Case No. 02-2559

United States Court of Appeals
for the
Sixth Circuit

HOBART WARD ANDERSON, et al.,

Plaintiffs-Appellants,

- against -

LLOYD E. SPEAR, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF OF *AMICUS CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF SUGGESTION FOR REHEARING *EN BANC*

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Brennan Center is a non-partisan, non-profit organization uniting thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Brennan Center's Democracy Program sponsors a Campaign Finance Reform Project that strives to strike the right balance between the need for candidates and political organizations to be able to communicate effectively with voters and other interests, such as ensuring that elected officials are not unduly influenced by donors and that elections embody the fundamental principle of political equality underlying the Constitution.

PRELIMINARY STATEMENT

To students of election law, reading the panel opinion in this case was like seeing a ghost. Barely one month after the Supreme Court had interred the distinction between "express advocacy" and "issue advocacy"—a distinction the Court called "functionally meaningless"—the panel not only exhumed the distinction but extended it to a context in which it had never previously been used. As the Attorney General's petition explains, the panel thereby opened the door to vote buying and voter intimidation, throwing out the Kentucky legislature's laudable effort to rid the Commonwealth of those twin scourges.

As startling as the panel's treatment of Kentucky's buffer zone statute was, its novel campaign finance holdings may have even more pernicious effects if al-

lowed to stand. The panel flatly contradicted prior circuit precedent, and it created splits of authority with other circuits and state courts on at least two campaign finance issues beyond those addressed by the Attorney General. Considering the many important questions raised by this case, and the many unique conclusions reached by the panel, we respectfully urge the Court to rehear the entire case *en banc*.

Not counting the statement of facts, the discussion of mootness, and the conclusion, the panel opinion contains nine numbered sections, each addressing a significant question of substantive law. Many of these questions are interrelated; for example, Kentucky's ban on post-election contributions and its $50,000 limit on the amount a gubernatorial candidate can lend to his own campaign work in tandem to discourage corruption—including bribery and extortion—and the appearance of corruption. While the panel opinion addresses these two provisions separately, it would be pointless to try to carve out one issue for *en banc* review and leave the other undiscussed. Rather than attempting to disentangle all of the issues in advance by specifying only a subset of the case for rehearing, the prudent course would be for the *en banc* Court to undertake a plenary review of the district court's judgment.

In addition to the issues mentioned by the Attorney General, this brief brings two other matters to the Court's attention.[1] The first is the panel's invalidating the "trigger" provision of Kentucky's public finance system. This provision, which is typical of similar systems around the country, removes the spending limit voluntarily accepted by candidates who participate in the system if a nonparticipating candidate exceeds that limit. Triggers are important because they reassure candidates that if they agree to limit their own expenditures, they will not be played for fools by opponents who opt out. A previous panel of this Court upheld Kentucky's trigger provision; this panel, contradicting the earlier holding, struck it down. The panel also disregarded the contrary decisions of the First and Eighth Circuits, creating a circuit split.

The second issue we raise is the interplay between the limit on candidates' lending to their own campaigns and the ban on post-election fundraising. As two former Kentucky governors demonstrated, and as California's governor has reminded us recently, these provisions prevent public officeholders from soliciting contributions that effectively go straight into their own pockets. If the panel opinion stands, wealthy candidates will be able to "lend" their campaigns unlimited

[1] Since the Court could order rehearing *en banc* even if no party requested it to do so, there is no bar to its considering issues raised by an *amicus* in deciding whether rehearing *en banc* is warranted. Should the Court grant rehearing *en banc*, the Kentucky Registry of Election Finance would presumably resume its defense of the statutes it has temporarily abandoned.

sums and then, when in office, repay themselves by raising money from people with business before the Commonwealth. This gambit skates very close to bribery, and certainly creates at least the appearance that a "pay to play" system is in effect. The Commonwealth has a compelling interest in preventing that appearance, let alone the reality; it is not surprising, therefore, that the panel is alone on the wrong side of a split of authority on this issue as well.

