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HENRY MCMASTER
ATTORNEY GENERAL

August 24, 2006

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have expressed concern about an issue that was recently brought to your attention and one which you state "has immediate ramifications for the parties involved including a letter ordering them to cease and desist ...." You note that you are requesting an expedited opinion and that "answers to this request may affect any legislative efforts that are needed during the next session." By way of background, you state the following:

> I have been informed that the facts surrounding this issue concern whether or not a group of candidates may jointly seek donations. I understand that a request would be sent for a donation for a number of candidates and that any donations received would be equally distributed amongst or equally spent on the candidates subject to the maximum donations allowed per candidate from a donor. However, the State Ethics Commission has informed the group that joint efforts, except under limited circumstances, are not allowed and that they must cease and desist from further fundraising in this manner. I believe that this pronouncement came after an earlier letter in which the Ethics Commission's director prescribed a process for this type of fundraising.
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> I am aware of no statutory prohibition to the manner of fundraising that is being contemplated here. The donor would send in an amount that could not exceed the statutory contribution limits and then distribute the money to each candidate equally or spend it for the equal benefit of each candidate. The most analogous example would be joint events in which someone would purchase a ticket with the receipts divided among the candidates involved. I believe that this method has and is permitted by the State Ethics Commission.
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> The seminal issue is whether the State Ethics Commission absent a statutory prohibition against a particular activity has the power to proscribe that action. In this

Request Letter

case, the issue is whether joint fundraising for a slate of candidates is allowed. I am concerned whether an executive agency can either attempt to divine the purpose of an act or fill in the blanks to prohibit actions not expressly proscribed. If the State Ethics Commission is using its interpretation in the absence of express statutory direction to proscribe conduct then it appears such action would be a separation of powers problem because their interpretations would evolve the Ethics Commission from their executive function of enforcing the law to a legislative one of making the law. Such a change in role by the Ethics Commission is contrary to our state constitution. I also am unaware of any provision that would purport to grant to the Ethics Commission plenary power concerning the Ethics laws in this state. However, if there is any provision that gives them interpretative power to restrict actions not proscribed by our Ethics law, I would request an opinion of whether that provision is constitutional since it appears it would be an unlawful delegation of legislative power to make law.

It is a long-standing rule of constitutional interpretation that any defect in the laws of this state must be remedied by the legislature. The executive branch's function is clearly limited to execute the laws of this state. That power certainly should be limited to as written since any attempt to divine the intent of the legislature where there is an absence of express language would be in essence granting the State Ethics Commission de facto law making ability.

Because these issues raised by the State Ethics Commission could hinder the ongoing fundraising efforts of several candidates in this year's election or else subject them to discipline and because there is a genuine issue of whether the General Assembly has spoken on the subject, I am writing to request an expedited opinion from your office on the following questions:

1. Is there any law that would prohibit a group of candidates from jointly seeking campaign contributions subject to the campaign limits and disclosure requirements of the Ethics Act?

2. Can the State Ethics Commission, absent express language, prohibit such joint fundraising?

3. Would an attempt by the State Ethics Commission to prohibit an activity not expressly prohibited by the Ethics Act be an intrusion of the province of the legislature and as such a separation of powers violation?

4. Would any law or regulation that expands the power of the State Ethics Commission to proscribe conduct not expressly prohibited by the state's Ethics laws be an unconstitutional delegation of legislative power?

Since these questions are very important to the individuals involved and your clarification will be of assistance to me as a member of the General Assembly in deciding what types of legislative initiatives may be needed in this area, I would respectfully request that they be answered as soon as possible. Thank you for your prompt attention to this matter.

