WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2001-02
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Campaigns & Elections (AC-CE)

File Naming Example:

Record of Comm. Proceedings ... RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

Published Documents

- *Committee Hearings ... CH* (Public Hearing Announcements)
- **

- *Committee Reports ... CR*
- **

- *Executive Sessions ... ES*
- **

- *Record of Comm. Proceedings ... RCP*
- **

Information Collected For Or Against Proposal

- *Appointments ... Appt*
- **

- *Clearinghouse Rules ... CRule*

**

- *Hearing Records ... HR* (bills and resolutions)
- **01hr_ab0018_AC-CE_pt02**

- *Miscellaneous ... Misc*
- **

Assembly Republican Majority
Bill Summary

Date: March 6, 2001

AB 18: Campaign Issue Ads

BACKGROUND

Under current law, a campaign disbursement or obligation that is not made or incurred by a candidate or a political organization must be reported to the Elections Board if the purpose of the disbursement or obligation is to expressly advocate the election or defeat of a candidate. Current law imposes a registration and reporting requirement on those individuals or entities making such contributions or disbursements for "political purposes."

SUMMARY OF AB 18 (AS AMMENDED BY COMMITTEE)

Assembly Bill 18 imposes registration and reporting requirements on any individual or organization that promotes a communication depicting the name or likeness of a candidate, specifies the office to be filled, or a political party 60 days prior to an election. Assembly Bill 18 also places the same restrictions on in-state and out-of-state individuals or organizations.

Assembly Bill 18 provides that a communication only including the name of a political party will not be considered a communication made for a political purpose. It also provides that no individual or organization required to register under the campaign finance law may accept any contribution made by a committee or group that does not maintain an office or street address in Wisconsin at the time the contribution is made, unless that committee or group is registered with the Federal Elections Commission under federal law.

Assembly Bill 18 defines "telephone bank operator" as someone who places or directs the placement of 50 or more substantially identical telephone calls to individuals.

The proposal creates a staff position with the Elections Board and provides for administrative expenses for enforcing this bill. This bill increases funding for the Elections Board by $67,400 for each fiscal year of the 2001-03 biennium.

Assembly Bill 18 applies the same restrictions on labor organizations as corporations and cooperative associations. Labor organizations would be prohibited from making contributions or disbursements for political purposes, other than to promote or defeat a referendum. Such organizations may establish and administer a separate segregated fund and solicit contributions for that fund.

Also, Assembly Bill 18 would replace the criminal penalties with civil penalties for violating this provision. If any person, group, or corporation makes an unlawful contribution or disbursement, they would be required to forfeit not more than 3 times the amount or value of the contribution, disbursement, or incurred obligation.

AMENDMENTS

Assembly Amendment 1 to Assembly Bill 18 provides that a communication only including the name of a political party will not be considered a communication made for a political purpose [Passed 6-1-1 (Rep. Grothman voting no, Rep. Colon excused.)]

Assembly Amendment 2 to Assembly Bill 18 provides that no individual or organization required to register under the campaign finance law may accept any contribution made by a committee or group that does not maintain an office or street address in Wisconsin at the time the contribution is made, unless that committee or group is registered with the Federal Elections Commission under federal law. [Passed 7-0-1, (Rep. Colon excused.)]]

Assembly Amendment 3 to Assembly Bill 18 defines "telephone bank operator" as someone who places or directs the placement of 50 or more substantially identical telephone calls to individuals. [Passed 7-0-1, (Rep. Colon excused.)]

Assembly Amendment 4 to Assembly Bill 18 creates a staff position with the Elections Board and provides for administrative expenses for enforcing this bill. This amendment increases funding for the Elections Board by $67,400 for each fiscal year of the 2001-03 biennium. [Passed 5-2-1, (Rep. Gundrum and McCormick voting no, Rep. Colon excused.)]

Assembly Amendment 5 to Assembly Bill 18 applies the same restrictions on labor organizations as corporations and cooperative associations. Labor organizations would be prohibited from making contributions or disbursements for political purposes, other than to promote or defeat a referendum. Such organizations may establish and administer a separate segregated fund and solicit contributions for that fund. [Passed 5-2-1, (Rep. Hebl and Staskunas voting no,Rep. Colon excused.)]

Assembly Amendment 6 to Assembly Bill 18 would replace the criminal penalties with civil penalties for violating this provision. If any person, group, or corporation makes an unlawful contribution or disbursement, they would be required to forfeit not more than 3 times the amount or value of the contribution, disbursement, or incurred obligation. [Passed 4-3-1, (Rep. Gundrum, Grothman, and Starzyk voting no, Rep. Colon excused.)]

Assembly Amendment 7 to Assembly Bill 18 eliminates primary elections from coverage under this bill. [Failed 2-5-1, (Rep. Gundrum, McCormick, Grothman, Montgomery, and Starzyk voting no,Rep. Colon excused.)]

FISCAL EFFECT

No fiscal estimate is needed for Assembly Bill 18. Assembly Amendment 4 would require $67,400 for a staff position and administrative support for the Elections Board..

PROS

1. Supporters of Assembly Bill 18 contend this bill will regulate thousands of special interest dollars from influencing the outcome of elections in Wisconsin.

CONS

1. Assembly Bill 18 prohibits legitimate issue ads with its blanket regulation on almost any advertisements within 60 days of "an election."

2. Assembly Bill 18 regulates speech for almost 120 days of an election year (almost 1/3 of a year) as the bill applies to actions taken 60 days prior to an election, which includes both primary and general elections.

3. Assembly Bill 18 regulates certain interest groups while giving others free reign in campaign-related activities.

SUPPORTERS

Jay Heck, Common Cause In Wisconsin; Sen. Judith Robson; Mike McCabe, Wisconsin Democracy Campaign; Nancy Nusbaum, Brown County Executive; and Jennifer Sunstrom, Wisconsin Counties Association.

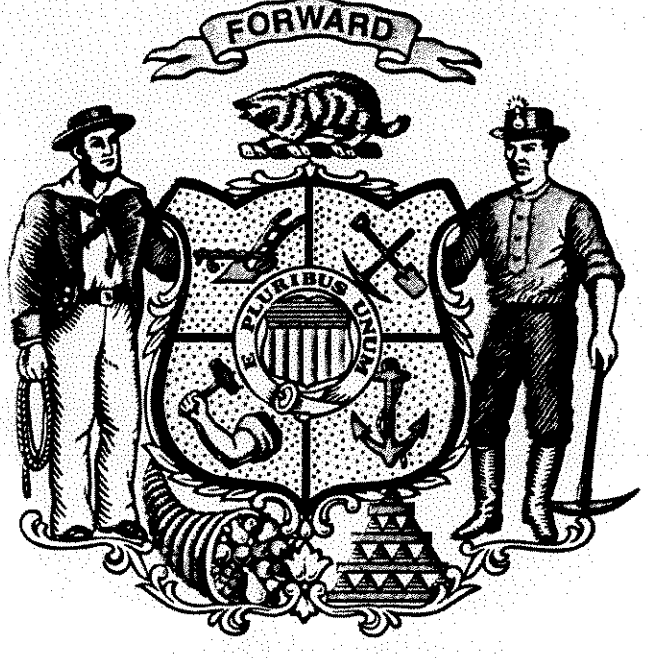
OPPOSITION

Joe Murray, Wisconsin Realtors Association; Brady Williamson, Wisconsin Realtors Association; Susan Armacost, Wisconsin Right to Life; and James Buchen, Wisconsin Manufacturers and Commerce.

HISTORY

A public hearing was held on Assembly Bill 18 on February 20, 2001. On February 22, 2001, the Assembly Judiciary Committee voted 0-7-1 in favor of passage of AB 18 [(Rep. Gundrum, McCormick, Grothman, Montgomery, Starzyk, Hebl, and Staskunas voting no, Rep. Colon excused.)]The Assembly Judiciary Committee voted 5-2-1 to recommend indefinite postponement of AB 18 [(Rep. Hebl and Staskunas voting no, Rep. Colon excused.)]

CONTACT: Jolene Rose Churchill, Office of Rep. Mark Gundrum


FORWARD
E PLURIBUS UNUM

Richard, Rob
From: Pirlot, R.J.
Sent: Tuesday, March 06, 2001 8:24 AM
To: Freese, Steve; Gundrum, Mark; Griffiths, Terri; Churchill, Jolene

I'm forwarding you a substitute amendment to SB 2. Upon adoption of this sub, SB 2 should be identical to AB 18, as amended by the Assembly Committee on Campaigns on Elections. Please take a look at it.

R.J. PIRLOT
POLICY DIRECTOR AND LEGAL COUNSEL
OFFICE OF ASSEMBLY SPEAKER SCOTT R. JENSEN

DIRECT: 608-261-9482
FAX: 608-266-5123

-----Original Message-----
From: **Smith, Irma**
Sent: Tuesday, March 06, 2001 8:19 AM
To: Pirlot, R.J.
Subject: Here is the draft you requested. Thank you, Irma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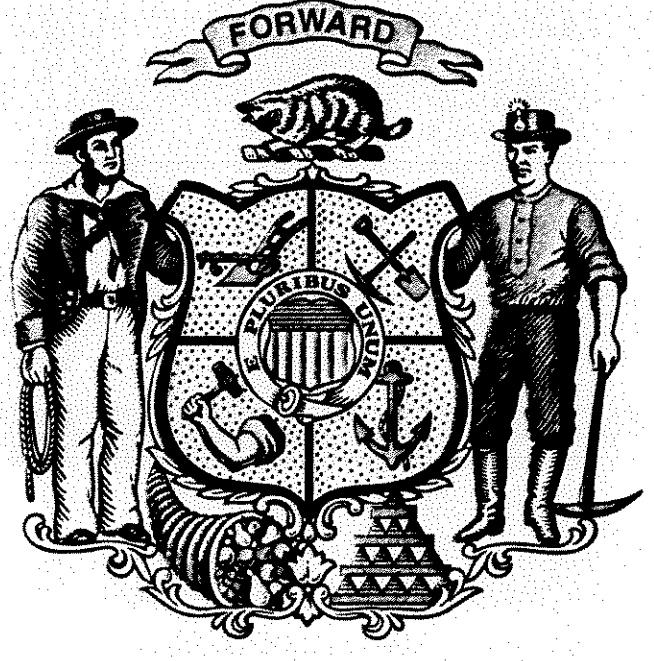
01s0057/1dn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E PLURIBUS UNUM

Richard, Rob
From: Pirlot, R.J.
Sent: Tuesday, March 06, 2001 8:34 AM
To: Freese, Steve; Gundrum, Mark; Griffiths, Terri; Churchill, Jolene

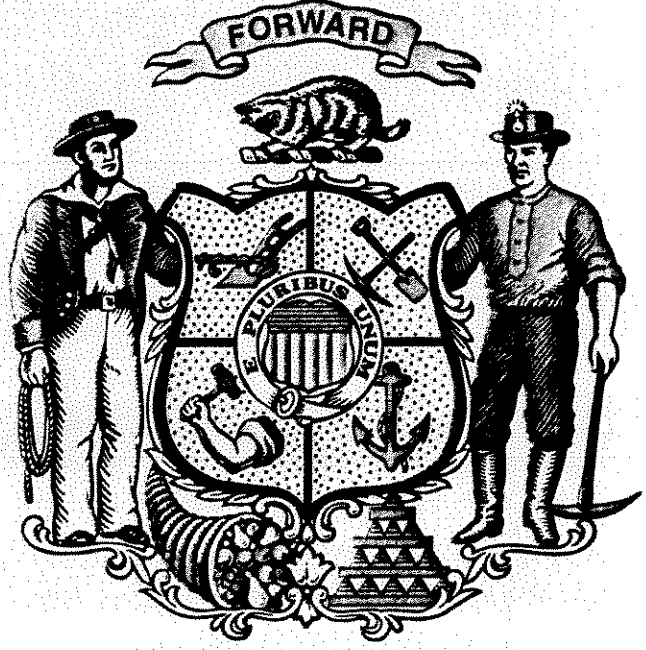
In light of a compromise advanced, yesterday, by the Realtors and WEAC, we've drafted an amendment to AB 18 which would accomplish the following:

1. Regulated non-candidate spending would include any communications made during the 60-day period preceding a general election that contain an explicit reference to a clearly identified candidate on a the ballot for the applicable election; "non-candidate spending" during this 60-day period would include independent expenditures as well as issue advocacy communications.
2. Any person or entity (including corporations) that spent more than $2,000 in the aggregate on such non-candidate communications would file a disclosure report with the state Elections Board within seven days of the communication.
3. The report would contain: (a) the name of the candidate identified in the communication; (b) an *optional* statement on whether the communication supports or opposes the identified candidate; and (c) the total amount or value of the communication expenditure made and the cumulative aggregate expenditures reported to date.
4. Electronic reporting would be required within 7 days of any non-candidate communication (in any form) within 6 months of an election (24 hours within 15 days of an election) by all non-candidate entities whose expenditures annually exceed $20,000.
5. Any person or entity that does not comply with the disclosure requirement would be subject to civil penalties (as in SB 2 as passed by the Senate).
6. Section 11.38 of the statutes would be specifically amended to state that corporations and associations are not prohibited from engaging in independent communications which do no constitute express advocacy.

