REPRESENTING WISCONSIN BUSINESS
Wisconsin Manufacturers & Commerce

Memo

TO: **Senate Judiciary Committee**

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

DATE: **January 22, 2001**

RE: **Senate Bill 2 – Issue Advocacy**

Wisconsin Manufacturers & Commerce (WMC) is opposed to Senate Bill 2 which would ban corporate issue advocacy 60 days prior to an election. While the bill is 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.

SB 2 Bans Corporate Issue Advocacy

The bill 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 the bill expands 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 the bill are essentially irrelevant as corporate issue advocacy would be banned under the bill and PAC-sponsored independent expenditures already require disclosure.

SB 2 Is 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.

The bill 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, so long as

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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, 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. The proposal 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 this bill 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.

Common Cause In Wisconsin

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MEMORANDUM

DATE: January 22, 2001

TO: Members of the Wisconsin State Senate Judiciary & Campaign Finance Reform Committee

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

SUBJECT: Senate Bill 2 – Closing the Phony Issue Advocacy Loophole

Extended uncertainty about who would be the nations's next President temporarily diverted attention from the scandalous Wisconsin elections of 2000, namely the record spending by special interest groups--much of it undisclosed and unrestricted--to influence the outcome of state legislative elections.

Candidate spending and independent expenditures--which are disclosed and regulated---broke all-time records in 2000, but it was the increase in the undisclosed, unregulated "phony issue advertisements" that should give Wisconsin citizens and legislators the most cause for concern. Untold hundreds of thousands of dollars were spent on these stealth campaign communications, paid for with funds from sources we will never know, in key State Senate and Assembly races during the Fall campaign. Sham issue advocacy has emerged as the single largest loophole in Wisconsin's once effective campaign finance law and it threatens to undermine any law, present or future, unless it is closed.

Ironically, this distressing phenomenon has created the dynamic for achieving early enactment of meaningful campaign finance reform in the upcoming 2001-2002 legislative session--the first such reform in almost a quarter of a century. Phony issue ads have been the main staple of Wisconsin Manufacturers & Commerce (WMC), the state's largest business group since 1996, primarily to benefit Republican candidates but this year new groups with names like "Americans for Job Security" (in support of Republicans), "People for Wisconsin's Future" (favoring Democrats) and others joined in the phony issue ad free-for-all to give this matter a truly bipartisan bent. As a consequence, there is a bipartisan consensus in favor of curbing this abuse.

Background:

Campaign ads masquerading as issue advocacy first gained notoriety in 1996 when WMC reportedly spent more than $400,000 (although we don't know for sure because it was not disclosed) in behalf of Republican legislative candidates, primarily to attack Democratic incumbents. WMC's aggressive utilization of a gaping loophole in Wisconsin's campaign

finance law permitted them to run campaign ads but, because they carefully avoided the use of certain so-called "magic" words (spelled out in the famous and much misinterpreted footnote number 52 of the 1976 *Buckley v. Valeo* Supreme Court decision), WMC claimed their ads were not subject to the disclosure and restriction laws that govern candidate campaign ads and campaign ads run by "outside" organizations which are called independent expenditures. In other words, WMC could run thinly veiled campaign attack ads, paid for by unlimited funds from corporations or wealthy individuals (candidate ads and independent expenditures have limits on the size of contributions that may be used to pay for them), and those sources of funding would not have to be disclosed (any contribution of $20 or more to a candidate or independent expenditure group must be disclosed). This was a deliberate end-run sweep around Wisconsin's nearly century old prohibition on corporate treasury money from being used to influence the outcome of state elections.

The State Elections Board enjoined WMC's ads right before the 1996 election for this very reason and the case wound its way through the courts until finally, in July of 1999, the Wisconsin Supreme Court ruled that state election law did not clearly spell out what differentiates express advocacy--or campaign-oriented speech, from issue advocacy--the discussion by individuals or groups about issues. Therefore, the Court said, WMC was not in violation of state election law in 1996. But the Court also said that the state had the right--and indeed the duty--to clearly define express advocacy so that there would be no ambiguity about this matter in the future. The Court challenged the State Elections Board or the Legislature to close this huge, gaping loophole in Wisconsin's campaign finance law and restore a measure of integrity to our system.

On September 29, 1999 the hopelessly dead-locked State Elections Board "punted" on the issue. For two years the Board had split 4 to 4 on whether or not to treat phony issue ads as campaign speech and after the Supreme Court's ruling they essentially left the decision to the Legislature. The Board issued a definition of express advocacy which was nothing more than a restatement of the infamous foot note number 52 of the 23-year old *Buckley* decision which meant that they would continue to split 4 to 4 on the matter of whether or not the WMC-type phony issue ads ought to be treated as campaign ads. The impotent rule then went to the Legislature's standing committees to consider. In February, 2000, the Republican-controlled Assembly Committee on Campaigns and Elections--at the strong urging of Common Cause In Wisconsin (CC/WI)--voted unanimously to reject the Elections Board's "do nothing" rule. The State Senate Committee on Government Operations, controlled by the Democrats, likewise voted without dissent to reject the rule. In both cases, a majority of legislators on each committee expressed the need to adopt a stronger measure to close the phony issue ad loophole.

