



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

July 25, 2007

DUPLICATE
OF FILING ON
JUL 25 2007
IN OFFICE OF
CLERK SUPREME COURT

Mr. Thomas F. Simon, Clerk
Supreme Court of Missouri
P.O. Box 150
Jefferson City, Missouri 65102

RE: James Trout v. State of Missouri – SC88476

Mr. Simon:

The Court has asked that the parties, including respondents/cross-appellants Missouri Ethics Commission, its members, and the State (collectively “the State defendants”), address “the issue of the effect of the invalidity of Section 130.032, RSMo. Supp. 2006, on campaign contributions collected in reliance on that section” and answer the question of “whether the effect is retrospective or prospective only.” In the view of the State defendants, the right answer has two parts. First, the pre-January 2007 version of § 130.032 applies retroactively, and contributions received in excess of the limits set there must be refunded. Second, the Court may carve out a narrow exception from that rule for two categories of contributions: those that were made for elections that were already completed before this Court ruled on July 19, 2007, and those made to committees that were terminated before that date.

In the Court’s decisions striking a rule or statute, restoring a preexisting one, then considering how to deal with what happened in the interim, this Court provided a legal construct that can and should be used to answer the question it posed. The Court used a two-step approach, (1) holding that the preexisting rule remained in place despite the temporary but erroneous overlay of the new rule, and thus applying that rule retroactively except as to (2) a narrowly defined group of people (a) who reasonably relied

on the invalid law, and (b) as to whom the harm or injustice of retroactive application outweighs the hardship or injustice to others who would benefit from the retroactive application of the law.

With regard to applying the second step here, the Court must consider the injustice evident in allowing some candidates to retain and use funds raised in excess of the limits while requiring their opponents to attempt to match those funds while living within the limits. The primary tool of all candidates is speech, and their ability to speak is often a function of the funds available to them. In regulating the receipt of funds and consequent ability to speak, competing candidates must be treated equally. Excepting past elections from the refund requirement does that; the candidates are no longer speaking on behalf of their past candidacies. But those who received contributions that could be used in campaigns for future elections must be placed on a level playing field with their competitors.

A. This court has applied changes in the law retroactively absent hardship, unfairness or injustice

This Court has most often addressed retroactive application in the circumstance where a statute is passed, then declared to have been unconstitutional. The Court stated the two-step approach in that context in *State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583 S.W.2d 107, 118 (Mo. banc 1979):

In the past it has been stated that “An unconstitutional statute is no law and confers no rights . . . (citations omitted) . . . This is true from the date of its enactment, and not merely from the date of the decision so branding it.” *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 652, 117 S.W.2d 319, 324 (Mo. banc 1938); *Accord, Norton v. Shelby County*, 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). The modern view, however, rejects this rule to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional, *e. g. Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1972); *Perkins v. Eskridge*, 278 Md. 619, 366 A.2d 21 (Md.1976); *Shreve v. Western Coach Corporation*, 112 Ariz. 215, 540 P.2d 687 (Ariz. banc 1975); *Downs v. Jacobs*, 272 A.2d 706 (Del.1970). We join the view espoused in *Lemon*, *Perkins*, *Shreve*, and *Downs*.

The Court has repeatedly quoted that language, as has the Missouri Court of Appeals. *Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791, 800 (Mo. banc 1996) (quoting *Cardinal Glennon*); *State ex rel. Knipschild v. Bellamy*, 615 S.W.2d 38, 40-41 (Mo. banc 1981) (Welliver, J. dissenting) (same); *Piskorski v. Larice*, 70 S.W.3d 573, 575 (Mo. App. E.D. 2002) (same); *Nike IHM, Inc. v. Zimmerman*, 122 S.W.3d 615, 621 (Mo. App. E.D. 2004)(citing *Piskorski*). Every time, the Court reiterated the “general rule” of retroactivity. And in the event the Court found an exception, it was a very narrow one, given only to those who justifiably relied on the unconstitutional statute and would suffer hardship from being retroactively required to conform to the old law, and never when a prospective-only application would have placed a considerable hardship on or rendered an injustice to others.

The Court has also applied that “modern view” in a largely parallel context: where it is declaring the common law in a way that differs from a past declaration. Most valuable among such cases is *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. banc 1985). There, the Court added some additional substance to the second step. It began, as in *Cardinal Glennon*, by “[r]ecognizing the existence of the general rule of retroactive effect of changes in the law wrought by its decisions.” *Id.* at 722-23. It then followed the *Cardinal Glennon* approach and allowed for an exception to avert “injustice or hardship.” *Id.* at 723. Finally, it addressed the method of analysis to be used in determining the scope of an “injustice or hardship” exception:

[T]he Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. See [Traynor, “Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,” 28 HASTINGS L.J. 533, 561 (1977)].