ARGUMENT

I. The Panel Opinion Contradicts Two Other Circuits and a Prior Sixth Circuit Panel and Threatens the Validity of Countless Public Finance Systems Around the Country.

Kentucky, like the federal government and many other states, has a voluntary public funding system in which candidates are encouraged to accept spending limits in exchange for partial public funding of their campaigns. Like many of those other public financing systems, Kentucky's includes a "trigger" provision to assuage participating candidates' fear that nonparticipating candidates will take advantage of the voluntary spending limit by grossly outspending them. Kentucky's trigger eliminates the $1.8 million spending limit for participating gubernatorial candidates and provides them additional matching funds when a nonparticipating candidate raises more than $1.8 million. Ky. Rev. Stat. § 121A.030.

Five years ago, this Court upheld the trigger and rejected a nonparticipating candidate's claim that it impermissibly burdened his First Amendment right to

spend more than $1.8 million in support of his candidacy. *Gable v. Patton*, 142 F.3d 940, 948–49 (6th Cir. 1998). The panel in this case contradicted *Gable*—and every other court that has ruled on similar trigger provisions—by holding that Kentucky's system is unconstitutional insofar as it counts a nonparticipating candidate's own contributions to his campaign towards the $1.8 million trigger. The *en banc* Court should decide which view is correct: that of the *Gable* panel (and every other court to decide the issue) or this panel's.

Gable concluded that the public financing system serves the compelling state interest of preventing corruption and the appearance of corruption and that, while the system creates strong incentives to participate, it does not coerce participation. The trigger provision differs only in degree from other, clearly constitutional, incentives to participate in a public financing system. *Gable* therefore upheld the trigger provision. *Gable*, 142 F.3d at 948–49; *Accord*, *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996).

Disagreeing, the panel in this case ruled that Kentucky could not define a candidate's own disbursement to his campaign as a "contribution" because the trigger provision is activated when a nonparticipating candidate amasses $1.8 million in "contributions." In other words, the panel concluded that the trigger imposed too great a burden on a candidate's right to spend unlimited amounts of his

own money on his campaign. The opinion in *Gable*, however, explicitly recognized that the trigger provision would deter some campaign expenditures and just as clearly rejected the claim that the Constitution prohibits such a disincentive to making unlimited expenditures. "The crux of [Gable's] claim is that the effect of the Trigger is to coerce him into limiting his campaign spending to $1.8 million, thereby forgoing protected speech." *Gable*, 142 F.3d at 947. By upholding the trigger, *Gable* foreclosed the argument raised in this case.

The only possible way to distinguish the question decided in *Gable* from the question presented by this case is to posit a distinction between expenditures from a candidate's private funds and expenditures paid for by contributions from others.[2] That distinction has no support in prior caselaw, with good reason: it cannot be rooted in any plausible theory of the First Amendment. As the law now stands, the government cannot impose mandatory spending limits no matter where the campaign's money comes from. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), struck down mandatory limits on expenditures from candidates' personal wealth,

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[2] Although panel noted that many provisions in Kentucky's campaign finance laws use the word "contribution," the panel cited only the trigger provision as burdening a candidate's First Amendment rights. *See Anderson v. Spear*, 2004 FED App. 0025P, at 26–27 (6th Cir.). The panel opinion cannot be distinguished from *Gable*, therefore, on the ground that it struck down only the statutory definition of "contribution" and left untouched the trigger provision that *Gable* upheld. Such a distinction would be untenable in any event: a definition alone cannot be unconstitutional without reference to the statute's substantive provisions.

id. at 51–54, but it also invalidated overall spending limits for campaigns, *id.* at 54–59. Both types of limitations were struck down in the same section of the Supreme Court's opinion, applying the same reasoning. A trigger provision based on expenditures from a candidate's personal resources can be unconstitutional only if the same restriction on a campaign's expenditures from third-party contributions would be unconstitutional. *Gable*, without reference to the source of funding, held that the trigger provision did not unconstitutionally burden the spending of nonparticipating campaigns. The panel's holding cannot be reconciled with *Gable*.