Solution:

On April 12, 2000, the rule was considered by the Legislature's Joint Committee for Review of Administrative Rules (JCRAR), which is evenly split with five Republicans and Democrats each. The Committee, acting on the recommendations of the two legislative standing committees, voted to reject the ineffective rule unanimously. JCRAR then had thirty days to devise a new rule. JCRAR Co-Chair, Senator Judy Robson (D - Beloit), was at first inclined to push for the adoption

of a measure that would require disclosure only of any widely disseminated communication made thirty days prior to the general election which named or depicted a candidate. This approach had been suggested as a compromise by the three-year-old Governor's Blue Ribbon Commission on Campaign Finance Reform (Kettl Commission) Report that had virtually no support in the Legislature or among reform organizations including CC/WI, because it did so little to address Wisconsin's campaign finance problems. But CC/WI sprang into action to press for JCRAR to adopt a stronger, more effective measure to deal with the phony issue advocacy problem. CC/WI convinced Senator Robson to adopt a sixty day measure (rather than a thirty day) requiring not only disclosure but restriction as well on the funds that could be used to pay for such campaign communications. In other words, groups like WMC or "People for Wisconsin's Future" would no longer be able to solicit $50,000 or $100,000 or even larger contributions from corporate or union treasury funds or from wealthy individuals to pay for phony issue ads. They would have to abide by contribution limits that would be disclosed--just as groups running independent expenditures and candidates running their own ads are forced to do. CC/WI enlisted the support of Republican reform leaders Representative Stephen Freese of Dodgeville and Senator Mike Ellis of Neenah to help gain Republican support for its stronger JCRAR measure and secured the support of all five committee Democrats. The vote, on May 10, 2000, was a stunning, overwhelming and strongly bipartisan 8 to 2 vote in favor of the sixty day rule requiring restriction and disclosure of the funding for phony issue ads. Three JCRAR Republicans (Senator Dale Schultz of Richland Center and Representatives Lorraine Seratti of Florence and Scott Gunderson of Union Grove) joined all five committee Democrats (Senators Robson, Richard Grobschmidt of South Milwaukee, Kevin Shibilski of Stevens Point and Representatives Spencer Black of Madison and James Kreuser of Kenosha) in endorsing the strong and effective measure. At a Capitol press conference on October 19, 2000, Senator Robson, Rep. Freese and Republican Dan Finley, the Waukesha County Executive, joined CC/WI in reiterating strong, bipartisan support for the JCRAR phony issue ad measure and for its immediate consideration and enactment into law in early 2001.

Brightest Opportunity for Reform since the 1970's:

Under Wisconsin Statutes section 227.19(6)(b), JCRAR must introduce the phony issue ad measure in January as part of the regular session of the Legislature where it is immediately referred to each house's standing committee that considers that subject area. Each standing committee has 30 days to review the measure and within 40 days of referral to the standing committees, the measure must be placed on the calendar of both the Assembly and State Senate for consideration. This means that campaign finance reform–usually delayed and considered at the end of each biennium session, if at all--must be one of the first orders of business of the new 2001-2002 Wisconsin Legislature.

Further supporting efforts to enact the phony issue ad measure is the fact that an overwhelming nearly 90 percent of Wisconsin's voters, residing in 59 of Wisconsin's 72 counties with nearly 90 percent of the state's population, voted a resounding "YES" on the advisory referendum question on campaign finance reform which asked if Wisconsinites favored, among other things, full and prompt disclosure of election related activities. This ought to provide some much needed

backbone to legislators who otherwise would fear the wrath of special interest groups opposing disclosure of their campaign ads masquerading as issue advocacy.

Outgoing Governor Tommy G. Thompson said shortly after the November elections he would love to face in the courts those outside groups in who misleadingly claim that phony issue advocacy is a First Amendment right protected by the Constitution. Where Lt. Governor Scott McCallum stands on this matter is not yet clear.

Senate Majority Chuck Chvala (D-Madison) announced that the JCRAR phony issue ad measure would be the first, top reform priority in that chamber where there is bipartisan support for it. And indeed, it was introduced in early January in the 2001 session of the Wisconsin Legislature as Senate Bill 2 and may be considered on the floor of the State Senate as early as next week.

Republican Assembly Speaker Scott Jensen of Waukesha did not entirely foreclose the idea of acting on the measure, acknowledging the strong statement made by Wisconsin's voters in the advisory referendum vote. But it remains to be seen if Jensen is serious about supporting serious campaign finance reform in the new session. He has said that specific rather than comprehensive campaign finance reform legislation is the way to proceed and Senate Bill 2 certainly fits that description.

