TIM GRIFFIN
ATTORNEY GENERAL

Opinion No. 2023-022

July 31, 2023

The Honorable David Ray
State Representative
137 Summit Valley Circle
Maumelle, Arkansas 72113-6096

Dear Representative Ray:

I am writing in response to your request for my opinion on the constitutionality of House Rule 108 and Senate Rule 6.0(2). Each rule prohibits legislators from accepting a campaign contribution 30 days before a legislative session, during the legislative session, and 30 days after the session. You ask whether these rules violate the state or federal constitution.

RESPONSE

Yes, both rules are unconstitutional under the First Amendment—a conclusion reached by nearly every court that has considered such contribution restrictions. In addition, the rules are likely preempted by the Federal Election Campaign Act for any candidate running for a federal position.[1]

DISCUSSION

Consistent with several courts and scholars, I will refer to the period of time within which these rules prohibit legislators from accepting campaign contributions as the "blackout period."

1. The rules' history. The blackout periods in House Rule 108 and Senate Rule 6.0(2) are substantively identical to an initiated act from the late 1990s that a federal district court considered unconstitutional. Initiated Act 1 of 1996, which was codified at A.C.A. § 7-6-203(g), was part of a broader effort to change Arkansas's campaign-finance law.[2] Between two federal court decisions, nearly all of Act 1 of 1996 was held to violate the First Amendment and declared unconstitutional.[3] Like the two rules you ask about, Act 1 banned Arkansas's constitutional officers and members of the General Assembly from accepting contributions or promises of

[1] Senate Rule 6.0(2) applies to elections for all federal positions except United States Representative. ARK. S., S. ETHICS, 94 Sess., at 3 (2023).

[2] *Ark. Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 542 (W.D. Ark. 1998).

[3] *See Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998); *Butler*, 29 F. Supp. 2d 540.

contributions for 30 days before any regular, extended, or special session until 30 days after the session.[4]

Opponents of Initiated Act 1 of 1996 challenged the constitutionality of multiple provisions of the act in federal court.[5] In that case, the plaintiffs argued that the blackout period infringed on their right to political speech and association, which are fundamental rights protected by the First Amendment.[6] The court agreed and held that the blackout period was unconstitutional.[7] A few years later, after the General Assembly repealed A.C.A. § 7-6-203(g),[8] the House of Representatives passed Rule 108, and the Senate passed Rule 6.0(2). As they pertain to members of the General Assembly, both rules are essentially identical to the statute the federal court declared unconstitutional. And nearly every court to consider such blackout periods has declared them to be unconstitutional.[9]

2. Constitutional standard. The rights to political speech and political association are core freedoms protected by the First Amendment.[10] Contributions to political campaigns are protected as both political speech *and* political association: Contributions are general expressions of support for candidates, but also, through those contributions, contributors join with others to advance their shared political beliefs.[11] Because of this protection, when state action restricts political contributions, that action is subject to strict scrutiny, which means the action is presumptively

[4] A.C.A. § 7-6-203(g) (repealed 2001).

[5] *Butler*, 29 F. Supp. 2d at 542.

[6] *Id.*

[7] *Id.* at 553.

[8] Act 1839 of 2001, § 2.

[9] **Alaska**: *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 629 (Alaska 1999); **Arkansas**: *Butler*, 29 F. Supp. at 553; **Missouri**: *Shrink Mo. Gov't PAC v. Maupin*, 922 F. Supp. 1413, 1424 (E.D. Mo. 1996); **Florida**: *State v. Dodd*, 561 So. 2d 263, 265–66 (Fla. 1990). Courts have also held bans of other blackout periods unconstitutional. **Alaska**: *Alaska Civil Liberties Union*, 978 P.2d at 629 (holding a nine month pre-election contribution ban to be unconstitutional because there was no evidence of corruption); **Arkansas**: *Jones v. Jegley*, 947 F.3d 1100, 1105–06 (8th Cir. 2020) (holding a ban on contributions two years before an election to be unconstitutional because the ban did not advance anti-corruption aims); **Tennessee**: *Emison v. Catalano*, 951 F. Supp. 714, 722–23 (E.D. Tenn. 1996) (holding that a ban on contributions to nonincumbents during legislative session was unconstitutional because the court found that nonincumbents are not subject to quid pro quo corruption like incumbents); **Texas**: *Zimmerman v. City of Austin*, 881 F.3d 378, 391–93 (5th Cir. 2018) (holding that a ban on contributions during the six months before an election was unconstitutional because the ban did not prevent actual corruption or its appearance). But the Fourth Circuit upheld a ban on contributions by lobbyists and political committees during the legislative session. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714–17 (4th Cir. 1999). And the Alaska Supreme Court upheld a ban on contributions during the 60 days after a legislative session. *Alaska Civil Liberties Union*, 978 P.2d at 630.