As soon as we get a draft of the amendment, I'll provide you with a copy.

R.J. PIRLOT
POLICY DIRECTOR AND LEGAL COUNSEL
OFFICE OF ASSEMBLY SPEAKER SCOTT R. JENSEN

DIRECT: 608-261-9482
FAX: 608-266-5123


FORWARD
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Richard, Rob
From: Freese, Steve
Sent: Tuesday, March 06, 2001 8:55 AM
To: Rep.Freese
Subject: FW: Campaign Finance

From: Pirlot, R.J.
Sent: Tuesday, March 06, 2001 8:55:24 AM
To: Freese, Steve; Gundrum, Mark; Churchill, Jolene; Griffiths, Terri
Subject: FW: Campaign Finance
Auto forwarded by a Rule

Is *Buckley* no longer relevant? Not according to the case cited in the story, below. I'm asking Conlin to check this out.

R.J. PIRLOT
POLICY DIRECTOR AND LEGAL COUNSEL
OFFICE OF ASSEMBLY SPEAKER SCOTT R. JENSEN

DIRECT: 608-261-9482
FAX: 608-266-5123

----- Original Message -----

From: **"Mike Wittenwyler" <Mwittenw@GKLAW.COM>**
To: <Mtheo@wra.org>
Sent: Tuesday, March 06, 2001 8:05 AM
Subject: Campaign Finance

Campaign Finance
Supreme Court Lets Stand Ruling
North Carolina Cannot Curb 'Issue Ads'

The Supreme Court March 5 once again refused to review a case that could have set new standards regarding when so-called issue ads may be regulated under campaign finance regulations (Bartlett v. Perry, U.S., 00-1092, cert. denied 3/5/01).

The court denied review of a case originating in North Carolina, where a hog farmers' group sponsored broadcast ads criticizing a member of the state Legislature running for re-election. The organization, called Farmers for Fairness Inc., acknowledged that the intent of the ads was to defeat a candidate but maintained that the message was protected from regulation because it did not contain express words of advocacy, such as "vote against" or "defeat."

The U.S. Court of Appeals for the Fourth Circuit agreed with the farmers group. The appeals court said the Supreme Court established a "bright line" protecting issue advocacy communications in its landmark 1976 de cision in Buckley v. Valeo.

The Fourth Circuit struck down as unconstitutional a North Carolina law requiring financial disclosure of the sponsors of issue ads if the sponsor admits that the intent of the ad is to defeat a candidate. North Carolina's attorney general in January asked the Supreme Court to uphold the state law, but the high court left the appeals court ruling intact.

The legal action followed an enforcement action by the North Carolina Board of Elections, which acted on a complaint filed by former state Rep. Cynthia Watson, who was defeated in a

Republican primary in 1998. Watson was targeted by tens of thousands of dollars worth of media advertising and polling sponsored by the hog farmers' organization.

Latest in Series of Cases

The attorney for the farmers' organization, James Bopp of the Indiana-based firm Bopp, Coleson & Bostrom, indicated before the Supreme Court decision that he did not expect the high court to grant review of the case. Bopp has argued successfully in numerous court cases in recent years that the First Amendment strictly limits the ability of the federal or state government to regulate communications that exclude a narrow range of words expressly advocation for or against a candidate.

Bopp contends that the Supreme Court clearly supports this view and thus has turned aside cases that seek to challenge a bright-line rule on express advocacy.

Others disagree, however, contending that it is impossible to know how the Supreme Court will rule on this issue until it grants review of one of these cases. Among these is Lawrence Noble, the former Federal Election Commission general counsel who is now director of the nonprofit, nonpartisan Center for Responsive Politics.

Mississippi Case Pending

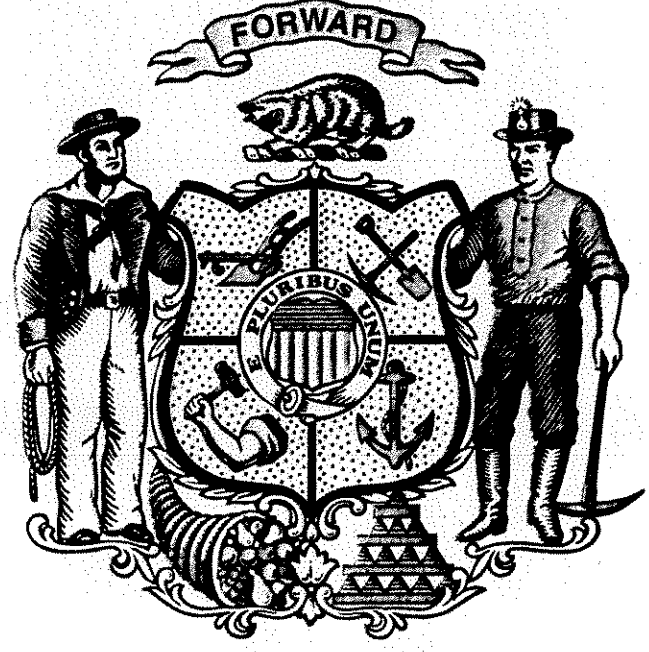
Denial of a petition for Supreme Court review simply means that there are not four justices voting to hear a case, Noble said. "It's very hard to read anything into it."

Noble added that it would be interesting to see if the Supreme Court comes out differently on the question of reviewing another pending express-advocacy case that originated last year in Mississippi. In that case (Chamber of Commerce of the U.S.A. v. Vollor, U.S., No. 00-1255, cert. petition filed 2/5/01), the lower courts came out differently than they did in North Carolina; they ruled that Mississippi could regulate issue ads sponsored by the U.S. Chamber of Commerce and targeting candidates for the state Supreme Court.

The U.S. Supreme Court has not yet decided whether to grant review of the Mississippi case.

The Supreme Court denied review March 5 in two other election-law cases. The court let stand a ruling by the U.S. Court of Appeals for the Sixth Circuit, which upheld a Tennessee law requiring voters to disclose their Social Security numbers in order to register to vote (McKay v. Thompson, U.S., 00-1111, cert. denied 3/5/01). The high court also let stand a ruling by the U.S. Court of Appeals for the Ninth Circuit that struck down as unconstitutional a state law requiring a candidate for one of California's seats in the U.S. Congress to be a California resident and registered voter before being elected (Jones v. Schaffer, U.S., 00-675, 3/5/01).

By Kenneth P. Doyle


FORWARD
E PLURIBUS UNUM

WISCONSIN LEGISLATIVE COUNCIL

MATERIALS FOR BILLS IN ASSEMBLY RULES COMMITTEE

Bill Number AB 18

Committee Staff Member Bob Conlin
Don Dyke

Telephone 6-2298 / 6-0292

☐ NO WRITTEN MATERIALS AVAILABLE IN COUNCIL FILES

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
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http://www.legis.state.wi.us/lc

REPRESENTING WISCONSIN BUSINESS
Wisconsin Manufacturers & Commerce

Memo

TO: **Assembly Judiciary Committee**

FROM: **James A. Buchen**
Vice President, Government Relations

DATE: **February 20, 2001**

RE: **Assembly Bill 18/Senate Bill 2 – Issue Advocacy**

Wisconsin Manufacturers & Commerce (WMC) is opposed to Assembly Bill 18/ Senate Bill 2 which would ban corporate issue advocacy 60 days prior to an election. While these bills are described as creating a disclosure requirement, it actually functions as a ban on the use of corporate funds for any advertisement that contains the name or likeness of a candidate 60 days prior to an election. Such a ban is clearly unconstitutional.

AB 18/SB 2 Ban Corporate Issue Advocacy
These bills modifies the definition of "political purpose" which causes other existing sections of Chapter 11 to work as a ban on corporate issue advocacy.

- Section 2 of these bills expand the definition of "political purpose" to include any mass communication that bears the name or likeness of a candidate 60 days out from an election.

- Under existing law, section 11.01(7) stats., defines disbursement as spending money for "a political purpose."

- Under existing law, section 11.38(1) stats., prohibits corporations from making "disbursements."

As a result, the proposed statutory changes would prohibit a corporation from paying for any type of communication that bears the name or likeness of a candidate for public office 60 days prior to an election. The disclosure provisions of these bills are essentially irrelevant as corporate issue advocacy would be banned under the bill and PAC-sponsored independent expenditures already require disclosure.

AB 18/SB 2 Are Unconstitutional
In the landmark decision, Buckley v. Valeo, 424 U.S. 1, 57 (1976), the court granted independent issue advocacy full freedom from government regulation. The court proclaimed that all regulations impinging political expression burden "core first amendment rights of political expression." Id.at 45-46. The court said that speech regulation could only apply to communications by individuals, groups or corporations that "in express terms advocate the election or defeat of clearly identified candidate." Id.at 44. The effect is to protect corporate issue advocacy from any regulation, especially an outright ban, so long as the advertisements contain no "explicit words of advocacy of election or defeat of a candidate." Id.at 43. Neither the State Legislature nor any state agency has the authority to alter or ignore the U.S. Supreme Court's interpretation of these first amendment rights.

These bills would ban corporate issue advocacy that contains the name or likeness of a candidate 60 days prior to an election. Proponents argue that this limitation is constitutional because it still allows corporations to discuss issues,

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so long as they avoid mention of candidates prior to an election. The Supreme Court has clearly established the principal that speech cannot be regulated by the government simply because a candidate's name is mentioned. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." Id. at 45. Absent express advocacy, the Constitution does not permit the government to regulate independent political communications.

In addition, a number of federal courts have ruled that an advertisement's proximity to an election can not be used to justify regulation. "Indeed the right to speak out at election time is one of the most zealously protected under the Constitution." Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d 45.53 (2nd Cir. 1980).

The Federal District Court in Right to Life of Michigan, Inc. v. Candice Miller, et al, 23 F. Supp. 2d 766; (1998), invalidated an administrative rule nearly identical to the Robson/Freese proposal. The rule prohibited corporations from paying for communications 45 days before an election that contained the name or likeness of a candidate. In their decision the court noted, "Public discussion of public issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct." Id. at 767. In rejecting the regulation, the court said:

> The Court is satisfied that Rule 169.39b is broad enough to chill the exercise of free speech and expression. Because the rule not only prohibits expenditures in support of or in opposition to a candidate, but also prohibits the use of corporate treasury funds for communications containing the name or likeness of a candidate, without regard to whether the communication can be understood as supporting or opposing the candidate, there is a realistic danger that the Rule will significantly compromise the First Amendment protections of not only Plaintiff, but many other organizations which seek to have a voice in political issue advocacy.
>
> Accordingly, the Court declares that Rule 169.39b is unconstitutional on its face, and the Court enjoins the State from enforcing Rule 169.39b. Id. at 770.

The Wisconsin Supreme Court also addressed the question of regulating corporate issues advocacy in Elections Board v. Wisconsin Manufacturers & Commerce, 227 Wis. 2d 650 (1999). The court pointed out that the Legislature and the Elections Board are free to try and develop new issue advocacy regulations, but in doing so they must "comport with the requirements of Buckley and MCFL . . ." and must "be limited to communications that include explicit words of advocacy of election or defeat of candidate." Id. at 33. The court clearly stated that neither the Legislature nor the Elections Board may stretch the definition of expressed advocacy to regulate communication that does not clearly advocate the election or defeat of a candidate. The court said:

> In our view, Buckley stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not "expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80. Any standard of express advocacy must be

> consistent with this principle in order to avoid invalidation on grounds of vagueness and/or overbreadth. See MCFL, 479 U.S. at 248-49; Buckley, 424 U.S. at 44, 80. We are satisfied that for a political communication or advertisement to constitute express advocacy under Buckley and MCFL, it must contain explicit language advocating the election or defeat of a candidate who is clearly identified. Id. at 19.