Facts

We have also been provided copies of several letters authored by Mr. Herbert R. Hayden, Jr. Executive Director of the State Ethics Commission, as well as a copy of Ethics Commission Advisory Opinion 2002-011 (March 20, 2002). In a letter dated August 11, 2006, Mr. Hayden addressed the subject of "joint fundraisers" by the "A Team," consisting of Republican candidates for the Charleston School Board. In this letter, Mr. Hayden concluded that, with regard to the "A-Team Committee and the five associated candidates," the State Ethics Act requires that "[a]ny ongoing solicitation must be conducted by each individual candidate. The joint fund raising committee, made up of the candidates, is allowed to hold joint fund raising events, and no later than ten (10) days after paying the expenses of the event, may divide the remaining proceeds among the candidates." Mr. Hayden cites Advisory Opinion 2002-011 (March 20, 2002) of the State Ethics Commission in support of his August 11, 2006 letter. His analysis is that the "A Team" is not following the guidelines provided in Opinion No. 2002-011. Elaborating further, Mr. Hayden wrote in that letter that

> [o]ur review of the committee's disclosure report indicates that the committee is not complying with this opinion. By conducting an on-going solicitation of contributions and by maintaining funds in the committee's account the committee is acting as a non-candidate committee and is therefore limited to making no more [than a] $1,000 contribution to each candidate.
>
> To resolve this issue the committee must immediately distribute the remaining funds equally among the five candidates and cease any ongoing solicitation or acceptance of contributions. An amended campaign disclosure report must be filed no later than August 25, 2006 by the committee and each candidate. Any further solicitation of contributions by the committee must be done at a joint fundraising event in compliance with AO 2002-011.

Mr. Hayden had sent an earlier letter to Senator Arthur Ravenel, Jr., regarding the "A Team" on April 4, 2006. In that letter, Mr. Hayden agreed that the "A Team Committee "would qualify as a joint fundraising committee." Mr. Hayden further stated:

> [t]he committee is the fundraising arm for the five candidates and not an independent committee. The guidelines established in AO 2002-011 must be followed to ensure compliance. The main points to remember are: (1) The maximum

amount any contributor may give is $1,000 per candidate; (2) The contributions must be deposited into the committee bank account and then divided among the candidates, either as monetary contributions by check to the candidates or by in-kind expenditures on behalf of the candidates, such as in joint advertising; (3) All advertising must clearly state all candidates names; (4) Each candidate must disclose their share of the contributions and/or in-kind contributions/expenditures on their campaign disclosure forms; (5) The committee must disclose the name and address of each contributor and each expenditure on the enclosed committee disclosure form.

We have also received a letter, dated August 15, 2006, from Mr. Sam Howell, Esquire, regarding this situation. In his letter, Mr. Howell states his legal concerns regarding the Ethics Commission's August 11, 2006 letter as follows:

> [i]n particular, the letter of August 11, 2006, states that the guidelines provided in Advisory Opinion 2002-011 are not being followed. Advisory Opinion 2002-011 concludes that "[c]andidates may participate in **joint fund-raisers** as long as they comply with the guidelines establishing a joint committee, requiring separate bank accounts, providing for the establishment of a formula for distribution of the proceeds, setting limits on contributions and providing for the distributions of proceeds within ten days."
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> When it promulgated Advisory Opinion 2002-011, the State Ethics Commission (the "Commission") correctly acknowledged that "the Ethics Act does not address procedures for holding **joint fund raising events**." The Commission wisely filled that gap by promulgating the guidelines for joint fund-raising events set forth in Advisory Opinion 2002-011. Because of the status of the State Ethics Act **in 2002**, the Commission narrowly tailored its guidelines to single, joint fund-raising events. Those guidelines for joint fund-raising events are, however, inapplicable to the committee's continual fund-raising activities and expenditures.
>
> By its express terms, Advisory Opinion 2002-011 does not address the on-going fund raising and expenditure activities of the committee. Unlike the fact situation in the Advisory Opinion, the committee is engaged in continuous fund raising and expenditure activities as described in Mr Hayden's letter of April 4, 2006. Although the conditions set forth in that letter have been complied with by the committee, the additional suggestion that the committee must disburse all funds within ten days of their receipt and disband are beyond the requirements of the State Ethics Act.
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> As Mr Hayden correctly acknowledged in his letter of April 4, 2006, the committee is "not an independent committee." In other words, it is not a "noncandidate committee" within the meaning of the State Ethics Act. It is, in fact,

a joint candidate committee. This characterisation ... is consistent with the committee's activities. The committee is maintained, controlled, and directed by the five candidates that it supports. In all respects under the State Ethics Act, it is a candidate committee. And there are no prohibitions against joint candidate committees in the State Ethics Act. Each candidate of the committee is required to separately comply with the State Ethics Act reporting requirements, including the candidate's participation in the joint candidate committee. There are certainly no intentions by the members of The "A" Team to circumvent either the candidate committee reporting and disclose requirements of the State Ethics Act or the limitation of $1000 per contributor per candidate.