701 S.W.2d at 724.

The Court thus used a balancing test to determine the scope of any “hardship or injustice” exception to the “general rule” of retroactive application. That test requires the Court to look at the impact of the retrospective or prospective-only application of the restored law not only on those who relied on the invalid version, but also on others. In other words, the Court must look at the results of both options on all those affected by its

choice; it is not enough to say that merely because someone would be adversely affected by retroactive application that person is entitled to an exception.

Applying that balancing test here, the question before the Court is whether considerations of hardship and injustice justify excepting from application of the now-restored § 130.032 contribution limits those who previously took such contributions so as to permit them to retain and use those contributions in campaigns against others who did not.¹

B. Prospective-only application of the now-restored §130.032 would be unjust and unfair to opposing candidates who did not take contributions in excess of the limits but must compete against candidates who did.

Applying the contribution limits to candidates who took over-limit contributions relying on the invalid law has an impact that is adverse to the interests of those candidates. But at this point, there is adequate time for anyone seeking office in 2008 to make up for an adequate portion of the funds that retroactive application requires them to return. It is thus not clear that refunding contributions in excess of the limits can fairly be characterized as a hardship, but even if it is a hardship, it must be weighed against the hardship and injustice to others.

The greater hardship and the injustice of prospective-only application would be imposed on those who, like appellant/cross-respondent Trout, did not accept contributions over the statutorily defined limits (hereinafter "opposing candidates"), but would have to campaign against someone who did. The immediate impact is shown by a real example. One state senate candidate committee reported accepting a contribution of \$40,000. For that candidate's opponent to collect that much under the reinstated limits would require the maximum \$650.00 from more than 60 contributors.

¹ The question is not whether or how to sanction a particular person who is subject to the retroactive rule but who is unable or declines to timely return over-limit contributions. The Missouri Ethics Commission can address the circumstances of individual candidates when deciding whether to refer a matter to a prosecutor for criminal charges (§ 105.961.2), or to pursue its own administrative action (§ 105.961.3).

We do not know, of course, who that opposing candidate will be; most such candidates are, at this stage, unidentifiable. After all, filing for the 2008 elections – the official act that makes one a candidate – does not open for months yet. *See* § 115.349, RSMo. 2000. And many apparent candidates have not yet taken steps that would require them to form and register committees. *See* §§ 130.016, .021, RSMo. 2000. If past practice is a guide, more than half of those who run in 2008 have not yet taken any official action reflecting their candidacies.

There are myriad reasons opposing candidates may not have begun accepting contributions before July 19. The most obvious would be that the person has not decided – or perhaps not even considered – whether to run. Indeed, recruiting for 2008 legislative candidates has probably not reached its climax. Others may have decided to run, but chosen to delay fundraising because of other demands on their time, or because of a strategic choice. Perhaps most problematic are those who cannot legally announce their candidacy, begin to raise funds, or campaign for partisan office without giving up their employment. *See, e.g.*, § 36.150.5, RSMo. 2000; 5 U.S.C. §§ 1502(a)(3), 7323(3).

There are perhaps nearly as many reasons persons who have declared their candidacies or otherwise created and registered committees, have chosen not to pursue over-limit contributions. And presumably there are some who have committees and have pursued such contributions, but who did not accept them before this Court ruled.²

To apply the contribution limits prospectively only, allowing all those who accepted contributions without limits to retain the benefits of those contributions, would severely disadvantage opposing candidates. Indeed, the inability of some opposing candidates to catch up under the reimposed limits would make the Court the effective arbiter of some elections. The primary tool of candidates for public office is speech, and to a large extent their ability to speak is a function of the funds on hand to purchase media time and other forms of advertising. To announce to prospective candidates that they will play on an uneven field – one where another candidate already raised funds in a way foreclosed to the prospective candidate – would be to violate this Court's past insistence that the government not give some candidates

² Acceptance does not necessarily occur immediately upon receipt; the law allows each candidate 10 days to return a contribution and deem it not to have been accepted. § 130.011.13(i)(b).

preferential treatment. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 960 (Mo. 1914) (candidate prohibited from having his name on the ballot more than once because of a fear of crowding out the names of other candidates.). *See also State ex rel. Bonzon v. Weinstein*, 514 S.W.2d 357, 364 (Mo.App. St.L. 1974) (“No candidate expects nor will he receive a perfect election; he can expect a fair and open one in which the electorate may freely express their will.”).

And requiring candidates to refund contributions in order to place them alongside their competitors is not unprecedented. The Commission required similar refunds before where a candidate, State Representative Jake Zimmerman, accepted contributions as a candidate for one office but then changed his object to another office with a lower limit. The Commission ruled that such a candidate must refund the amounts accepted over that lower limit. Missouri Ethics Commission Opinion 06.01.100-1 (copy attached). The Commission’s object was the same one this Court should have: to ensure that all those in a particular race play on the same level field.

C. An extremely limited exception to the general rule of retroactive application may be carved out for those candidates whose election is completed or whose committee has been terminated.