In conclusion, AB 18/SB 2 would not merely regulate, but prohibit, corporate issue advocacy 60 days prior to an election if it contained the name or likeness of a candidate. These proposals clearly fails to meet the constitutional minimum standard articulated by both the U.S. Supreme Court and the Wisconsin Supreme Court which requires communications to contain not only the name or likeness of a candidate, but explicit words advocating the candidate's election or defeat in order to be subject to regulation of any kind. There can be no doubt that this proposed regulation is unconstitutional on its face.

We urge the Committee to reject these bills and uphold the right of groups and individuals to freely participate in the public discussion of issues and candidates which the Supreme Court has recognized as crucial in "assuring the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Buckley, 424 U.S. at 14.

Waukesha FREEMAN
Saturday, February 10, 2001

EDITORIAL

Campaign finance bill would choke off speech

Once again the state Legislature is trying to craft campaign finance reform and once again they have aimed at the wrong part of the target.

Legislators have made it clear that their main goal is to try to drive independent voices from the open dialogue so they "control" their own campaigns.

A more simple way to put this is they simply want to limit speech and thereby limit criticism.

There is no doubt that open dialogue sometimes means allowing statements we don't agree with. And free speech for all has certainly led to expensive elections, once all those independent expenditures are tallied up.

But in a free society, no politician has a copyright or trademark on a campaign — even their own — any more than they can have exclusivity on an idea. Many of the Founding Fathers valued the basic freedom of expression much more than prerogatives of the politicians we elect.

Now come state leaders from both sides of the political aisle who have felt the sting of tongue lashings from spinoff groups of Wisconsin Manufacturers & Commerce on the right and the Wisconsin Education Association on the left. In Senate Bill 2, they seek to create a 60-day freeze on freedom of expression by independent groups. Only Connecticut has such a deadline and it is under challenge.

"Being a politician means being sworn at as well as sworn in."

Both the U.S. Supreme Court and the Wisconsin Supreme Court have ruled that political ads need not disclose every individual who contributes if they do not expressly ask voters to vote for or against someone. The courts do not say that protection applies except for 60 days before an election.

In short, the courts have ruled that the First Amendment is more important than a politician's desire to seek out and fend off critics. We agree.

SB2 would seek to ban any ads that mention a candidate's name within 60 days of an election, unless the advertiser discloses everyone who contributed to the group running the ad. How absurd.

There can be no on-off switch for free speech. Pecking away at the constitutional fabric runs contrary to the oath our legislators take when elected. Being a politician means being sworn at as well as sworn in.

Campaign finance reform is a laudable goal. But it cannot be all things to all people. It certainly should not be a bubble designed to protect the thin skins of politicians from their critics, whomever they may be.

We urge all Waukesha County legislators to oppose making SB2 law.

60-Day Issue Ad Regulations
Unconstitutional Speech Restrictions

A proposal to limit political issue ads within 60 days of an election has been proposed for Wisconsin in 2001 SB 2. Similar plans have been rejected by federal courts and a state supreme courts as unconstitutional violations of the First Amendment.*

WEST VIRGINIA – In *West Virginians for Life, Inc. v. Smith*, a federal court enjoined the enforcement of a "60-day voter guide law" as an unconstitutional attempt by the legislature to regulate issue advocacy. The legislature had enacted a new campaign finance statute "on the unstable foundation of a presumption that any voter guide distribution within sixty days of an election is express advocacy and therefore subject to regulation under the principles of *Buckley v. Valeo*."

MICHIGAN – A federal court struck down a Michigan rule that imposed a prohibition on corporate communications employing a candidate's name or likeness within the 45 days prior to an election. Striking down the rule as facially unconstitutional, the court described the ban as "broad enough to chill the exercise of free speech and expression . . . without regard to whether the [political] communication can be understood as supporting or opposing the candidate." The state did *not* appeal the court's decision.

VERMONT – In 2000, the U.S. Court of Appeals rejected a state disclosure requirement that applied to anyone who makes an expenditure totaling $500 or more on "mass media activities" within 30 days of an election. *See Vermont Right to Life v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000). The Vermont Right to Life Committee ("VRLC") had challenged the disclosure provision as an unconstitutional restriction on "issue advocacy."

WASHINGTON – Echoing the constitutional concerns addressed in *Vermont Right to Life*, the Washington State Supreme Court recently affirmed a lower court decision prohibiting the application of a state campaign finance law to issue advocacy. In a 6-3 decision, the Washington Supreme Court concluded that "soft money" state GOP ads were issue advocacy and, therefore, protected from *any* government regulation under the First Amendment.

NORTH CAROLINA – In North Carolina, the legislature had enacted a statute designed to regulate all political communications, at any time, that directly named a candidate and were not "[m]aterial that is solely informational and not intended to advocate the election or defeat of a candidate . . . ." A U.S. Appeals court ruled: "Because [the disclosure statute] would allow the regulation of issue advocacy wherein the speaker has manifested an intent to advocate the election or defeat of a candidate, it is unconstitutionally overbroad and the State is permanently enjoined from enforcing it.

*(Source: Memo from La Follette, Godfrey & Kahn to Wisconsin Realtors Association.)

Wisconsin Legislative Council Staff Memorandum
(Feb. 5, 2001), pp. 7-8.

"The general trend of courts to strictly adhere to the *Buckley* standard of express advocacy would appear to suggest that the regulation contained in Senate Bill 2 and Assembly Bill 18 would not be viewed favorably by the courts."

"The regulation proposed in Senate Bill 2 and Assembly Bill 18 would appear to go beyond both the 'bright line' standard of *Buckley* and the somewhat more relaxed standards suggested by *Furgatch* and *WMC*."

"Since *Buckley* was concerned about the content of political communications, courts may not look favorably on a regulation that relies almost entirely on the timing of a communication . . . ."

"[W]hat is clear is that even with the amendments, Senate Bill 2 would still regulate communications which, as discussed above, have been protected by the courts."

"To date, most courts have not found a sufficiently compelling governmental interest to support even minimal regulation of communications that are defined to be issue advocacy."

In our view, *Buckley* stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not "expressly advocate the election or defeat of a clearly identified candidate."

Elections Board v. Wisconsin Manufacturers & Commerce, 227 Wis. 2d 650, 669, 597 N.W.2d 721 (1999).

Common Cause In Wisconsin

152 W. Johnson Street, #210 ♦ P.O. Box 2597 ♦ Madison, WI 53701-2597 ♦ (608) 256-2686

MEMORANDUM

DATE: February 20, 2001

TO: Members of the Wisconsin Assembly Committee on Judiciary

FROM: Jay Heck, Executive Director of Common Cause In Wisconsin

SUBJECT: Assembly Bill 18/Senate Bill 2

On Tuesday, January 30, 2001 the Wisconsin State Senate passed **Senate Bill 2** by an overwhelming, bi-partisan 23 to 10 margin. This measure was introduced by the Joint Committee for Review of Administrative Rules (JCRAR) to close the gaping, phony issue advocacy loophole in Wisconsin's campaign finance law. The measure passed with a similarly strong, bi-partisan 8 to 2 margin in JCRAR last May. Common Cause In Wisconsin strongly urges you to vote for this measure in order to restore a measure of integrity to our state's once effective and respected political process. A vote against Assembly Bill 18/Senate Bill 2 is a vote for continuation of the corrupt *status quo*–where campaign ads masquerading as issue advocacy are being run with increasing frequency–undisclosed and unregulated–robbing the voters of Wisconsin of the right to know who is attempting to influence the outcome of our elections and undermining our public policy-making process.

Despite continued attempts of opponents of reform to obscure this issue–this legislation is not an attempt to "upset" the political balance between Republican-leaning special interest groups countering Democratic-leaning outside groups. This matter is not about undermining Wisconsin Manufacturing & Commerce's clout as a political counterweight to WEAC. During the 2000 campaign, phony issue ads were utilized by special interest groups supporting or attempting to defeat candidates of both political parties. Groups with names like "People for Wisconsin's Future" attacking Republicans and "Americans for Job Security" attacking Democrats joined WMC, "Independent Citizens for Democracy" (which is anything but independent or good for democracy) and others in pouring huge amounts of unrestricted, phantom money through this gaping loophole inWisconsin's campaign finane laws. Phony issue advocacy is a bi-partisan problem and one that will only intensify and increase in 2002 unless effective action is taken now. While we will never know with any certainty because there is no requirement they be disclosed, Common Cause In Wisconsin estimates that as much as $2 million or more was spent by various groups for phony issue ads in state legislative elections during 2000--all of the money unrestricted and unreported.

The fact of the matter is that all of the special interest groups who spend big dollars to influence Wisconsin's elections are opposed to Assembly Bill 18/Senate Bill 2 which is precisely the reason you ought to support it. Isn't it about time legislators put the interests of the voters above those of the deep-pocketed special interest groups? The citizens of Wisconsin will support and applaud you for helping to return their elections and their state government to them.

Opponents of Assembly Bill 18/Senate Bill 2 have claimed with smug certainty that the measure is "unconstitutional on its face." In fact, there are eminent national legal experts who believe that Senate Bill 2 could withstand the inevitable court challenge that would occur were it to be enacted into law. One of these is the Senior Attorney for the nationally-renowned Brennan Center for Justice of the New York University School of Law, Glenn Moramarco.. Additionally, the state of Connecticut has had an even stronger 90-day rule in place since 1999 and which was in effect during the 2000 elections. The measure (enclosed) was signed into law by a Republican Governor and was supported by a large, bi-partisan legislative majority.

Attached, for your information, is testimony that Mr. Moramarco prepared for a hearing last week before the Assembly Committee on Campaigns & Elections concerning the constitutionality of Assembly Bill 18/Senate Bill 2. Also attached is a memo from Professor Don Kettl of the University of Wisconsin's La Follete Institute for Public Policy who chaired Governor Thompson's 1997 Blue Ribbon Commission on Campaign Finance Reform. Kettl also strongly supports this measure and also disagrees with the sweeping assertions made by reform opponents. Assembly Bill 18/Senate Bill 2 has been endorsed by the *Milwaukee Journal Sentinel, Green Bay Press-Gazette*, Appleton *Post-Crescent, The Capital Times* of Madison, the *La Crosse Tribune*, the Ashland *Daily Press* and the *Sheboygan Press* and copies of some of those editorials are attached.

The citizens of Wisconsin are understandably skeptical that state legislators will have the courage to defy the special interest groups and take it upon themselves to clean up our politics by reducing the increasing influence that campaign cash from those deep-pocketed groups increasingly exert on our elections and public policy-making. Your vote for Assembly Bill 18/Senate Bill to–in the form that emerged from the State Senate--is an opportunity to reverse this trend and advance significant campaign finance reform in this state for the first time in a generation.

Please contact me if I can be of assistance to you.

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Testimony of Glenn J. Moramarco
Senior Attorney, Brennan Center for Justice
at NYU School of Law

before the

Assembly Committee on
Campaigns and Elections

on

Registration and Reporting Requirements
for Electioneering Communications

February 13, 2001

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Testimony of Glenn J. Moramarco

Senior Attorney, Brennan Center for Justice at NYU School of Law

before the
Assembly Committee on Campaigns and Elections

February 13, 2001

Good morning, Chairman Freese and Members of the Committee. I am a senior attorney at the Brennan Center for Justice at NYU School of Law. I am honored to have been invited to testify before the Subcommittee concerning the limits on the legislature's ability to regulate electioneering speech without infringing on the right to engage in protected issue advocacy.