To the extent that Advisory Opinion 2002-011 purports to limit the activities of a joint candidate committee, it is in conflict with amendments to the State Ethics Act enacted by the General Assembly in 2003. After promulgation of Advisory Opinion 2002-011 in March, 2002 by the Commission, the Legislature amended the State Ethics Act by Act No. 76 of 2003. Section 43 of Act No. 76 of 2003 amended Section 8-13-1340 of the State Ethics Act by adding subsection (E) as follows:

> (E) The provisions of subsection (A) do not apply to a committee directly or indirectly established, financed, maintained or controlled by a candidate or public official if the candidate or public official directly or indirectly establishes, finances, maintains, or controls only one committee **in addition to** any committee formed by the candidate or public official to **solely** promote his own candidacy and one legislative caucus committee.

This amendment provides that candidates can maintain two committees. In other words, a candidate can have a committee dedicated "solely" (the word used in the statute) to his candidacy, and a second committee that, among other aspects, could be a joint candidate committee, such as the committee formed and maintained by The "A" Team candidates.

Like any candidate committee, contributions to a joint candidate committee are contributions to each of the candidates and are subject to the campaign contribution limits and reporting requirements of the State Ethics Act as outlined in Mr Hayden's letter of April 4, 2006 and Section 8-13-1314(A)(1)(b).

Limitations on joint candidate committees were specifically rejected by the General Assembly in the 2003 amendments to the State Ethics Act. Prior to the 2003 amendments, the Commission had ruled in SEC AO 099-004, in accordance with Section 8-13-1316 (as it provided prior to the 2003 amendments), that there were

limitations on the expenditure of contributions for multi-candidate promotional expenditures. By expressly repealing the limitations on multi-candidate expenditures, the General Assembly rejected the notion of limitations on multi-candidate contributions, functions, committees, or expenditures.

It is our position that The "A" Team committee is a joint candidate committee. The State Ethics Act does not prohibit joint candidate committees. To the contrary, we believe the General Assembly has expressly acknowledged joint or multi-candidate fundraising, expenditures, committees, and other activities.

Law / Analysis

In responding to your questions, we must examine the Ethics, Government Accountability, and Campaign Reform Act of 1991, codified at S.C. Code Ann. Section 8-13-100 *et seq.* Of course, primary jurisdiction for interpretation of the Act is bestowed upon the State Ethics Commission, pursuant to § 8-13-320(11) [Commission to "issue, upon request from persons covered by this chapter, and publish advisory opinions on the requirements of this chapter, based upon real or hypothetical sets of circumstances ...."]. Thus, this Office typically defers to the Commission's interpretation of the Ethics Act. *See, e.g. Op. S.C. Atty. Gen.*, November 2, 2005. However, where the issue of the Ethics Commission's authority or constitutional questions are involved, we have opined as to such questions. See, *Op. S.C. Atty. Gen.*, June 24, 2003 [Ethics Commission lacks authority to decide questions of constitutional law].