As to just two groups, the compelling need for level playing fields may not outweigh the hardship on those who accepted contributions in excess of the preexisting limits: those whose game is over, and those who have left the field.

First are candidates in elections that occurred before July 19, 2007. Early this year, candidates ran in both primary and general municipal elections. Those candidates – all of them – had the opportunity to accept contributions under the apparently valid new law, and voters chose among them based in part, presumably, on the source or amount of contributions they received and the actions they took using those funds. The municipal elections are over; to require that candidates now come up with the funds necessary to repay contributors would be an obvious and considerable hardship. And to carve out an exception to the retroactivity rule for

candidates who accepted contributions in an election that has already occurred would be neither a hardship nor an injustice for others.³

The second group may largely (and perhaps completely) overlap with the first: those who once formed committees and received contributions, but have terminated those committees as provided by § 130.021.8, RSMo. 2000. Those defunct committees have neither assets that could be used to make refunds nor the authority to accept contributions that could be used to pay refunds.

But anyone with an active committee entitled to expend funds to support a candidate in a future election should not be excepted from the retroactive application of the law, including the obligation to refund amounts they received in excess of the statutory limits. None of those candidates or prospective candidates have filed or otherwise qualified for office. All of them still have considerable time in which to recover from the changes that this Court requires in their campaign strategies, including funding strategies. To permit them to retain the benefits of their past actions, now held to have been unlawful, might well raise a constitutional equal protection problem.

Despite the Commission's ability to take up individual cases (*see* note 1, *supra*), the Court should not leave any but the most truly exceptional cases to be addressed by the Commission. Otherwise some, perhaps many, cases could end up back in the courts – and do so closer to the elections, when there is insufficient time for the candidates to account for the resolution of their disputes. The Court should model its answer to the question it posed on its Supplemental Opinion in *Cardinal Glennon*. To draw a bright line that places competing candidates on a level playing field is the best, or perhaps the only way to promote “order rather than chaos” in our efforts to implement “fair and honest” elections. *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974), cited in *Libertarian Party v. Bond*, 764 F.2d 538, 540 (8th

³ Any exception should apply only to funds available for use during campaigns for the 2007 election, and not to funds that a candidate receives after that election that are available for use in the next election cycle. A new cycle begins immediately after each election day, though the life of the old one may be extended in a limited fashion through the use of a debt service committee pursuant to § 130.037. Because having a debt service committee for a past election does not disadvantage an opposing candidate, contributions to such committees fit within the scope of the past election exception, insofar as they occurred before July 19, 2007.

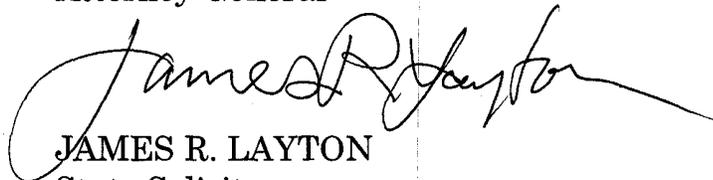
Cir.1985); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 90 (Mo.App. W.D. 1993) (Fenner, J. dissenting).

CONCLUSION

The Court's holding ensures that the pre-January 2007 version of § 130.032 applies prospectively to every candidate and committee as of July 19, 2007. For the reasons stated above, it must also apply retroactively, requiring refunds, except as to contributions accepted before elections already completed, or to debt service committees for such elections, and contributions accepted by committees that were terminated.

Sincerely,

JEREMIAH W. (Jay) NIXON
Attorney General



JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
Phone: (573) 751-1800
Facsimile: (573) 751-0774

ALANA BARRAGAN-SCOTT
Assistant Attorney General
Missouri Bar No.38104
207 West High Street
Jefferson City, MO 65101
Phone: (573) 751-3321
Facsimile: (573) 751-0774

Enclosure

C: Robert Hess
Jane E. Dueker
Gretchen Garrison
Charles W. Hatfield
Luann Madsen



MEC
OPINION NO.

01-06-100--1

STATE OF MISSOURI
MISSOURI ETHICS COMMISSION
P. O. BOX 1254
JEFFERSON CITY, MISSOURI 65102

573/751-2020
1-800/392-8660

January 23, 2006

At the January 19, 2006 meeting of the Missouri Ethics Commission, your request for an opinion was discussed. The following is the Commission's response to your question:

If a candidate amends the statement of committee organization to change the office sought and the contribution limits for the first office were higher than the contribution limits for the second office, can the committee keep all contributions given for the first office?

The action of changing office sought subjects an individual to the contribution limits for the new office sought. In this case it subjects you to lower contribution limits. Contributions received above the limits for State Representative must be returned.

Sincerely,

R.F. Connor
Executive Director

RFC;jh

NOTICE

Anyone examining this advisory opinion should be careful to note that an opinion of the Missouri Ethics Commission deals only with the specific request to which the opinion responded and only as to the law as it existed at the date of the response and cannot be relied upon for any other purpose or in any other manner.