By way of introduction, the Brennan Center for Justice at New York University School of Law is a nonpartisan institution devoted to scholarship, discourse, and action on issues of justice that were central to the jurisprudential legacy of Justice William J. Brennan Jr. We are guided by principles that were important to Justice Brennan -- a willingness to ask the hard questions and to reexamine old doctrine, an insistence on developing constitutional norms that make pragmatic sense, and an ardent insistence on protecting liberty. Justice Brennan did more than any Justice in the history of our nation to protect civil liberties -- and particularly freedom of speech. It is no accident that we chose as our first Legal Director, Burt Neuborne, one of the most renowned advocates of civil liberties, who rose to prominence as the longtime National Legal Director of the American Civil Liberties Union, or that several other lawyers on our staff have spent their careers fighting for civil liberties in many contexts, including at the ACLU. Given our namesake and our backgrounds, we would like to think that we approach all issues, and particularly issues relating to the financing of campaigns, with a special sensitivity to concerns about free speech.

Any attempt to stanch the flow of money into politics raises difficult constitutional questions. None are thornier than the issues that are before this Committee today -- defining the permissible line dividing speech that is regulable from speech that is not. On the one hand, we have a duty to protect our democracy from corrosive influences, to encourage good candidates to run, to enhance the competitiveness of elections, and to fulfill the constitutional mandate of one-person-one-vote. On the other hand, in accomplishing any of these goals, we need to be sure that we do not trammel

our cherished freedom of speech, that we do not choke off the funds necessary to communicate a message to a wide audience, and that we allow multiple voices to flourish and clash.

These interests are not easy to balance. But the Supreme Court has provided some guidance. Let me start with a principle that is undisputable: Under current law, legislatures are constitutionally permitted to draw *some* line distinguishing two types of speech. On one side of the line is some category of speech directed at advocating the election or defeat of clearly identified candidates. In the interest of trying to find a neutral phrase that carries no baggage, let's call it "electioneering," without defining for the moment exactly what falls on that side of the line. Maybe it is "magic words" (such as "vote for" or "vote against") maybe it is something broader. But we all agree that some line is permissible.

If speech falls on the "electioneering" side of the line, we all agree, three consequences follow:

1. **Disclosure:** The legislature may require the speaker -- whether a PAC or a corporation or a party or an individual or a candidate -- to disclose the sources of the money and the nature of the expenditures in support of the speech.

2. **Source restrictions:** The legislature may absolutely bar certain speakers from spending money on electioneering. The legislature may preclude corporations and unions from electioneering (or, more accurately, from spending money to engage in electioneering). the legislature may limit participation to individuals and PACs. The legislature may prohibit foreigners from electioneering.

3. **Fundraising restrictions:** The legislature may restrict the sources from which speakers can raise their money -- to individuals, for example -- and the legislature can limit the size of the contributions to a collective fund.

We may not all like these rules, but this is black letter constitutional law about which none of us can disagree.

Do these restrictions infringe on speech and privacy rights? Of course they do. Wherever one draws the "electioneering" line, there are certain words that corporations and unions are banned from uttering. There are certain messages that can be funded only by individuals or by groups that amass individual contributions in discrete amounts. These regulations necessarily reduce the sheer amount of money that can be spent on certain messages. And these regulations require speakers to reveal certain information such as how much they spent and who supported their message.

Even though these regulations infringe on speech, they are undisputably constitutional. Since 1907, corporations have been barred from electioneering, since 1947 those restrictions have been extended to labor unions, and since 1974, the law has restricted the size of contributions that can be made to speech funded by a group. The Supreme Court has clearly and emphatically upheld all these

restrictions. The corporate restrictions were reaffirmed as recently as 1990, in *Austin v. Michigan Chamber of Commerce*. In that case, the Supreme Court upheld a law banning corporations from engaging in electioneering.

So, to reiterate, our point of departure is a constitutional regime that permits a legislature to draw a line between electioneering and other speech and that permits us to regulate electioneering in a way that does infringe somewhat on speech and privacy rights. The question before this Committee is where exactly the line is between electioneering and other speech.

A lot rides on what qualifies as "electioneering." If the government defines the concept too broadly, it could end up restricting speech on issues of public importance that happens to have an influence on elections -- a result that is antithetical to the First Amendment. If the law defines it too narrowly, we may as well not bother having campaign finance laws, because all players could readily find a way to influence elections in a direct way, making a mockery of the law.

That is where we find ourselves today. We are now in a world where everyone has gotten accustomed to thinking that it is not electioneering unless the speaker utters a magic word -- like "vote for," "vote against," "elect," or "defeat." So all players -- corporations, unions, parties and independent groups -- engage in an open strategy to influence elections by running or paying for ads that look, smell, waddle, and quack like campaign ads, but are just missing the magic words. They use money from prohibited sources, they raise it in prohibited amounts, and they close their books to public scrutiny. In many cases, their stated goal is to influence the election. They crow about their success in influencing the election, and yet they claim the First Amendment protects their right to engage in any speech, even with that clearly proscribable motive.

Some of today's witnesses will suggest that we are stuck with a constitutional doctrine that nominally allows us to preclude business and labor groups from electioneering, but that nevertheless allows them to accomplish the same result through naked subterfuge. What they fail to acknowledge is that there is nothing particularly magical about the "magic words" test. When the Supreme Court declared that it is permissible to infringe on the right of corporations or labor unions to engage in electioneering, it was not because there was something particularly nefarious or corrosive about the words "vote for," "vote against," "elect," or "defeat." It was because the Court considered corporate and union funding of elections to present particularly strong potential for corrupting politics and skewing elections. In my view, we are not stuck with any such wooden formulation. The range of options is much narrower than most reformers are willing to accept, but the Supreme Court need not stand by a rule that could be so readily bypassed as to be worthless.

We are navigating between the Scylla and Charybdis of two very complicated constitutional doctrines. The first doctrine -- void for vagueness -- says the government cannot punish someone without providing a sufficiently precise description of what is legal and what is illegal. The second doctrine is the overbreadth doctrine. Even a clear test that everyone understands could nevertheless be unconstitutional because it prohibits too much protected speech.

When the Supreme Court first devised the "express advocacy" test, it did so in the context of a particular federal statute -- the Federal Election Campaign Act -- that regulated any expenditure "relative to a clearly identified candidate." That was an extraordinarily broad phrase, and the Court saved it from invalidation by reading it very narrowly. However, the Court never said that all legislatures in the future would be prohibited from attempting to devise alternate language that would be both sufficiently narrow and sufficiently precise.

We have had 25 years of experience with political advertising since *Buckley* was decided. Last year, the Brennan Center published *Buying Time: Television Advertising in the 1998 Congressional Elections*, an unprecedented study which analyzed data from more than 300,000 ads aired in 1998 and created the first-ever nationwide survey of both candidate advocacy and so-called "issue advocacy." More recently, we analyzed all of the data from the 2000 federal election cycle. One of the important things that we learned was that, in modern political advertising, the *Buckley* "magic words" are almost never used, even by political candiates, whose ads are electioneering by definition. We also found that ads which mention a candidate and are aired close to an election are almost invariably intended to influence the outcome of an election.

The McCain-Feingold Bill, which is currently pending in the Senate, and the Shays-Meehan Bill in the House, have adopted an objective approach to defining "electioneering" that is based on a series of measurable factors. Under the McCain-Feingold and Shays-Meehan approach, ads are subject to regulatory control if they mention a specific candidate within a certain limited time period prior to an election. Unions and corporations are prohibited from using their general treasury funds to purchase these electioneering communications, and other speakers are required to disclosure their contributions and expenditures.

The Bill passed by the Wisconsin Senate, Senate Bill 2, is even more protective of First Amendment values than both the McCain-Feingold Bill and the Shays-Meehan Bill

Senate Bill 2 has eliminated all criminal penalties for violations of the new disclosure regime. The Supreme Court's reasoning in *Buckley* was heavily dependent on the fact that the Federal Election Campaign Act contained criminal penalties. Thus, the Court was especially careful in limiting the application of the law to situations where it was confident that no speaker would be inadvertently drawn into the regulatory net. However, First Amendment jurisprudence does not usually require such a high degree of certainty. For example, the line between obscenity (which can be criminalized) and protected pornography (which cannot) depends on extraordinarily subjective factors such as whether the speech is "utterly without redeeming social value." There is no magic words test in the obscenity context.

Even in the context of core political speech, there are lines that do not depend upon magic words of any sort. In the context of union elections, for example, employers are permitted to make "predictions" about the consequences of unionizing but they may not issue "threats." The courts have developed an extensive jurisprudence to distinguish between the two categories, yet the fact remains that an employer could harbor considerable uncertainty as to whether or not the words he is about to utter are sanctionable. The courts are comfortable with that uncertainty -- even in the context of core speech about a very important issue of public policy -- because they have provided certain concrete guidelines.

I am aware of only one decision in which a court has been asked to examine a broadened definition of regulable electioneering in a statutory context that did not contain criminal penalties. In *Crumpton v. Keisling*, 160 Or.App. 406, 982 P.2d 3 (1999), the Oregon Court of Appeals upheld against constitutional challenge an Oregon law that required disclosure of expenditures in "support" or "opposition" to a candidate. The Court rejected the argument that *Buckley* allowed for regulation only of ads that contain "magic words" of express advocacy. The Court relied in part on the fact that the Oregon statute contained only civil penalties, and it gave a common-sense interpretation to the challenged law.

In sum, it is constitutionally permissible for you to enact legislation that regulates ads that are intended to influence the electoral outcome of particular candidates, as long as the legislation does not unduly sweep within its reach ads that are intended to discuss issues only. The Bill recently passed by the Wisconsin Senate has followed the reform model that is at the heart of the current campaign finance reform debate in Washington, D.C. However, the Wisconsin Bill is more protective of First Amendment values than the federal bill. While no one can predict with any certainty how a court will ultimately rule on the constitutional validity of this approach, it is a well-reasoned attempt to meet the concerns of the courts while still being true to the ultimate purposes of the legislation.

January 26, 2001

TO: Senator Judy Robson
FROM: Don Kettl

SUBJECT: Senate Bill 2

I write in strong support of the passage of SB 2. The bipartisan Blue Ribbon Commission on Campaign Finance Reform that I chaired in 1996-97 produced a very similar recommendation. It was time in 1997 to require disclosure from those who engage in political speech during election season. It's well past time now.

The Commission found that "Everyone in electoral politics-candidates, political parties, PACs, and groups educating voters or exploring issues-ought to be playing on a level playing field, in the clear light of day." Toward that end, the Commission recommended:

> *Mass activities-television commercials, radio commercials, mass mailings, and central telephone banks-that occur within 30 days before an election or primary, and which include the name or likeness of a candidate for office, should be considered an election-oriented activity.*

The activity and the source of the funds used to pay for it, the Commission concluded, ought to be disclosed. The Commission's recommendations, therefore, track very closely to the provisions of SB 2. The major exception is that SB 2 extends the period of disclosure from 30 to 60 days. I find that fully acceptable and, indeed, a wise amendment to the Commission's original proposals.

The case is simple. Our entire system of elections hinges on effective regulation of campaign contributions in a way that balances the public's confidence in the process while promoting the ability of interested parties to engage in political speech. It is clear that, with the rise of issue ads, this balance has been disrupted. Many ads now labeled "issue ads" are, quite clearly, designed to influence the outcome of elections. That is especially the case for issue ads run in the last month or two before an election. These ads differ from "express advocacy" ads, now subject to disclosure, only because they do not use "magic words" outlined in a footnote to the U.S. Supreme Court's key case in this area, *Buckley v. Valeo.*

The Court's original argument was that citizens ought to be free to engage in discussions about issues, and that issue-based discussion ought to be free from the disclosure regulations imposed on election-oriented speech. However, the Court in *Buckley* identified the magic words only as examples.

Two things are now clear. First, the practice of campaigns has evolved far past the basic approaches envisioned by the Court in *Buckley*. Second, it is possible-indeed, necessary-to maintain the thrust of *Buckley* while adapting it to these new campaign approaches: to

avoid chilling public discourse on issues while ensuring disclosure of political speech clearly intended to influence elections, especially when that political speech occurs immediately before an election.

It defies common sense to separate issue-oriented speech from campaign-oriented speech on the basis of examples contained in a Supreme Court decision's footnote. This standard would exempt most television commercials aired by candidates themselves. In fact, a 2000 survey by New York's Brennan Center for Justice, one of the nation's most respected organization's in the analysis of campaign regulation and freedom of speech, found that only 4 percent of ads by candidates used the Supreme Court's "magic words."