Section 8-13-1300(6) defines a "committee" as "an association, club, an organization, or group of persons which, to influence the outcome of an elective office, receives contributions, or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle." A "committee" is deemed to include "a party committee, a legislative caucus committee, a noncandidate committee, or a committee that is not a campaign committee for a candidate, but that is original for the purpose of influencing an election." The term "Influence the outcome of an elective office" is defined in § 8-13-1300(31) as a variety of activities including "expressly advocating the election or defeat of a clearly identified candidate ...," or communicating campaign slogans or words which, taken in context, have no other reasonable meaning than urging the election or defeat of a candidate, or "any communication made, not more than forty-five days before an election which promotes or supports a candidate or attacks or opposes a candidate ...." Section 8-13-1314 sets dollar limits for contributions to candidates for statewide offices, as well as other offices. And, § 8-13-1340(A) forbids a candidate or public official from making a contribution to another candidate or independent expenditures on behalf of another candidate or public official from the candidate's or public official's campaign account or through a committee, except in certain circumstances. As noted above, subsection (E) provides an exception to (A)'s prohibition, if the candidate or public official directly or indirectly establishes, maintains or controls "only one committee in addition to any committee formed by the candidate or public official to solely promote his own candidacy ...."

With respect to interpretation of the Ethics Act, several principles of statutory construction are pertinent to your inquiry. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

In addition, we note that the State Ethics Act is a penal statute, attaching criminal penalties to any violation thereof. *See*, § 8-13-1520. Penal statutes are generally strictly construed against the State and in favor of the defendant. *State v. Hill*, 361 S.C. 297, 305, 604 S.E.2d 696, 700 (2004). Further, our Supreme Court has recognized that statutes are to be given a constitutional construction whenever possible. *State v. Peake*, 353 S.C. 499, 579 S.E.2d 297 (2003).

Further, in an opinion, dated June 24, 2003, we commented upon the authority of the State Ethics Commission as an administrative agency. There, we quoted from *S.C. Tax Comm. v. S.C. Tax Bd. of Review*, 278 S.C. 556, 559, 299 S.E.2d 489, 491 (1983) with respect to the limited powers of an executive agency such as the Ethics Commission:

> "[a]n administrative agency has only such powers as have been conferred on it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers nor has it any discretion as to the recognition of or obedience to a statute. Quoting, 2 Am.Jur.2d *Adm. Law*, § 188, p. 21.
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> Moreover, it has also been stated that the power to make laws is a legislative power and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the effect of legislation or otherwise. Similarly, the power to alter or repeal laws resides only in the General Assembly and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the Legislature. 16 C.J.S., *Constitutional Law*, § 217. An administrative officer may apply only the policy declared in the statutes with respect to the matter with which he purports to act and he may not set different standards or change the policy. 73 C.J.S., *Public Administrative Law and Procedures*, § 32.

As our Supreme Court recognized in *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 423 S.E.2d 101, an administrative agency must act in conformity with and not in excess of statutory and

constitutional authority. The Legislature may not delegate its power to make laws. *Id.* Moreover, even though an administrative agency possesses power to promulgate regulations, it may not add to or detract from the statutory law. *Brooks v. State Bd. of Funeral Services*, 271 S.C. 457, 247 S.E.2d 820 (1978). Such board "possesses only those powers that are conferred expressly or by reasonable necessary implication, or merely incidental to the powers expressly granted." *Id.*, 247 S.E.2d at 822.

The powers and duties of the State Ethics Commission are generally set forth in § 8-13-320. Pursuant thereto, of relevance here are the following:

> ... (11) to issue, upon request from persons covered by this chapter, and publish advisory opinions *on the requirements of this chapter*, based on real or hypothetical sets of circumstances; provided, that an opinion rendered by the commission, until amended or revoked, is binding on the commission in any subsequent charges concerning the person who requested the opinion and who acted in reliance on it in good faith unless material facts were omitted or misstated by the person in the request for the opinion. Advisory opinions must be in writing and are considered rendered when approved by five or more commission members subscribing to the advisory opinion. Advisory opinions must be made available to the public unless the commission, by majority vote of the total membership of the commission, requires an opinion to remain confidential. However, the identities of the parties involved must be withheld upon request;
>
> (12) to promulgate and publish rules and regulations to carry out the *provisions of this chapter*. Provided, that with respect to complaints, investigations, and hearings the rights of due process as expressed in the Rules Governing the Practice of Law must be followed;