As noted, both of the other courts of appeals that have considered the constitutionality of trigger provisions have upheld them. *Daggett*, 205 F.3d 445 (1st Cir. 2000); *Rosenstiel*, 101 F.3d 1544 (8th Cir. 1996). Although the Eighth Circuit had previously rejected a trigger provision as applied to independent *third-party* expenditures, *see Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *Rosenstiel* expressly limited *Day* to the context of independent expenditures and upheld a trigger as applied to expenditures by the nonparticipating *candidate* (*Daggett* upheld a trigger as applied to both candidate and independent expenditures). As with the panel's contradicting the decision of a previous Sixth Circuit panel, the rules expressly cite a threatened circuit split as a grounds for *en banc* review. Fed. R. App. P. 35(b)(1).

The panel's unique holding is a matter of great importance for another reason: it calls into question the laws of many jurisdictions around the country, in-

cluding two of the other three states in this circuit. Michigan and Ohio both have public finance systems with trigger provisions. *See* Mich. Comp. Laws § 169.269(8); Ohio Rev. Code § 3517.103(D)(1). While those systems differ from Kentucky's in some respects, so that they might be distinguishable in future litigation, the panel's decision raises serious doubts about their continued vitality. More generally, trigger provisions similar to Kentucky's are a staple of public funding systems. *See, e.g.,* Ariz. Rev. Stat. § 16–952; N.C. Gen. Stat. § 163–278.67. At the very least, the panel opinion, if not vacated, will call into doubt many states' electoral mechanisms just at the outset of a major election year in almost all American jurisdictions.

II. The Panel Opinion Contradicts Unanimous Authority By Tying Kentucky's Hands in Its Fight Against Corruption.

The panel struck down two related provisions of Kentucky's campaign finance law that are essential to preventing corruption and the appearance of corruption. Kentucky law permits gubernatorial candidates to lend up to $50,000 to their campaigns, apart from the completely unlimited amount of outright gifts they may make to their campaigns. A separate provision prevents candidates from soliciting campaign contributions after the election. The panel struck down both provisions. Under the regime the panel imposed on Kentucky's citizens, a candidate can spend as much as he wants on his campaign, call that spending a "loan" to his campaign

committee, and then, after winning, extract contributions that permit the now insolvent committee to repay the loans to the candidate's personal bank account.

When elected officials press state contractors to give them money for their own personal accounts, it is called extortion. When the contractors voluntarily make such gifts in the expectation of receiving state business, it is called bribery. If the panel opinion did not quite legalize extortion and bribery, it certainly imposed a system in which elected officials will receive money that citizens will reasonably perceive as bribes. The panel opinion would also make it more difficult to prosecute genuine bribery by giving perpetrators a convenient and lawful pretext for corrupt payments.

Other states have apparently reached this conclusion, because they have also limited candidates' loans to their committees and banned post-election fundraising. Courts in those states, moreover, have upheld the rules; once again, the panel opinion would leave this Court all alone on one side of a split of authority. The panel opinion rejected the analysis of *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), and *Ferre v. State*, 478 So. 2d 1077 (Fla. Dist. Ct. App. 1985). Only last week, a California court found that Governor Schwarzenegger had violated his state's campaign finance laws by lending millions of dollars to his campaign and then soliciting post-election contributions to repay the debt to himself. The court noted the important state interests in prohibiting the governor's funding

methods, although it does not appear from the opinion that the governor challenged the statutes' constitutionality. *See Camp v. Schwarzenegger*, No. 03AS05478 (Cal. Super. Ct. Sacramento County Jan. 27, 2003), slip op. at 18 (attached hereto as an appendix). Creating a split with the state courts that have considered the issue is a serious step meriting *en banc* review.