Wisconsin needs to reform its electoral regulations to recognize the obvious:

> Many "issue ads" in campaign season are, in fact, clearly intended to influence the course of the election (in fact, some of those who have purchased campaign-oriented issue ads in Wisconsin during election season have stated explicitly that they in fact did intend to influence the election-but that they chose the issue ad route because they could avoid disclosure);
>
> Most of these issue ads differ from other election-oriented ads only because they quite carefully do not use the "magic words";
>
> Most candidate ads do not use the "magic words" either;
>
> The "magic word" test contained in the footnote to the *Buckley* decision is woefully out of date;
>
> We can maintain the Court's basic principle in *Buckley*-that campaign-oriented speech ought to be disclosed and that issue-oriented speech need not be disclosed-by pursuing the course set in SB 2.

The bill's foes have argued that SB 2 is unconstitutional on its face. It is important to recognize that this bill-and, indeed, *any* bill proposing changes in campaign finance regulation-will surely be challenged in court. However, the Blue-Ribbon Commission I chaired in 1996-97 concluded that disclosure of mass communications that use the name or likeness of a candidate during campaign season was both wise and constitutional. Moreover, a bipartisan national study commission, which included some of the country's leading authorities on both constitutional law and campaign practice, reached precisely the same conclusion.

It is time for Wisconsin to reassert its leadership in campaign finance reform and pass SB 2. We need broader campaign finance reform as well, but no other reform will matter without passage first of this bill. The bill, quite simply, requires that all those who engage in campaign-oriented speech during election season ought to play by the same rules; and that the most basic rule is disclosure: ensuring that Wisconsin voters know who is speaking to them during election season and trying to influence their votes.

Excerpts from
Buying Time
Report of a National Blue-Ribbon Commission (2000)

Participants in the political arena, by simply eschewing the use of the magic words of express advocacy, have been able to turn the world of campaign finance upside down, threatening the three pillars of federal campaign finance law: contribution limits, financial source restrictions, and disclosure requirements. By arguing that their activities are not electioneering, parties and interest groups are able to solicit unlimited sums from donors.

. . . everyone agrees that the best feature of the campaign finance system is its transparency, but these new campaigners [through issue ads] are able to avoid the campaign finance laws' disclosure requirements and operate in near secrecy.

As the Buckley Court recognized, disclosure is often the least restrictive means for satisfying the compelling government interests that undergird campaign finance reform legislation. Thus, comprehensive disclosure requirements, which are an integral part of a well-functioning marketplace of ideas, raise few serious First Amendment issues.

A fully effective system of disclosure would ensure that, a) the name of the sponsor of an advertisement appears clearly within the ad and that, b) basic information about the sponsors of election advertisements is publicly available.

How might we do better? First, we must recognize that, as a legal matter, Congress [and the state legislature, for that matter] is not foreclosed from adopting a definition of "electioneering" or "express advocacy" that goes beyond the "magic words" test. When the Supreme Court devised the "express advocacy" test in Buckley, it did so in the context of a poorly drafted statute whose definition of regulable electioneering contained problems of both vagueness and overbreadth. The Court found that the regulated conduct, which included spending "relative to a clearly identified candidate" and "for the purpose of influencing an election" was not defined with sufficient precision. The Court adopted a narrowing interpretation of this specific language in order to save the statute from constitutional invalidity. Congress is of course bound by the Supreme Court's reasoning in Buckley, which teaches that regulation of political speech must be drafted clearly and targeted at electioneering rather than true issue advocacy. However, as long as these vagueness and overbreadth concerns are met, Congress is presumably free to draft new legislation that is more effective in achieving its constitutionally valid goals.

The most prominent current proposals for better defining regulable electioneering are "bright-line" tests that are based on a series of measurable factors. The bright-line approach has been adopted in various forms by the main campaign finance proposals before Congress in the last four years, including McCain-Feingold (1998), Shays-Meehan (1998 and 1999), and Snowe-Jeffords (1998). This approach typically uses the calender to label as electioneering ads that mention or picture a candidate for federal office if the ads appear close - usually within 60 days - to an election. Under the current proposals, the ads are not banned; rather they are subject to the same rules about disclosure and funding that affect regular campaign activities.

THE SUNDAY JOURNAL SENTINEL
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EDITORIALS

Defining political speech

Opponents of campaign finance reform have portrayed its principal advocates, Arizona's John McCain and Wisconsin's Russ Feingold, as hopelessly out of touch with the realities of modern politics and, even worse, at war with the free-speech provisions of the First Amendment.

The first charge is nonsense. The second finally may be tested — and not a moment too soon. McCain-Feingold, the reform legislation its authors have pushed for five years, has its best shot yet at an up-or-down vote on the U.S. Senate floor. In Wisconsin, meantime, Senate Bill 2 — targeted at unregulated issue advertising — is scheduled to be heard on the floor of the Legislature this week.

We believe McCain-Feingold in Washington and SB 2 in Madison merit approval. Special interest money is plainly overwhelming the process and has turned today's politics into one seamless fund-raiser. But it also is important to pass these bills because both almost certainly would be challenged in the courts. If that happens quickly, politicians at every level of government finally might gain some unambiguous direction — before the next election cycle kicks in — on what is and is not political speech protected by the First Amendment.

McCain-Feingold contains several provisions, but its principal aim is to ban so-called soft money — funds from corporations, unions, wealthy individuals and a wide variety of interest groups to the national parties and their campaign committees. The parties and committees recycle the money into political advertising.

According to Common Cause, soft money donations in the 2000 presidential cycle soared to $457 million, compared with $231 million four years earlier. The total spent for all federal races the past two years came to $3 billion, which is roughly equal to the gross domestic product of Barbados, compared with $2 billion four years earlier.

The question is whether a soft money ban would pass constitutional muster. A Supreme Court decision in 1976, Buckley vs. Valeo, currently serves as the principal ruling on the matter. It and some subsequent court decisions seem to draw a distinction between contributions and spending: Restrictions can be legally imposed on the former without infringing free speech, but the bar is much higher on the latter.

In other words, legislators at the federal and state level can regulate individual and corporate contributions, but they may have a tougher time making the case that money spent on political "issue" ads are unconstitutional. These are the ads run by special interest groups that do not ask voters to cast a ballot for a specific candidate even though they often attack or promote the candidate by name.

McCain-Feingold also contains a provision that would ban spending by corporations and unions on issue ads that mention a candidate's name within the 30 days before a primary and 60 days before an election; spending by political action committees and interest groups would still be permitted under strict disclosure rules.

A similar 60-day measure is the centerpiece of SB 2. It would ban unregulated issue advertising unless the sponsoring group disclosed the source of its funds; traditional spending by PACs, limited to $10,000 each, would be permitted.

Full disclosure, in fact, may be the best curative for what ails campaign finance, especially if the high court rules that a blanket ban on soft money is unconstitutional. It's one thing to protect campaign advertising as free speech, but the First Amendment does not guarantee a right to anonymity. All Americans deserve to know who or what is behind those thinly disguised attack ads from groups no one has ever heard of. Requiring public disclosure, posted on the Internet at a site especially created for that purpose, might give real meaning to the concept of truth in advertising.

GREEN BAY PRESS-GAZETTE

★ MONDAY, JANUARY 29, 2001 SERVING AN ALL-AMERICA CITY www.greenbaypressgazette.com

IN OUR VIEW

Legislature should curb phony issue ads

■ Issue:
Campaign-finance reform

■ Our view:
Senate, Assembly should act now to close the loophole allowing phony issue ads.

It's time for the Wisconsin Legislature to stop talking about campaign-finance reform and to do something about it.

It can start in the state Senate on Tuesday, when members take up Senate Bill 2.

The bill would close the loophole that allows phony issue advertisements in Wisconsin. Such ads masquerade as support of or opposition to a political issue but, in fact, are attacks on candidates running for political office.

An ad run against Sen. Chuck Chvala, D-Madison, just before an election, for example, said Chvala never saw a tax he didn't like. Then, the ad urged people to let Chvala know they didn't like it.

The ad carefully avoided using the kinds of words that would have subjected it to public disclosure under existing campaign-finance laws, such words as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat" or "reject."

But the unmistakable purpose of the ad was to convince voters that they shouldn't vote for Chvala.

It was a classic phony issue ad. They're usually negative, turning off voters and increasing voters' cynicism about government and politics. The wealthy corporations and people who pay for them have no spending limits or disclosure requirements.

Madison-based Wisconsin Manufacturers & Commerce, which ran the Chvala ad, was the first to use phony issue ads, to benefit Republican candidates, in 1996.

Since then, the ads have taken off and now target candidates from both political parties. The mysterious sponsors include groups like People for Wisconsin's Future and Americans for Job Security. The names sound good, but voters have no idea who they are or how much money they spend.

Northeastern Wisconsin got a dose of phony issue advertising last fall in the multi-million dollar 30th Senate District race in which incumbent Gary Drzewiecki, R-Pulaski, lost to his Democratic challenger, Dave Hansen of Green Bay.

Neither Drzewiecki nor Hansen had any control over what the ads said, and whoever paid for them did not have to report how much money was spent or where the money came from.

A withering barrage of such advertising in key legislative races last year must have both Republicans and Democrats wondering whether they will be the next targets.

That prospect apparently has galvanized bipartisan support for reform in the new session of the Legislature.

Lawmakers also have a strong message from voters in 59 of Wisconsin's 72 counties. Those voters overwhelmingly said in a November referendum that they want campaign-finance reform.

Stopping the phony issue ads is a good first step in restoring the squeaky-clean image that Wisconsin politics had until a few years ago.

Senate Bill 2 would apply to ads that name or depict a candidate or name a political office or party and that run within 60 days of an election. It would limit the amount of money that individuals or organizations could spend on such ads and would require disclosure of who paid for them.

The Senate should pass the bill, and Republican Assembly Speaker Scott Jensen should take the lead in making sure the Assembly does likewise.

How to contact your state legislators

We urge you to contact your state legislators and urge them to vote for campaign-finance reform, starting with the bill regulating phony issue ads.

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Appleton

THE POST-CRESCENT
OPINION
Sun 28-Jan-2001

Who says you can't legislate morality?

This Tuesday, Wisconsin's Senate has a chance to take a big step toward meaningful campaign finance reform with the adoption of SB2, a bill that would clarify issue advocacy advertisements.

The bill - which is included in many of the more comprehensive campaign finance reform bills floating around Madison - is sorely needed in this state, and we demand that our lawmakers pass it without delay.

SB2 sets a 60-day window before elections in which the third-party groups that sponsor these so-called "issue ads" are forbidden to use the voice, the depiction or the name of candidates they are targeting. If they do, the bill requires the groups to register the ads as an independent expenditure, and identify the source of their funding.

If the groups refrain from using the likeness, name or depiction of candidates, they can continue to run the spots as legitimate issue advocacy, instead veiled campaign ads.

The reason this bill is needed is simple: Too many anonymous people - those who sponsor "issue ads" - are affecting the outcome of our elections. Voters deserve to know who's paying the bills for these ads, so they can make more informed choices.

This bill isn't the be-all, end-all for campaign finance reform, but it will make an important statement to those who want to circumvent honest and ethical political behavior.

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Our view: Time to regulate those so-called 'issue' ads

Tribune editorial

During his State of the State speech last week, outgoing Gov. Tommy Thompson made an appeal for campaign finance reform.

It was a short comment - just a paragraph in a speech whose text covered 19 pages. But it is significant just the same - and legislators should take heed.

The former governor said legislators should take the findings of a commission that finished its work two years ago and pass them into law.

That commission, headed by University of Wisconsin political scientist Don Kettl, recommended sweeping reforms upgrading the Wisconsin State Elections Board and changing state law to allow for quicker disclosure of campaign spending.

It also advocated regulating so-called "issue" ads - ads that criticize candidates but stop short of telling people to vote against the candidate.

This last election had the biggest volume of those ads - all negative. On top of that, allowing them to be run as "issue advocacy" means that voters will never know who is paying for the ads.

Here is what Thompson had to say in his State of the State speech: "It is time to quit the political posturing and pass the first Kettl Commission Report - the comprehensive campaign finance reform. It's the only bipartisan reform out there. And let's take it a step further: Develop stronger regulations on independent ads. The Constitution makes speech free, but last-minute attack ads are costing our democracy too much. We need to strike a better balance."

So we do.