(emphasis added). In each instance, as the Act states, the Commission's authority to issue "advisory opinions" and promulgate "regulations" must be based upon the text of the Ethics Act itself. And, even if such authority includes the making of "policy" beyond the terms of the Ethics Act, that authority cannot, consistent with separation of powers, be delegated by the General Assembly. *Gilstrap, supra.*

In its Advisory Opinion AO 2002-0011 (March 20, 2002), the Ethics Commission stated that "[a]lthough not specifically addressed in the Ethics Reform Act, the Commission issues the following joint fund raising guidelines." The Commission further acknowledged that it was "mindful that the Ethics Reform Act does not address procedures for holding joint fund raising events." No statute regulating joint fundraising was identified. The Advisory Opinion stated that "the State Ethics Commission hereby *establishes as policy* the following ... ."

As we stated recently in *Op. S.C. Atty. Gen.*, April 3, 2006,

> [t]he administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. It is the statute, not the agency which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare ....

In this instance, the Ethics Act does not address continuing, joint fundraising activities. We are unable to locate any prohibition in the Act upon candidates who wish to run as a team from conducting such ongoing joint fundraising activities. Inasmuch as no express or specific provision of the Ethics Act proscribes such joint fundraising, the law will not permit such a limitation to be implied. Any prohibition thereof may be imposed only by the General Assembly. Accordingly, while we agree that the campaign limits and disclosure requirements should be followed in joint fundraising activities, the Ethics Commission's requirement that "[a]ny ongoing solicitation must be conducted by each individual candidate" is not based upon any specific prohibition or requirement of the Ethics Act. Absent any such specific prohibition, such activity must be deemed permitted. *See*, *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991) [where criminal statute which does not proscribe certain activity, such activity is permitted].

Furthermore, important First Amendment considerations are involved here. In *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), the United States Supreme Court recently concluded that limitations or restrictions on both campaign expenditures and political contributions "implicate fundamental First Amendment interests." (Quoting *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).). While *Buckley* upheld the particular restrictions upon campaign contributions involved there, ($1,000 limit) in *Randall*, the Court declared the limitation as too restrictive and violative of the First Amendment. See also, *Legacy Alliance v. Condon*, 76 F.Supp.2d 674 (D.S.C. 1999) [applies close scrutiny analysis to limitations upon contributions. Speech does not lose its First Amendment protection simply because of the source involved. *First Nat. Bank v. Bellotti*, 435 U.S. 765 (1977). As *Buckley* had noted, contribution limitations are permissible as long as the Government demonstrates that the limitations are "closely drawn" to promote a "sufficiently important interest." 424 U.S. at 25.

In *Randall*, the Supreme Court concluded that contribution limits established by the Vermont legislature

> ... are sufficiently low as to generate suspicion that they are not closely drawn. The Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate (with significantly lower limits for contributions to candidates for State Senate and House of Representatives .... These limits apply both to contributions from political parties,

> whether made in cash or in expenditures coordinated (or presumed to be coordinated) with the candidate.

126 S.Ct. at 2492-93.

In addition, the plurality opinion in *Randall* addressed the right of political association which was deemed to be infringed by the Vermont legislation which required that "political parties abide by *exactly* the same law contribution limits that apply to other contributors ...." *Id.* at 2496. These restrictions would "severely limit the ability of a party to assist its candidates' campaign by engaging in coordinated spending on advertising, *candidate events*, voter lists, mass mailings, even yard signs." *Id.* at 2497 (emphasis added). In the view of the plurality, "... the Act would severely inhibit *collective political activity* by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate." *Id.* (emphasis added). Thus, the Act's contribution limits "'would reduce the voice of political parties' in Vermont to a 'whisper.'" *Id.* at 2498.

In concurrence, Justices Thomas and Scalia added their view that "this Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights." *Id.* at 2502. These Justices "would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny ...." *Id.*

Moreover, in *Weld for Governor v. Director of the Office of Campaign and Political Finance*, 556 N.E.2d 21 (Mass. 1990) the Massachusetts Court concluded that the First Amendment requires any doubt regarding a prohibition upon candidates running as a "team" and making joint expenditures for the purchase of campaign buttons, bumper stickers and signs bearing the names of both candidates, to be resolved in favor of the law permitting such joint activity. In *Weld*, the candidates for Governor and Lt. Governor

> ... publicly announced their candidacies ..., endorsed each other's candidacy, and announced they intended to run together as a "team" in the primary election and, if nominated, in the general election.