[10] *McCutcheon v. Fed. Election Com'n*, 572 U.S. 185, 203 (2014).

[11] *Id.*

unconstitutional and will be upheld only if it is "narrowly tailored to serve a compelling state interest."[12]

There is no question that these rules restrict political contributions. And every court that has considered blackout periods agrees that, in principle, states have a sufficient interest in preventing quid pro quo corruption or the appearance of corruption.[13] Therefore, the only remaining question about the rules' constitutionality is whether they are narrowly tailored to achieve those interests.

3. Narrow tailoring. The reason nearly every court to consider blackout periods has declared them unconstitutional is because they are not narrowly tailored to achieve the government interests of preventing quid pro quo corruption or its appearance. These courts have determined that blackout periods are flawed in two main ways. First, they are overinclusive because (1) they prohibit both large and small contributions, even though courts have held that small contributions do not present a danger of corruption or its appearance;[14] and (2) they prohibit legislators from personally donating to their campaigns during the blackout period, even though those types of contributions would not be influenced by corruption.[15] Second, the blackout periods are also underinclusive because they target contributions only when they are near or during a legislative session. Courts have held these bans fail "to recognize the reality that corruption can occur anytime, even outside the banned time period."[16]

The house and senate rules at issue are fatally flawed in that they too are both overinclusive and underinclusive, and are, therefore, unconstitutional because they are not narrowly tailored to avoid corruption or its appearance. Therefore, a federal court would almost certainly declare the rules to be unconstitutional.

4. Federal preemption. Finally, the rules are likely preempted by the Federal Election Campaign Act (FECA)[17] to the extent they apply to candidates running for federal positions. The FECA

[12] *Butler*, 29 F. Supp. 2d at 551.

[13] *McCutcheon*, 572 U.S. at 206–09; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010); *Jones*, 947 F.3d at 1105; *Bartlett*, 168 F.3d at 715; *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998) (internal quotations and citations omitted); *Emison*, 951 F. Supp. at 723; *Maupin*, 922 F. Supp. at 1420; *Alaska Civil Liberties Union*, 978 P.2d at 631 (internal quotations and citations omitted). But there are often evidentiary disputes over whether such corruption or its appearance existed before the blackout period was enacted. *See Jones*, 947 F.3d at 1105 (Arkansas failed to show that contributions made more than two years before an election pose a greater risk of actual or apparent quid pro quo corruption); *Butler*, 29 F. Supp. at 551 (Arkansas failed to show that actual corruption had occurred from incumbents receiving contributions during the legislative session); *Maupin*, 922 F. Supp. at 1420 (Missouri failed to show that corruption had occurred from contributions during the legislative session); *Alaska Civil Liberties Union*, 978 P.2d at 629 (Alaska failed to show that contributions made prior to an election or during the legislative session posed a greater risk of corruption).

[14] *Butler*, 29 F. Supp. 2d at 552.

[15] *Maupin*, 922 F. Supp. at 1422.

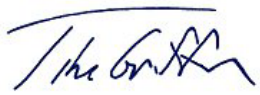
[16] *Maupin*, 922 F. Supp. at 1422; *see Butler*, 29 F. Supp. 2d at 552; *see also Dodd*, 561 So. 2d at 265–66.

[17] 52 U.S.C. § 30101 et seq.

provides that its provisions and rules "supersede and preempt any provisions of state law with respect to election to Federal office."[18]

Assistant Attorney General Jodie Keener prepared this opinion, which I hereby approve.

Sincerely,



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[18] 52 U.S.C. § 30143; *see Teper v. Miller*, 82 F.3d 989, 999 (11th Cir. 1996) (holding that the FECA preempted a Georgia blackout period as to candidates for federal elections).