Opponents of that measure - mostly well-heeled special-interest groups - say that forcing those ads to be regulated as full-fledged campaign ads violates the First Amendment.

But it would not prevent groups from speaking out. It would just force them to be honest about their political activity - and to disclose the sources of the money to buy the ad.

Last week, the state Senate passed a bill that would do just that. Senate Bill 2 passed the Senate on a 23-10 vote. All the Democrats supported it, along with five Republicans.

Let's build on that bipartisan effort and pass the bill in the Assembly as well.

Let's finally do something about those last-minute attack ads.

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Phony ads one reason for campaign reform

Campaign-finance reform swung back into the national spotlight last week when reform champion John McCain visited the White House to chat with former rival George W. Bush about taking up the cause.

Those hoping for breakthroughs may take heart that the president was willing to meet on the subject at all during his first week in office.

But apparently little new ground was broken. Bush doesn't want another topic to ebb momentum from his top priorities, including a tax cut and education reforms.

And the fact remains that, just as during their hotly contested Republican primary campaign, the two men simply don't agree on how best to go about campaign-finance reform.

Not surprisingly, the sticking points boil down to politics. One example: To undermine Democrats' edge in union fundraising, Bush is pushing for a provision to let union members designate that their dues cannot be used for politics. McCain opposes that because Democrats would then refuse to support the bill altogether.

CAROL HUNTER

That example points to why attempts at comprehensive reform efforts have routinely failed. Sweeping measures invariably contain at least one provision that prompts enough discomfort to result in a no vote.

As is often the case, the better chance for progress may come at the state level.

It's not that Wisconsin legislators have distinguished themselves of late on this issue. The tactic last session: The Democrat-controlled Senate and the Republican-controlled Assembly each passed a bill that it knew the other house would reject. So campaigning legislators could claim that they voted for campaign-finance reform without risking its passage.

This time around, reform advocates are pushing a narrowly crafted bill to curb one of the most egregious abuses: phony issue ads. Those are the ads that run right before the election and say: "High taxes are terrible. Call Sen. Jane Doe and tell her to quit voting for high taxes."

Because such ads don't directly say "Vote against Jane Doe" or "Vote for John Doe," current law doesn't require disclosure of who paid for them or limit fund-raising to bankroll them. Even a candidate who may be helped by the ads doesn't always know who's behind these sneak attacks.

Jay Heck, executive director of Common Cause in Wisconsin, visited our Editorial Board last week to urge support for Senate Bill 2, to be introduced Tuesday, which would regulate phony issue ads.

"This is where more and more of the money is going," he said.

Such ads dominated local airwaves last fall in the 30th Senate District race, in which Democratic challenger Dave Hansen of Green Bay defeated incumbent Republican Gary Drzewiecki of Pulaski. Neither candidate had control of these messages and images shaping their campaigns.

Senate Bill 2 would require disclosure of who pays for ads that name or depict a candidate and run within 60 days of the election. It also would limit the amounts that could be spent on such ads.

Because candidates from both parties have been harmed by these types of ads, bipartisan interest may be building.

Senate Democrats have pledged to pass the bill. The key will be whether it gains enough Republican votes to pressure the Assembly into giving it serious consideration.

An editorial in Monday's newspaper endorses Senate Bill 2 as a sensible step to allow Wisconsin's voters to begin re-taking control of elections from big-money interests, often based out of state.

We'll monitor the bill's progress, to see whether state legislators have the courage to lead, or whether they'll join their federal colleagues in status-quo stalemate.

If you have questions or comments about the newspaper, please call Executive Editor Carol Hunter at (920) 431-8377. Or write to her at: Executive Editor's Column, Green Bay Press-Gazette, P.O. Box 19430, Green Bay, WI 54307-9430.

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Legislators must close bribery loophole

In the old days, corporate special interests bought favors from politicians with direct bribes — an envelope of cash delivered in a hallway or bar.

These days, lobbyists and legislators have worked out a slightly more complicated means of delivering special interest money. But the end result is the same: Wealthy individuals and corporations use their money to aid elected officials, who in turn warp public policy to serve their illicit benefactors.

Here's how it works:

- Wealthy individuals and corporations direct their campaign giving to so-called "soft money" groups. These organizations use a gaping loophole in state election law to hide the sources of their funding.
- Flush with unregulated money, these groups run phony "issue ads" in state Assembly and Senate races. These ads, which take advantage of another loophole in the election laws, are clearly political in purpose. Often they employ vicious and disingenuous attacks, taking advantage of the fact that the shadowy groups running these "campaigns" are not currently required to comply with the laws governing candidates for office.
- After a favored candidate is elected, lobbyists show up to slyly encourage the legislator to vote for legislation that serves the interests of the individuals and corporations that provided the money for the campaign. Legislators know they must live up to their end of the bargain or the bribes — which now come in the form of critical aid at election time — will stop flowing.

Chvala

Everyone in Wisconsin politics knows this is how the system works.

Everyone in Wisconsin politics knows, as well, that this is how public policy is corrupted to favor the interests of the few over the public good.

And everyone in Wisconsin politics knows that the Legislature has the power to close the loopholes that allow for the secret bribery of legislators.

This week, the state Senate will vote on a proposal that would do just that. It's a simple plan to require groups that run "issue ads" displaying the picture or name of legislative candidates within 60 days before an election to comply with state election laws by disclosing the sources of the money they spend and obeying campaign contribution limits.

Ellis

Senate Majority Leader Chuck Chvala, D-Madison, is backing the bill, as are members of the Senate Democratic caucus. They are joined in this principled position by responsible Republicans such as former Senate Majority Leader Mike Ellis, of Neenah, and veteran Sen. Dale Schultz, of Richland Center. A number of other Republicans are weighing whether to support the bill.

This bill needs to pass the Democrat-controlled Senate with a broad, bipartisan majority so that the Republican-controlled Assembly will move quickly to enact it. Wisconsinites should call the legislative hotline at (608) 266-9960 and urge their Senate representatives to back the measure. They should make it clear, as well, that they know any legislators who vote against this bill are acting to defend political bribery — and, as such, are not worthy to sit in the Legislature of the state of Wisconsin.

Distributed 2/13/01

WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

TO: SPEAKER SCOTT R. JENSEN

FROM: Robert J. Conlin, Senior Staff Attorney RJC

RE: Constitutionality of 2001 Senate Bill 2 and 2001 Assembly Bill 18, Relating to Express Advocacy

DATE: February 5, 2001

This memorandum, prepared at the request of R.J. Pirlot of your office, discusses the constitutionality of 2001 Senate Bill 2 and 2001 Assembly Bill 18, relating to express advocacy.

Both bills were introduced by the Joint Committee for Review of Administrative Rules.

A. BACKGROUND: HISTORY OF SENATE BILL 2 AND ASSEMBLY BILL 18

As you know, current law provides that a campaign disbursement or obligation that is not made or incurred by a candidate or an entity primarily organized for political purposes is required to be reported to the Elections Board if the purpose of the disbursement or obligation is to expressly advocate the election or defeat of a clearly identified candidate. [See s. 11.06 (2), Stats.]

On October 26, 1999, the Elections Board began a formal rule promulgation process by initiating Clearinghouse Rule 99-150, relating to express advocacy. Interpreting various provisions of ch. 11, Stats., the rule provided that an individual other than a candidate, and a committee other than a political committee, are subject to campaign registration and reporting requirements if the person or committee makes a communication meeting all of the following conditions:

1. The communication makes a reference to a clearly identified candidate.

2. The communication expressly advocates the election or defeat of the candidate.

3. The communication unambiguously relates to the campaign of the candidate.

4. The communication contained certain words or phrases or the functional equivalent of these phrases or terms.

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Clearinghouse Rule 99-150 was unanimously objected to by both the Assembly Committee on Campaigns and Elections and the Senate Committee on Economic Development, Housing and Government Operations. The Joint Committee for Review of Administrative Rules (JCRAR) concurred in the standing committee objections.

Following the objections to Clearinghouse Rule 99-150, JCRAR recommended for introduction into both houses of the Legislature, companion bills relating to the scope of regulation and reporting of information by nonresident registrants under the campaign finance law. As introduced, these bills provide in part that the campaign registration and reporting requirements of ch. 11, Stats., will be imposed on certain communications that are defined to be made for "political purposes." Such a communication must be made by means of one or more communications media or mass mailing, or through a telephone bank operator, that is made within 60 days preceding an election and that includes a name or likeness of a candidate, the name of an office to be filled at that election, or the name of a political party. A person who makes such a communication but fails to comply with ch. 11, Stats., is subject to criminal penalties.

The Senate adopted three amendments to Senate Bill 2. Briefly, Senate Amendment 1 provides that telephone bank operators are not subject to the reporting requirements of the bill unless they place 50 or more substantially identical telephone calls. Senate Amendment 2 modifies the penalty applicable to a person who makes such a communication and fails to comply with the reporting requirements in ch. 11 from a felony to a civil forfeiture. Finally, Senate Amendment 3 provides that the bill does not apply to a communication that merely includes the name of a political party. The bill, as amended, passed the Senate on January 30, 2001, on a vote of Ayes, 23; Noes, 10.

B. CONSTITUTIONAL BACKGROUND

The issue at the heart of Senate Bill 2 and Assembly Bill 18 is the regulation of speech, and in particular, political speech. The First Amendment protects this type of speech and numerous legal challenges have been leveled against laws that seek to restrict such speech. The primary case to address the constitutionality of the regulation of political speech is *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612 (1976). In that case, the U.S. Supreme Court essentially held that disclosure and reporting requirements may be imposed on a person who makes a communication for the purpose of expressly advocating the election or defeat of a candidate while ruling that such requirements may not be imposed on a person who makes a communication for the purpose of discussing, or providing information about, issues of public interest.

The *Buckley* Court struck down a provision of the Federal Election Campaign Act (FECA) which, in general, limited the amount of expenditures that could be made to advocate the election or defeat of a clearly identified candidate because the court felt that the regulation was too broad and the line between advocating for a candidate and some other type of communication was imprecise. The Court pointed out that:

> . . . the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions

> on various public issues, but campaigns themselves generate issues of public interest. [*Buckley v. Valeo*, 424 at 42.]

Quoting from one of its past cases, the court highlighted the problem caused by the vagueness of a law trying to regulate advocacy:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. [*Id.* at 43; internal citations omitted.]

To remedy the vagueness problem emanating from the regulation of advocacy, the Court concluded that such regulations must be construed to apply only to expenditures for communications "that in express terms advocate the election or defeat of a clearly identified candidate." [*Id.* at 44.] In a footnote, the court indicated "this construction would restrict the application [of the law at issue] to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat" or "reject." [*Id.* at 44, n. 52.]

The *Buckley* Court also construed a reporting requirement contained in FECA in a similar manner so as to save it from being unconstitutionally overbroad. The Court explained:

> To insure that the reach of [the reporting provision of FECA at issue] is not impermissibly broad, we construe "expenditure" . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate. [*Id.* at 80.]

In the only U.S. Supreme Court case after *Buckley* to revisit express advocacy standard, the Supreme Court in *Federal Election Commission (FEC) v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616 (1986) (hereafter referred to as *MCFL*), explained that in *Buckley* it had adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. The Court went on to state that, "we therefore concluded in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." [*FEC v. MCFL*, 479 U.S. at 249.] In *MCFL*, the Court concluded that a voter's guide that urged voters to "vote pro life," and identified several candidates as being pro life, went

beyond mere issue discussion and was in fact express advocacy even though the guide did not expressly urge a vote for a particular candidate.

AFTER BUCKLEY: THE LOWER COURTS

Although the Supreme Court has not further delineated the express advocacy standard since 1986, other state and federal courts around the country have been called upon to do so. Although this memorandum will not discuss all the cases that have been issued since *Buckley* on the issue of express advocacy, the trend among lower courts that have considered the matter is to strictly adhere to the *Buckley* "magic words" standard and require that any advocacy subject to regulation be express in its nature and include the type of words identified by *Buckley* as signifying an exhortation to vote for or against particular persons. It appears that most lower courts view the *Buckley* standard as a "clear" or "bright line" standard that protects the public discussion of issues even though it may allow for some speech that affects elections. For example, one federal district court described its interpretation of *Buckley* this way:

> What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. [*Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8, 12 (D. ME 1996).]