The two candidates proposed to make "joint purchases of campaign buttons, bumper stickers, and signs bearing candidates' names." 556 N.E.2d at 22. Cost of the campaign would be "split evenly between them, and ... each [candidate's] committee would pay one half of the cost by separate check." *Id.* The Court noted that "[t]he primary issue presented is ... whether the joint expenditures by the committees for the purchase of campaign buttons, bumper stickers, and signs being the names of Weld and Cellucci constitute prohibited 'contributions' ...." Massachusetts law prohibited the "'transfer of money or anything of value between political committees.'" Thus, it was contended that "unless the party which incurs the expenses does so wholly independently, the expense constitutes a prohibited 'contribution.'" *Id.* at 24. The Office of Campaign Finance concluded that such joint

expenditures by the candidates was a violation of the provision against one candidate contributing to another and was thus prohibited.

However, in the Court's view, "because a violation of G.L. c. 55, § 6 can be punished as a crime," the statutory scheme governing campaign finance would necessarily be interpreted "with regard to the settled principle that criminal statutes are to be narrowly construed." *Id.* at 24. Moreover, the Court determined that the statutes must be construed with the protections of the First Amendment in mind. Accordingly, the Court concluded as follows:

> [w]e find nothing in the language of G.L. c. 55 which indicates that the Legislature intended to prohibit joint candidacies in primary elections for Governor and Lieutenant Governor. *Were that in fact the legislative objective, we would expect to see much more specific language to that effect in view of the fact that our Constitution not only permits but requires that each party's candidates for Governor and Lieutenant Governor run as a "ticket" in the* general election. See art. 86 of the Amendments to the Massachusetts Constitution. Thus, the interpretation of § 6 advocated by the defendants could require us to read that statute differently in the context of a primary election than in the context of a general election. While this could be done, it leads to a somewhat strained application of the law, particularly if art. 86 is *considered expressive of a policy that is not antithetical to what the plaintiffs have done.*
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> *Finally, we note that a statutory ban on joint candidacies in primary elections would be of dubious constitutionality.* The United States Supreme Court has observed that the First Amendment rights of speech and association have their "fullest and most urgent application precisely to the conduct of campaigns for political office," *Buckley v. Valeo, supra* at 15, 96 S.Ct. at 632, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971), and that "[f]ree discussion about candidates for public office is no less critical before a primary than before a general election." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1020, 103 L.Ed.2d 271 (1989). *"When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected* expression." *Brown v. Hartlage*, 456 U.S. 45, 53-54, 102 S.Ct. 1523, 1529, 71 L.Ed.2d 732 (1982). See *Commonwealth v. Dennis*, 368 Mass. 92, 99, 329 N.E.2d 706 (1975). *A prohibition of joint candidacies of this type would burden both candidates' rights of free speech, see Buckley v. Valeo, supra* 424 U.S. at 19, 96 S.Ct. at 634-35 (restrictions on political communication during a campaign "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"), and of free association, see *Eu v. San Francisco*

