aware." Accordingly, we must only consider whether the definition of "knowingly," as applied to the appellees in these specific circumstances, is constitutional.

The appellees had fair warning that the activities in which they allegedly engaged were illegal. They were experienced political operatives who knew that the Patton/Henry campaign had elected to receive state funding; they were certainly not novices in

---

[51] Id. at 863-64 (internal citations omitted).

[52] Kash, supra, n. 44, at 44 (citing Dieruf v. Louisville & Jefferson County Bd. of Health, 304 Ky. 207, 200 S.W.2d 300, 302 (1947); Hardin County Fiscal Court, 899 S.W.2d at 862).

the political arena. We believe that the appellees could determine, with reasonable certainty, whether their actions were illegal.

From the language of the statute, it is clear that the General Assembly did not intend to create penalties for unintentional violations of the law, thus preventing arbitrary and discriminatory enforcement. As we said in Kash, "the statute encompasses only conduct which is engaged in 'knowingly' . . . ; inadvertence or ignorance will not suffice. This scienter requirement further restricts the range of conduct susceptible to prosecution."[53] The term "knowingly" is found in three sections of the Kentucky Constitution and numerous state statutes, and this term is heavily utilized in Kentucky jurisprudence. Thus, we conclude that the term "knowingly" as defined in KRS 121.015(10) is not unconstitutionally vague.

V. CONCLUSION

Because we have determined that the circuit court erred in concluding that KRS 121.015(6), 121.015(10), and 121.150(1) are unconstitutional, it is unnecessary for us to address the Commonwealth's additional arguments. Accordingly, we reverse the order declaring Kentucky's campaign finance law unconstitutional and dismissing the indictments against the appellees, and we remand this case to Franklin Circuit Court for further proceedings.

SCHRODER, Judge, CONCURS.

McANULTY, Judge, DISSENTS BY SEPARATE OPINION.

---

[53] Kash, supra, n. 44, at 45. See also Hill v. Colorado, supra, n. 33, at ____, 120 S. Ct. at 2495, 147 L. Ed. 2d at 622.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. I disagree with the majority as to the constitutionality of the statutes at issue. I believe the trial court correctly held that the definitions in the statutes are vague and overbroad. Furthermore, I believe they impinge on the First Amendment rights of freedom of speech and freedom of association in a direct and impermissible manner.

The majority opinion discusses the propriety of regulation of campaigns generally, without attention to the operation of the particular provisions in this case. Moreover, the majority refuses to consider possible interpretations of the statute, reasonable or unreasonable, which might result from its "imprecise language." The majority seems only to consider the question answered long ago in Buckley v. Valeo: whether the legislature can regulate expenditures for a political campaign. However, our task in this case is to determine the constitutionality of the manner in which the Kentucky General Assembly has attempted to regulate publically financed campaigns. The contribution and independent expenditure limitations of the Kentucky election statutes at issue concern "an area of the most fundamental First Amendment activities." Buckley v. Valeo, 424 U.S. 1, 14, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659, 685 (1976). A major purpose of the First Amendment was to protect the free discussion of governmental affairs, including the discussions of candidates. Id. Furthermore, the First Amendment protects the right of political association as well as political expression. 424 U.S. at 15, 96 S. Ct. at 632, 46 L. Ed. 2d at 685.

In an effort to control impermissible conduct, the statutes at issue, by operation of the definitions of the key terms in KRS Chapter 121, effectively prohibit conduct which is constitutionally permissible. See Commonwealth v. Ashcraft, Ky. App., 691 S.W.2d 229, 232 (1985). As such, the statutes are overbroad. See id.; Commonwealth v. Foley, Ky., 798 S.W.2d 947, 952 (1990). The statutes do more than address "coordination," as the majority asserts, but also sweep within their scope conduct and communications which constitute protected speech.

Additionally, I believe the statutes do not withstand the test for vagueness set out in Foley, 798 S.W.2d at 951, which is "whether a person disposed to obey the law could determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation." Under the operative definitions of "contribution" and "independent expenditure" in the 1995 Kentucky election statutes, there is a gray area in which the question of whether one's conduct is a violation of the law is anybody's guess. It remains unclear what communication between a campaign and its supporters is permissible and what is prohibited.

The essential problem with the lack of precision is the fact that these are statutes which curtail political speech. The statute at issue here does even more than regulate contribution amounts, as the legislation in Buckley and Nixon did. Instead, the public financing statutes at issue in this case directly limit speech and association. State action which may have the effect of curtailing first amendment freedoms is subject to the closest scrutiny. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-

461, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). "[T]he government may regulate the exercise of the protected right of political associations when it is demonstrated, by the government, that a sufficiently important interest exists and there is employed a narrowly drawn means which avoids unnecessary abridgement of associational rights." Buckley, 424 U.S. at 25, 96 S. Ct. at 638, 46 L. Ed. 2d at 691, cited by Associated Indus. of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947, 952-953 (1995). I believe the Commonwealth has shown that a compelling interest exists in establishing a public financing system, and thereafter ensuring that those who accept public financing and spending limits do not abuse the system by evading the limits. However, these statutes are not the least restrictive means of accomplishing that purpose. In my humble opinion, they impermissibly burden the rights of freedom of expression and of association. As such, they are unconstitutional. I would affirm the order of the court below.

BRIEF FOR APPELLANT:

Albert B. Chandler III
Attorney General

Janet M. Graham
Jennifer L. Carrico
Assistant Attorneys General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Janet M. Graham

JOINT BRIEF FOR APPELLEES:

ANDREW J. MARTIN
William E. Johnson
JOHNSON, JUDY, TRUE & GUARNIERI
Frankfort, Kentucky

DANNY ROSS
Phillip J. Shepherd
Frankfort, Kentucky

Thomas L. Osborne
WHITLOW, ROBERTS, HOUSTON & STRAUB
Paducah, Kentucky

LON FIELDS
Sam Carl
Louisville, Kentucky

ROBERT WINSTEAD
Bart Adams
Louisville, Kentucky

Alton Priddy
HARDY, LOGAN & PRIDDY
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

William E. Johnson
Phillip J. Shepherd