

Eighth Circuit Vindicates Free Speech Rights in Arkansas Campaign Contribution Case

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The U.S. Court of Appeals for the Eighth Circuit vindicated free speech rights by enjoining enforcement of an Arkansas statute that prohibits making campaign contributions more than two years before an election. Judge David Stras, joined by Judges Michael Melloy and Jane Kelly, held on behalf of the unanimous panel that Arkansas' "blackout period" likely violated the First Amendment.

Under Arkansas law, an individual may donate up to \$2,700 to a candidate in a primary election, and up to \$2,700 to a candidate in the general election. However, a candidate may only accept contributions within two years of an election. And Arkansas made clear in its representations to the court that it deems both accepting and making contributions outside that two-year period a prosecutable offense.

The plaintiff in the case, Peggy Jones, is a political activist who wanted to donate to candidates for the 2022 election cycle but was prevented from doing so by the Arkansas statute. Jones believed that the prohibition violated her First Amendment rights of speech and association. She sought a preliminarily injunction. The district court held that Jones was likely to win on the merits of her First Amendment claim and preliminarily enjoined Arkansas from enforcing the statute against her.

The Eighth Circuit affirmed. The court began with the premise that when an individual contributes money to a candidate, she exercises her First Amendment right to participate in the public debate through political expression and political association. Although the Eighth Circuit recognized that the government may restrict that right to prevent quid pro quo corruption or its appearance, the court found

Authors

Carol A. Laham
Partner
202.719.7301
claham@wiley.law
Jeremy J. Broggi
Partner
202.719.3747
jbroggi@wiley.law

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that “Arkansas ha[d] not shown that contributions made more than two years before an election present a greater risk of actual or apparent quid pro quo corruption than those made later.”

The Eighth Circuit’s analysis is notable for two reasons. First, the decision correctly recognized that the U.S. Supreme Court’s decision in *McCutcheon v. FEC*, 572 U.S. 185 (2014), effectively tightened the First Amendment level of scrutiny applicable to limits on campaign contributions. The Eighth Circuit relied on *McCutcheon* to justify a rigorous examination of the Arkansas statute. And the court expressly rejected Arkansas’ argument that *McCutcheon*’s approach to “exacting” or “closely drawn” scrutiny was not binding because it was articulated by a plurality. The Eighth Circuit’s rejection of that argument is important because, as D.C. Circuit Judge Katsas recently pointed out, “the [*McCutcheon*] plurality sought to minimize the differences between strict and closely drawn scrutiny” and to apply the higher standard to laws limiting campaign speech. See *Libertarian Nat’l Comm., Inc. v. FEC*, 924 F.3d 533, 559 (D.C. Cir. 2019) (Katsas, J., joined by Henderson, J., concurring in part and dissenting in part).

Second, the Eighth Circuit properly held Arkansas to its First Amendment burden. The court repeatedly faulted Arkansas for failing to produce evidence that its statutory blackout period had any actual effect on preventing quid pro quo corruption or its appearance. That is important because although the Supreme Court has long made clear that the burden is on *governments* to justify any restrictions they place on fundamental rights, too often lower courts confuse that burden and force *citizens* to prove that a law is unjustified. See, e.g., *Hatfield v. Barr*, 925 F.3d 950, 952 (7th Cir. 2019) (faulting plaintiff for failing to produce “data” or “any study” that would disprove a restriction’s effectiveness in advancing the federal government’s interests). By keeping the burden on Arkansas, where it belonged, the Eighth Circuit properly recognized that the First Amendment is a limitation on government, not a grant of government power.

The case is *Jones v. Jegley*, 947 F.3d 1100 (8th Cir. 2020).