> *County Democratic Central Comm., supra* 109 S.Ct. at 1021 ("imposing limitations 'on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association' "), quoting *Citizens Against Rent Control/Coalition For Fair Hous. v. Berkeley*, 454 U.S. 290, 296, 102 S.Ct. 434, 437, 70 L.Ed.2d 492 (1981).
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> It is problematic that the State interest in preventing corruption or the appearance of corruption, the only interest so far held to be sufficiently compelling to justify First Amendment burdens of the type described above, see *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 1396-1397, 108 L.Ed.2d 652 (1990), would apply to the facts in this case, where the source of the equal transfers for the highest elective offices in the State is a cocandidate rather than an unrelated outside entity with potentially diverging economic interests. Cf. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224, 107 S.Ct. 544, 553-54, 93 L.Ed.2d 514 (1986) (State may enact laws to "prevent the disruption of the political parties from without" but not laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates"); L. Tribe, American Constitutional Law 1143 (2d ed. 1988) (reasoning that expenditures from a candidate's own personal funds pose less of a corruption danger than outside contributions because a candidate "could hardly be suspected of bribing herself"). *In the absence of express statutory language on point, we are reluctant to attribute to the Legislature an intent to enact a provision of doubtful constitutionality*, see *Baird v. Attorney Gen.*, 371 Mass. 741, 745, 360 N.E.2d 288 (1977); *First Nat'l Bank v. Attorney Gen.*, 362 Mass. 570, 577-578, 290 N.E.2d 526 (1972); id. at 595, 596, 290 N.E.2d 526 (Quirico, J., concurring in the result), and we are also reluctant to give deference to an agency to construct an interpretation of a statute so as to ban activity bespeaking no appearance of corruption.

556 N.E.2d at 25-26 (emphasis added). See also, *Friends of Gov. Tom Kean v. N.J. Election Law Enf. Comm.*, 497 A.2d 555 (N.J. 1985) [First Amendment prohibits allocation of advertising costs to gubernatorial candidate when local office candidates advocate Governor's election without Governor's cooperation on prior consent].

Moreover, in *Winborne v. Easley*, 523 S.E.2d 149 (N.C. 1999), the North Carolina Court of Appeals declared invalid a provision which prohibits independent political committees from soliciting contributions on behalf of candidates for the General Assembly. The prohibition encompassed solicitation by members of or candidates for the General Assembly from lobbyists while the General Assembly was in session. There, a "limited contributee" was defined as a "political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly." However, Defendant argued that a "legislative candidate would be closely allied with his or her political committee, thus preventing it from being independent," and, therefore, the restriction was valid. However, the Court of Appeals

disagreed, referencing cases such as *Buckley v. Valeo, supra* and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). In the Court's view, the "statute prohibits political committees for the candidates, *in addition to the candidates themselves*," from soliciting contributions. 523 S.E.2d at 154. Such a restriction, concluded the Court, "was not narrowly drawn to serve the compelling governmental interest of preventing corruption or the appearance of corruption while the General Assembly is in session and therefor constituted an impermissible restriction on political speech." *Id.*

Finally, in *Op. S.C. Atty. Gen.*, March 7, 1996, we concluded that proposed legislation prohibiting a political party or any person or entity acting on behalf of a political party were prohibited from soliciting or accepting contributions for school board members was of questionable constitutionality. There, we cited a number of decisions, including *Buckley v. Valeo, supra, Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, and *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), as well as *Eu v. S. F. Cty. Dem. Central Comm.* 489 U.S. 214 (1989) and numerous other decisions. While we noted that "the State has an important interest in keeping politics out of nonpartisan offices such as that of school trustee to the extent possible," we also were of the view that "the State 'may not suppress free speech' in the process."

Conclusion

As we have recognized in previous opinions, an administrative agency, such as the State Ethics Commission, possesses no authority to alter by means of construction or interpretation those laws enacted by the General Assembly. The Commission may not modify legislative policy as set forth in the governing statutes. *Op. S.C. Atty. Gen.* June 24, 2003. As we stated in that June 24, 2003 opinion, "... the power to make laws is a legislative power and [the Ethics Commission or its officers may not exercise such power] ... either my means of rules, regulations or orders having the effect of legislation or otherwise." Under the constitutional requirements of separation of powers, only the General Assembly may make the law or alter it.