No one can dispute the Commonwealth's interest in preventing even the appearance of corruption, let alone the reality. *See, e.g.*, *McConnell v. FEC*, 124 S. Ct. 619, 660 (2003). Nor is Kentucky limited to punishing extortion and bribery after the fact (and then only when it can prove a criminal *mens rea*). As in other jurisdictions, Kentucky law restricts gifts to elected officials and requires officials to report gifts publicly, precisely to prevent corruption from happening in the first place. *See, e.g.*, Ky. Rev. Stat. §§ 6.747, 6.751, 6.787, 11A.045. Under the regime required by the panel, the governor could hold a fundraiser solely to collect $1,000 gifts directly for himself. Even if the fundraiser did not cause actual corruption, the appearance of corruption would be plain.

The panel opinion also invites a "pay to play" system that is completely antithetical to the First Amendment: victims are pressed to contribute to politicians irrespective of whether they support those politicians and their policies. It is bad enough that such pressure can be brought to bear before an election. *See, e.g.,* Brief of Amici Curiae Committee for Economic Development, Warren E. Buffett, Ed-

ward A. Kangas, Jerome Kohlberg, Paul Volcker, and Sixteen Other Business Leaders, *McConnell v. FEC*, No. 02–1674, *available on Lexis at* 2002 U.S. Briefs 1674, at 6–15 (2003) (discussing the pressure business leaders felt to give soft money before the passage of the Bipartisan Campaign Reform Act). However, when the possibility of enhancing an elected official's personal wealth arises, the incentives to give (and to coerce "donations") becomes much stronger.

The loan limit and the ban on post-election contributions work in tandem to combat corruption and the appearance of corruption (as do other provisions the panel invalidated, such as the ban on cash contributions addressed in the Attorney General's petition). The limit on the size of loans candidates may give their committees limits the candidate's personal financial stake in donors' pre-election contributions while still permitting candidates to lend seed money to their campaigns. The ban on post-election fundraising prevents the tremendously corrupting effect of elected officials demanding contributions to pay off campaign debts to themselves along with other obligations incurred by their campaigns. Although each provision is useful on its own, the combination serves to prevent the worst examples of corruption.

The panel opinion is especially troubling because it appears to have struck down Kentucky's campaign finance statutes *on their face*. Even if the provisions were unconstitutional as applied to losing candidates such as the Plaintiff—a dubi-

ous proposition to begin with—their manifest constitutionality when applied to winning candidates should doom any facial challenge. Consider three types of candidate: the winner; a losing candidate who holds another public office; and a losing candidate who is a private citizen. As to the first two categories of candidates, the ban on post-election contributions is clearly constitutional, because public officials are both susceptible to corruption and able to extort "contributions" from people with official business. In practice, those are likely to be the only candidates who can raise meaningful post-election funds. Losing candidates who lack public positions must essentially request gifts out of charity. As a result, the statute is constitutional in the overwhelming majority of the cases where it would apply.

A law should not be struck down on its face unless it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 123 S. Ct. 2191, 2196 (2003) (internal quotation marks omitted). Courts have frequently noted specific circumstances in which a campaign finance provision cannot be applied constitutionally, yet not struck down the law as to its constitutional applications. *See, e.g., FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Styling the analysis as considering whether the law is narrowly tailored does not change the fact that the panel's remedy was far too severe. Whenever a law unconstitutionally restricts speech in some cases, it could be said to be insufficiently tailored because of its failure to exclude those

cases. Where a simple exception for the unconstitutional case would suffice, however, courts should not sweep away the entire statute because of an occasional dubious application.

If this court is wary of reading an exception into a state law, comity and respect for state sovereignty counsel certifying to the Kentucky Supreme Court the question of whether the law can be construed as applying only to winning candidates or candidates who hold other public positions. *See* Ky. R. Civ. P. 76.37. The panel's decision instead to create a vacuum in state law fails to respect adequately the authority of the Commonwealth of Kentucky and its citizens' interest in corruption-free government.

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests the Court to rehear this case *en banc*.

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Respectfully submitted,

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