One notable exception to this general trend of strictly adhering to *Buckley's* bright line test is found in a 1987 Federal Court of Appeals case from the 9th Circuit. In *FEC v. Furgatch*, 807 F.2d (9th Cir. 1987), *cert. denied* 484 U.S. 850, 108 S. Ct. 151 (1987), the U.S. Court of Appeals for the 9th Circuit held that the context in which speech is made is relevant to determining whether communication is express advocacy. The court stated that such speech need not contain the *Buckley* words, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation than as an exhortation to vote for or against a specific candidate. The speech must be unmistakable and unambiguous, suggesting only one plausible meaning and it must clearly ask the recipient to undertake specific action. (The Federal Elections Commission has adopted a regulatory standard for express advocacy based on the *Furgatch* decision. Generally, almost all state and federal courts that have reviewed this issue have followed the *Buckley* holding that, in order to be considered express advocacy, a communication must include the explicit language described in *Buckley* and have rejected the more expansive approach described in *Furgatch*.)

In addition, the Wisconsin Supreme Court has recently indicated that it may read *Buckley* somewhat more broadly. In *Elections Board v. Wisconsin Manufacturers and Commerce (WMC)*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999), the Wisconsin Supreme Court considered whether particular communications constituted express advocacy and held that the appropriate definition of that term is not limited to the "magic words" described in the *Buckley* decision. However, the court refused to create a rule on this topic and stated that the task was better left to the Legislature or the Elections Board. In discussing the issue, the court noted the difference between defining "express advocacy" in terms of specific words that advocate election or defeat of the candidate and defining "express advocacy" in terms of the context in which a campaign advertisement appears. The opinion is not entirely clear as to which approach the court ultimately will favor. The court made its holding in the case "regardless of whether it might be permissible to consider context in defining express advocacy." [*Elections Board v. WMC*, 597 N.W.2d at 734.] On the other hand, the court concluded the opinion with the following

remarks: "Consistent with this opinion, we note that any definition of express advocacy must comport with the requirements of *Buckley* and *MCFL* and may encompass more than the specific list of 'magic words' . . . but must, however, be limited to communications that include specific words of advocacy of election or defeat of a candidate." [*Id.*, 597 N.W.2d at 737; footnote omitted.] In addition, both the concurring and dissenting opinions appear to look favorably upon a context-based approach to regulating express advocacy.

As noted, however, most courts have strictly adhered to the "magic words" standard of *Buckley*. The following recent state and federal court cases summarized below demonstrate courts' adherence to the *Buckley* standard.

In *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999), the Indiana Supreme Court responded to a question from the U.S. Court of Appeals for the 7th Circuit as to the state's interpretation of the phrase "to influence the election of a candidate" in Indiana statutes. The federal court asked the state court whether this phrase regulated only organizations which make contributions or expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for office or the victory or defeat of a public question. The Indiana court answered in the affirmative and narrowly construed Indiana statutes so that its regime of regulation applied only to express advocacy as defined in Buckley.

In *State ex rel. Crumpton v. Keisling*, 160 Or. App. 406, 982 P.2d 3 (1999), *rev. den.* 329 Or. 650, 994 P.2d 132, the Court of Appeals of Oregon had before it a case in which an individual brought an action against an expenditure reporting requirement when the plaintiff made a communication including the pictures and names of candidates. The Oregon statute involved the required reporting of expenditures designed either to promote or express hostility to a specific individual for a covered office. The court approved a modified Furgatch approach and interpreted the Oregon statute to require disclosure if: (1) a communication contains a message clearly and unambiguously urging the election or defeat of a candidate; (2) the communication seeks action, rather than importing simple information; and (3) the communication advocates clear action. The court emphasized that since Oregon law only requires disclosure, and since no criminal penalties would be involved, the reporting requirement would be imposed on the plaintiff whose communication was determined to be in opposition to the candidates included in the communication under the standards prescribed in the opinion.

In *Washington State Republican Party v. Washington State Public Disclosure Commission*, 4 P.3d 808 (Wash. 2000), Washington statutes, in brief, authorized the expenditure of "soft money" for particular ends. Not included in this list was the expenditure of "soft money" for issue advocacy. After a complaint was made regarding the expenditure of "soft money" by the Washington State Republican Party for an advertisement addressing the policies of a gubernatorial candidate, the Republican Party brought an action against the Commission. The Washington Supreme Court strictly held to the *Buckley* opinion and rejected the *Furgatch* approach of considering the context in which a communication is made. The court distinguished between communications regarding a candidate's stand on an issue versus attacks against a candidate's character or tactics. It found the former to be issue advocacy and the latter to be express advocacy. The most important question for the court was whether a clear exhortation of a candidate's election or defeat is involved in a communication in accordance with *Buckley*. The Republican Party was found not to have violated state law.

In *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), cert. den. __ U.S. __, 120 S. Ct. 2690, the Texas Supreme Court considered the disclosure requirement imposed on an expenditure "in connection with an election." The court determined that the statute properly encompassed the definition of the term "express advocacy" as enunciated in *Buckley*. It was determined that the statute applied to a communication in which the plaintiff made statements about the positions of two candidates and suggested that the reader of the communication vote for candidate A or candidate B depending on those positions. The court concluded that, although the statements may have tended to balance one another, taken as a whole, there was an exhortation to vote and, therefore, the plaintiff engaged in express advocacy that was subject to regulation.

In *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999), the U.S. Court of Appeals considered a state statute requiring a candidate to disavow the candidate's connections to specified independent communications. An administrative code provision regulated political speech in accordance with ***both*** the *Buckley* and *Furgatch* opinions. In other words, regulated political speech included the explicit terms used in *Buckley* and the more contextual approach taken in *Furgatch*. The opinion states that while *Buckley* did not provide an exclusive list of words that will determine a communication to be express advocacy, there is no doubt that the communication must contain express language of advocacy with an exhortation to elect or defeat a candidate. The administrative code provision based on *Furgatch* creates uncertainty, potentially chills discussion of public issues and is likely invalid.

In *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), the court "steadfastly" adhered to the *Buckley* bright line test of express advocacy that requires the inclusion of explicit words in a regulated communication. Similarly, the court rejected the contextual approach of *Furgatch*. The court found invalid a statute requiring reporting with respect to advertisements that name a candidate, unless the communication is solely for the purpose of information and not intended to advocate the election or defeat of a candidate. The communication remains issue advocacy even if the entity promoting the communication that merely contains a candidate's name later admits that its intent was to affect the outcome of an election.

In *Citizens for Responsible Government State Political Action Committee v. Davidson*, 2000 U.S. App. LEXIS 33727 (10th Cir. 2000), the court reiterated the *Buckley* statement that express advocacy means the inclusion of express words of advocacy. Advertisements without express words are issue ads and not subject to regulation. A statute that attempts to regulate express advocacy in terms of communications "which unambiguously refer" to a candidate impermissibly reach advocacy with respect to public issues, thus violating *Buckley's* strictures. Such a statute only can be saved if a narrow construction limits the statute to regulating express words of advocacy.

In addition, the following recent federal district court cases have followed the *Buckley* decision by firmly holding that express advocacy is evidenced by the use of explicit terminology clearly advocating the election or defeat of a candidate: *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D. D. C. 1999); *Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668 (E. D. Va. 2000); *North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498 (E. D. N. C. 2000); and *Brownsburg Area Patrons Affecting Change v. Baldwin*, 2000 U.S. Dist. LEXIS 12215 (S.D. Ind.).

Similarly, the few courts that have actually had the opportunity to consider the constitutionality of an express advocacy regulation like that created by Senate Bill 2 and Assembly Bill 18 have struck them down as unconstitutional.

For example, in *Vermont Right to Life Com., Inc. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000), two Vermont statutory provisions that required that all political advertisements disclose both the payer of the communications and the candidates supported by the advertisements, and a third provision requiring those who make expenditures for mass media activities within 30 days of an election to report to the state and to any candidate whose name or likeness was included in the activity were found to be facially unconstitutional because they were not limited to the form of express advocacy delineated in *Buckley*.

In *West Virginians for Life Inc. v. Charles R. Smith*, 960 F. Supp 1036 (S.D. W. Virginia 1996), a federal district court struck down a provision of the West Virginia statutes which set forth various campaign reporting requirements and which created a presumption that any person or organization that distributed or disseminated a voter guide or other written analysis of a candidate's position or votes within 60 days of an election was engaging in political activity for the purpose of advocating or opposing the election or defeat of a candidate. The court pointed out that the 60-day presumption of express advocacy encompassed some of the very same type of activity that *Buckley* sought to protect. Accordingly, the statutory provision was found to be unconstitutionally overbroad.

Finally, in two separate Michigan cases, two different federal district courts invalidated a state administrative rule that prohibited corporations from using their general fund for communications that used the name or likeness of a candidate within 45 days of an election. The courts found the provision to be overbroad and an infringement of free speech because it sought to regulate issue advocacy. [*Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Michigan 1998) and *Right to Life of Michigan v. Miller*, 23 F. Supp. 766 (W.D. Michigan 1998).]

C. DISCUSSION

Although it is not possible to say with certainty how a court would rule on a challenge to the constitutionality of a law such as that contained in Senate Bill 2 and Assembly Bill 18, several observations may be made.

First, both bills would apply to communications which do not use the "magic words," or similar words, as set forth in *Buckley*. Thus, communications that discuss issues, but happen to use the name or likeness of a candidate without expressly advocating the election or defeat of the candidate, would be subject to regulation. The general trend of courts to strictly adhere to the *Buckley* standard of express advocacy would appear to suggest that the regulation contained in Senate Bill 2 and Assembly Bill 18 would not be viewed favorably by the courts.

Second, those courts which have either expressly or implicitly acknowledged that a regulation may apply to communications that do not use the "magic words" of *Buckley*, have suggested that any regulation employing something other than the "magic words" must either include specific words that exhort the election or defeat of a candidate or must, when taken as a whole, be susceptible of no other reasonable interpretation. Although the regulation proposed in Senate Bill 2 and Assembly Bill 18 would include communications which would meet these more relaxed standards, it would also be broad enough to encompass communications that involve nothing other than a discussion of public issues. The

regulation proposed in Senate Bill 2 and Assembly Bill 18 would appear to go beyond both the "bright line" standard of *Buckley* and the somewhat more relaxed standards suggested by *Furgatch* and *WMC*. The breadth of the regulation in Senate Bill 2 and Assembly Bill 18 and given that courts that have considered similar regulations have found them unconstitutionally broad, courts may be inclined to view Senate Bill 2 and Assembly Bill 18 in a similar light.

Third, while both *Furgatch* and *WMC* indicated that the timing of a communication, along with other factors indicative of the context in which a communication is made, may be a relevant factor in determining whether a communication is express advocacy, the regulation proposed in Senate Bill 2 and Assembly Bill 18 relies almost entirely on the timing of the communication. For example, under Senate Bill 2 and Assembly Bill 18, identical communications may or may not be subject to regulation based solely on whether they were made within 60 days of an election. Since *Buckley* was concerned about the content of political communications, courts may not look favorably on a regulation that relies almost entirely on the timing of a communication and minimizes the importance of the communication's content.

Fourth, as noted above, the Senate adopted three amendments to Senate Bill 2. Generally, Amendments 1 and 3 narrowed the breadth of the bill. It is not clear though that the narrowing accomplished by the amendments would affect a court's analysis of its constitutionality. In addition, Senate Amendment 2, which reduced the applicable penalty from a criminal sanction to a civil sanction, was intended, it appears, to lessen the scrutiny that a court may apply to the provision. Although *Buckley* noted that legislation that imposes criminal penalties in an area permeated by First Amendment issues must be reviewed closely [see *Buckley* at 41.], the court was addressing the vagueness of the FECA regulation. Senate Bill 2, generally, does not appear to be vague. Thus, the impact of Senate Amendment 2 on the bill's constitutionality is not clear. However, what is clear is that even with the amendments, Senate Bill 2 would still regulate communications which, as discussed above, have been protected by the courts.