In this instance, the Ethics Act does not address or comment upon ongoing joint fundraising activities by a group of candidates. We are unable to locate any prohibition in the Act upon candidates who wish to run as a team from conducting joint fundraising activities on a continuing basis. If the Legislature had intended to prohibit or severely restrict such joint fundraising efforts, surely it would have said so expressly. Inasmuch as no express or specific provision of the Ethics Act proscribes such ongoing joint fundraising, the law will not permit such a limitation to be implied. Any prohibition thereof may be imposed only by the General Assembly. Accordingly, while we agree that the campaign limits and disclosure requirements should be followed in such joint fundraising activities, the Ethics Commission's requirement that "[a]ny ongoing solicitation must be conducted by each individual candidate" is not addressed by any specific prohibition or requirement of the Ethics Act. Absent any such specific prohibition, such activity must be deemed permitted. *See, State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991) [where criminal statute does not proscribe certain activity, such activity is permitted].

Indeed, if anything, § 8-13-1340(E) appears on its face to recognize the legality of ongoing joint fundraising activity. Such provision, enacted in 2003, as an exception to one candidate contributing to another, (and, of course, not yet in existence when AO 2002-011 was issued) provides that there may be a candidate – controlled committee "in addition to any committee formed by the candidate or public official to *solely* promote his own candidacy." (emphasis added). Such language, which uses the term "solely" in one instance, and omits it elsewhere, certainly suggests that a "joint" fundraising committee is statutorily authorized, particularly in view of the fact that subsection (E) is an exception to subsection (A)'s prohibition of one candidate contributing to another. See, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Moreover, at the same time, in 2003, the Legislature repealed limitations on multi-candidate expenditures. Thus, a court could conclude that these provisions impliedly *authorize* joint fundraising efforts by a group of candidates. Accordingly, in our opinion, the Ethics Commission is not empowered to curtail activity which the Legislature has not prohibited.

In addition, there are here important First Amendment considerations which require all doubt to be resolved in favor of ongoing joint fundraising efforts by a group of candidates. As the Massachusetts Court concluded in the *Weld* case, absent an express prohibition upon joint campaign activity, as well as a prohibition which is "narrowly drawn," the First Amendment requires that all doubt be resolved against the existence of such prohibition. Thus, the *Weld* Court held that such activity is legal. See also *Randall v. Sorrell, supra*. While in *Buckley v. Valeo, supra* the Supreme Court recognized a distinction for First Amendment purposes between limits upon campaign expenditures and those involving contributions, the Court also emphasized that the First Amendment protects the right to contribute to candidates as part of one's expressive and associational activity. See, *Winborne v. Easley, supra*. This protection was also affirmed in *Randall v. Sorrell* where the Court struck down the Vermont contribution limits as too restrictive. In this instance, if the reporting and disclosure provisions of the Ethics Act are followed, there can be little danger of campaign contributions' corrupting influence where co-candidates for the school board simply choose to run and raise funds as a team. *See* also *Ex Parte Curtis*, 106 U.S. 371 (1882) (Bradley, J. dissenting) [Federal statute unconstitutional under First Amendment because "deny[ing] to a man the privilege of associating and making joint contributions with such other citizens as he may choose is an unjust restraint of his right to propagate and promote his views on public affairs."]; *Lautenberg v. Kelly*, 654 A.2d 510 (N.J. 1994) [statute prohibiting Senator's name being in same column on primary ballot as other party candidates endorsed by party committee violates First Amendment]. Therefore, First Amendment implications weigh heavily in any determination of whether joint fundraising activities by a group of candidates wishing to run as a team is legally permitted.

We recognize that school boards are generally non-partisan in nature, an important State interest to be sure. However, as we stressed in *Op. S.C. Atty. Gen.*, March 7, 1996, the interest of the State in preserving non-partisanship in school board elections may not be sufficient to outweigh First Amendment interests in certain situations (prohibition upon political party's financial involvement in school board elections is of doubtful constitutionality). Here, we are unaware of any express prohibition upon a group of candidates for school board from jointly seeking campaign

contributions subject to the campaign limits and disclosure requirements of the Ethics Act. Thus, we must apply the legal maxim, "that which is not prohibited is permitted." *Witt v. Realist, Inc.*, 118 N.W.2d 85 (Wis. 1962). Accordingly, absent such express prohibition, and in view of the penal nature of the Ethics Act, as well as the First Amendment's protection of joint activity, it is our opinion that such activity is legally permitted.

Very truly yours,

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