Finally, it should be noted that some may see the Supreme Court's recent decision in *Nixon v. Shrink Missouri Govt.*, 528 U.S. 377, 120 S. Ct. 897 (2000) as an indication that the Supreme Court is ready to reexamine *Buckley*. In *Shrink Missouri*, the Court essentially reaffirmed *Buckley* in sustaining Missouri's individual contribution limits. However, at least four members of the Court (Justices Breyer and Ginsburg, concurring, and Justices Kennedy and Thomas, dissenting) expressed some level of willingness to reexamine *Buckley* and the constitutional underpinnings of its campaign finance jurisprudence. Even if *Buckley* may be ripe for reexamination, it is not at all clear where that reexamination will lead or whether the Court would modify the "magic words" standard.

D. CONCLUSION

In general, judicial opinions regarding express advocacy and issue advocacy recognize that political speech is "core" speech protected by the First Amendment to the U.S. Constitution. Disclosure and reporting requirements imposed on those who disseminate communications clearly advocating the election or defeat of a candidate are valid if determined to be narrowly drawn in the service of a compelling governmental interest. To date, most courts have not found a sufficiently compelling governmental interest to support even minimal regulation of communications that are defined to be issue advocacy. *Buckley*, at least as viewed by the lower courts, offers little support for a regulation like that contained in Senate Bill 2 and Assembly Bill 18. Understanding that the lower courts tend to look to the

U.S. Supreme Court for guidance on constitutional issues, a shift in how the courts view the regulation of express and issue advocacy will likely need to emanate from the Supreme Court. Although some may view the Supreme Court's recent discussion of campaign finance law in *Nixon v. Shrink Missouri Govt.*, as a harbinger of the Court's willingness to revisit *Buckley*, the Court has not yet wavered from its *Buckley* holding with respect to express advocacy.

If the Court were to revisit *Buckley* and uphold a statutory regulation similar to that contained in Senate Bill 2 and Assembly Bill 18, it may have to be convinced either: (1) that the appearance of certain communications containing the name or likeness of a candidate or the office at stake within a specified period before an election constitutes explicit and clear advocacy of election or defeat of a candidate; or (2) that in the 25 years since the decision in *Buckley*, the means of political discourse, campaign financing and communications have changed to such an extent that a compelling governmental interest for minimal regulation of some forms of expression that are now considered to be issue advocacy can be upheld. Ultimately, the resolution of these issues resides in a future decision of the U.S. Supreme Court.

If I can be of any further assistance in this matter, please feel free to contact me at the Legislative Council Staff offices.

RJC:rv:wu:tlu;ksm

EXECUTIVE

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NANCY J. NUSBAUM
COUNTY EXECUTIVE

Testimony to Assembly Judiciary Committee

Public Hearing on AB 18

Tuesday, February 20, 2001
3:30 PM
225 North-West
State Capitol

Thank you for taking my testimony. AB 18/SB 2 represents an opportunity for Wisconsin to take a major step forward in the effort to enact meaningful campaign finance reform. It is not, nor ***should*** it be, a partisan issue. It addresses an abuse which has been perpetrated by both sides in campaigns: the use of phony issue ads to take campaign messages out of the hands of candidates themselves and the influencing of elections without the disclosure of sources of funds.

Please do not hide behind the constitutionality question. Any meaningful reform can be expected to be tested in the courts. That does not mean reform should not happen. The citizens of Wisconsin have asked for and deserve meaningful campaign finance reform. These phony issue ads are the perfect place to start.

I urge you to pass AB 18 in exactly the same form as its Senate counterpart and let this process move forward.

Thank you for your consideration of this matter.

Nancy J. Nusbaum

Nancy J. Nusbaum

Brown County Executive

Office of Sen. Judith Robson
Office of Rep. Glenn Grothman
Phone 608-266-2253
Phone 608-264-8486

Joint Committee for Review of Administrative Rules

Report to the Legislature on Clearinghouse Rule 99-150

Produced pursuant to s. 227.19(6)(a), Stats.

Description of the Rule

Clearinghouse Rule 99-150 was written by the State Elections Board under the authority provided in s. 11.01(3), (6), (7) and (16), Stats. According to the Elections Board, the rule "attempts to define more specifically those communications that are to be considered express advocacy subject to regulation by ch. 11 of the Wisconsin Statutes." The rule was written by the Elections Board to implement the decision of the Wisconsin Supreme Court in Wisconsin Manufacturers & Commerce, et al. v. State of Wisconsin Elections Board, 227 Wis.2d 650, 597 N.W.2d 721 (1999). The proposed rule amends s. El Bd. 1.28(1)(intro.) and (2)(c) of the Wisconsin Administrative Code.

CR 99-150 was submitted to the Senate Committee on Economic Development, Housing and Government Operations on December 22, 1999 for standing committee review. A public hearing was held on February 9, 2000. The Senate Committee met in executive session February 14 and unanimously objected to the rule.

Simultaneously, the proposed rule was submitted to the Assembly Committee on Campaigns and Elections on December 30, 1999. A public hearing was held on

January 27. The proposed rule was unanimously objected to at an executive session held on February 16.

Because of the objections of the standing committees, CR 99-150 was referred to the Joint Committee for Review of Administrative Rules.

Action by the Joint Committee for Review of Administrative Rules

One of the statutory duties with which the Joint Committee for Review of Administrative Rules is charged is the review of partial or complete objections to Clearinghouse Rules by standing committees of the Assembly and Senate. Generally, the Joint Committee may take one of three executive actions in response to a standing committee objection:

- The Joint Committee may vote to concur in the objection of a standing committee. Should this occur, the Clearinghouse Rule will be suspended. The Joint Committee must then introduce bills into both houses of the Legislature to codify the objection.
- The Joint Committee may vote to nonconcur in the objection of a standing committee. In that event, the Clearinghouse Rule will go into effect.
- The Joint Committee may vote to request that the agency make modifications to the Clearinghouse Rule.

In this case, the Joint Committee held a public hearing and executive session on April 11, 2000 at which the objections of the Senate and Assembly Committees to

CR 99-150 were discussed. The Joint Committee voted unanimously to *concur in* the objections of both standing committees to Clearinghouse Rule 99-150.

On May 10, 2000, the Joint Committee voted to introduce 1999 LRB 4936 (or its 2001 equivalent, introduced here as 2001 LRB 1764) to uphold the Legislature's objection to CR 99-150. The Joint Committee vote was 8-2.

Arguments Presented For and Against the Proposed Rule

The Joint Committee upheld the objections of the standing committees to CR 99-150 after hearing the following arguments at the public hearing.

Arguments in Favor of Concurring in the Objection

- *The rule is not necessary.* The rule merely reiterates a list of words used by the U.S. Supreme Court in a footnote as examples of speech that constitute express advocacy. Because the rule does not create a new standard, it is redundant and therefore unnecessary.

- *The rule is not strong enough.* The rule should make it clear that the requirements of ch. 11 of the Wisconsin Statutes (governing campaign finance) apply to all political speech that advocates the election or defeat of a clearly identified candidate, regardless of whether specific words are used. Political speech may advocate a specific vote even if certain "magic" words are not used. Because the proposed rule uses specific words as the standard for determining whether a communication is subject to state campaign finance laws, the rule may not be able to regulate communications that avoid the use of specific words or phrases but nevertheless advocate for a particular electoral result.

Arguments Against Concurrence in the Objection

■ *The Elections Board lacks statutory authority to write a stronger rule.* The Elections Board testified that it did not have statutory authority to write a stronger rule and that such regulation must come directly from the Legislature.

■ *A stronger rule would violate the First Amendment.* The rule uses language taken directly from the U.S. Supreme Court's Decision in Buckley v. Valeo. Re-writing the court's definition of express advocacy would be a violation of First Amendment rights to freedom of speech.

■ *The proposed rule adequately defines express advocacy.* The proposed rule does not just list specific words, it also regulates "functional equivalents." Therefore, the rule is flexible enough to adequately regulate express advocacy in future situations.

Statutory Basis for the Joint Committee's Objection

The Joint Committee voted to concur in the objections of the standing committees to Clearinghouse Rule 99-150 pursuant to s. 227.19(5)(d), Stats, and for the reason enumerated in s. 227.19(4)(d)6, Stats., "arbitrariness and capriciousness, or imposition of an undue hardship."

The proposed rule is arbitrary and capricious because it regulates some speech and not other speech on the basis of specific words, even though the intent of both communications is the same – the election or defeat of a given candidate.

WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2001 SB 2	Senate Amendments 1, 2 and 3
Memo published: January 26, 2001	***Contact*: Ronald Sklansky, Senior Staff Attorney (266-1946)**

Current Law and Senate Bill 2

Current law provides that a campaign disbursement or obligation that is not made or incurred by a candidate or an entity primarily organized for political purposes nevertheless is required to be reported to the Elections Board if the purpose of the disbursement or obligation is to expressly advocate the election or defeat of a clearly identified candidate. Current law also imposes registration and reporting requirements on those individuals or entities making contributions or disbursements for political purposes.

Senate Bill 2 adds to the definition of the term "political purposes" by specifically including a communication made by means of one or more communications media or a mass mailing, or through a telephone bank operator, that is made within 60 days preceding an election and that includes a name or likeness of a candidate, the name of an office to be filled at that election or the name of a political party. The term "telephone bank operator" is defined to mean any person who places or directs the placement of telephone calls to individuals.

Senate Amendment 1

Senate Amendment 1 amends the definition of the term "telephone bank operator" to mean a person who places or directs the placement of 50 or more substantially identical telephone calls to individuals.

Senate Amendment 1 was adopted by the Senate Committee on Judiciary and Consumer Affairs by a vote of 5 Ayes, 0 Noes, on January 24, 2001.

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Senate Amendment 2

Senate Amendment 2 provides that anyone who makes a communication described in the bill and who fails to comply with campaign registration or reporting requirements will be subject to a civil forfeiture of not more than three times the amount or value of the cost of the communication. Criminal penalties will not apply.

Senate Amendment 2 was adopted by the Senate Committee on Judiciary and Consumer Affairs by a vote of 5 Ayes, 0 Noes, on January 24, 2001.

Senate Amendment 3

Senate Amendment 3 provides that a communication only including the name of a political party will not be considered a communication made for a political purpose.

Senate Amendment 3 was adopted by the Senate Committee on Judiciary and Consumer Affairs by a vote of 5 Ayes, 0 Noes, on January 24, 2001.

Senate Bill 2 was recommended for passage, as amended, by the Senate Committee on Judiciary and Consumer Affairs by a vote of 3 Ayes, 2 Noes, on January 24, 2001.

WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2001 Assembly Bill 18	Assembly Amendments 1, 2, 3, 4, 5 and 6
Memo published: February 28, 2001	*Contact*: **Robert J. Conlin, Senior Staff Attorney (266-2298)** **Don Dyke, Senior Staff Attorney (266-0292)**

Current law provides that a campaign disbursement or obligation that is not made or incurred by a candidate or an entity primarily organized for political purposes nevertheless is required to be reported to the Elections Board if the purpose of the disbursement or obligation is to expressly advocate the election or defeat of a clearly identified candidate. Current law also imposes a registration and reporting requirement on those individuals or entities making contributions or disbursements for "political purposes." Additionally, under current law, with certain exceptions, those required to register under the campaign finance law are required to file regular reports that identify certain contributions, transfers, loans and other income received and certain disbursements and obligations made. However, if a registrant does not maintain an office or street address within the state, the registrant need only identify contributions, transfers, loans and other income received from sources in this state and disbursements and obligations incurred with respect to elections for state or local office in this state.

Finally, current law regulates and restricts corporate involvement in election financing. For example, current law prohibits any foreign or domestic corporation or cooperative association from making any contribution or disbursement, either directly or indirectly, for a political purpose, other than to promote or defeat a referendum. Notwithstanding this general restriction on corporate political expenditures, the law allows any corporation or cooperative association to establish and administer a separate segregated fund and to solicit contributions from individuals to the fund to be utilized by such corporation or association for the purpose of supporting or opposing any candidate for state or local office. However, the corporation or association is prohibited from making any contribution to the fund. Generally, a corporation or association is limited to a combined total of $500 annually in expenditures for the solicitation of contributions to such a fund.

Assembly Bill 18 adds to the definition of the term "political purposes" by specifically including a communication that: (1) is made by means of one or more communications media or a mass mailing or through a telephone bank operator; (2) is made within 60 days preceding an election; and (3) includes a name or likeness of a candidate, the name of an office to be filled at that election or the name of a political party. The term "telephone bank operator" is defined to mean any person who places or directs

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