Enactment into law early in the 2001 legislative session of Senate Bill 2 would provide momentum for further, comprehensive campaign finance reform legislation earlier rather than later in the session. It would also close the single largest loophole in Wisconsin's campaign finance law. Opponents of reform would almost certainly take the measure to the courts in an attempt to have it struck down as unconstitutional. But a similar phony issue ad measure enacted into law in 1999 in Connecticut that stipulates that communications depicting a candidate's name or likeness 90 days prior to the general election are treated as campaign speech subject to disclosure and restriction, was in place and functional during the entire 2000 election cycle and the law still stands.

Enactment of Senate Bill 2 would be the most significant campaign finance reform in Wisconsin since 1977. Failure to pass it could lead to the usual stalemate, partisan wrangling and ultimately, failure to achieve any reform Wisconsin's campaign finance laws. It is an opportunity that must not and cannot be wasted. But state legislators must know that the public and the media is watching to see what they do on this first, all-important test for meaningful reform in Wisconsin.

* * *

Please feel free to contact me if you have questions or require further information about this or any other campaign finance reform matter. My phone number is 608/256-2686 and my e-mail address is ccwisjwh@itis.com. Thank you.

Substitute House Bill No. 6665

Public Act No. 99-275

An Act Concerning Candidate Related Advertisements.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (a) of section 9-333c of the general statutes is repealed and the following is substituted in lieu thereof:

(a) As used in this chapter, the term "expenditure" means:

(1) Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made for the purpose of influencing the nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or on behalf of any political party;

(2) Any advertisement that (A) refers to one or more clearly identified candidates, (B) is broadcast by radio or television other than on a public access channel, or appears in a newspaper, magazine or on a billboard, and (C) is broadcast or appears during the ninety-day period preceding the date of an election, other than a commercial advertisement that refers to an owner, director or officer of a business entity who is also a candidate and that had previously been broadcast

or appeared when the owner, director or officer was not a candidate; or

[(2)] (3) The transfer of funds by a committee to another committee.

Sec. 2. This act shall take effect July 1, 1999.

Approved June 29, 1999

TOP

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STATE EDITION ★ FRIDAY, OCTOBER 20, 2000 ★ WWW.ONWISCONSIN.COM

ELECTION 2000

Reformers take on issue ads loophole

Advocates of campaign finance change argue that Legislature needs to act

By DENNIS CHAPTMAN
of the Journal Sentinel staff

Madison — Campaign reform advocates Thursday called on the Legislature to close a major loophole in state election law by regulating what they call phony issue ads.

The ads — expected to be increasingly prominent on Wisconsin television and radio in the 18 days before the Nov. 7 election — are often run by groups whose identity and backing are hard to identify.

The commercials do not directly advocate for or against a candidate, but often include a call to action such as, "Call Senator Smith and tell her you're opposed to her high-spending ways."

"These groups often spring up overnight. By the time you find them, the election's over," said Rep. Stephen Freese (R-Dodgeville). "We've got to bring some sanity and balance back, or we'll have people in record numbers walk away and say, 'I'm not voting. They're all a bunch of crooks.' "

A key legislative panel in May urged the Legislature to pass a measure requiring groups that run ads with the name or image of a candidate within 60 days of the election to register with the Elections Board and list their contributors and expenses. Because the recommendation was made after the last legislative session, lawmakers have yet to consider it.

"Phony issue advocacy is the fastest-growing campaign finance abuse in Wisconsin, and it is getting worse with each passing day," said Jay Heck, executive director of Common Cause in Wisconsin.

One of the hot spots for issue ads has been in the 32nd Senate District in La Crosse, where former GOP Sen. Brian Rude resigned. Indications are that outside interests are spending heavily to influence the race, Heck said.

Advertising invoices provided by Common Cause showed Wisconsin Manufacturers & Commerce, the state's largest business group, has spent at least $24,121 on radio and TV ads, and a group called Americans for Job Security bought at least $20,575 in ads favoring Republican candidate Dan Kapanke.

Common Cause also cited a news release from the Committee to Elect a Republican Senate that contended that People for Wisconsin's Future would spend $33,000 and Independent Citizens for Democracy would spend an additional $87,000 on ads favoring Democrat Mark Meyer.

Exact figures are hard to come by, because the expenditures are not required to be disclosed to the state, and not all television and radio stations provide the invoices on request, Heck said.

Jim Pugh, spokesman for Wisconsin Manufacturers & Commerce, said the proposed legislation is an unconstitutional infringement on free speech rights of groups and individuals.

> **"Phony issue advocacy is the fastest-growing campaign finance abuse in Wisconsin, and it is getting worse with each passing day."**
>
> Jay Heck, executive director of Common Cause in Wisconsin

"These people want censorship. They want to take groups and individuals out of the process, and that's what's undemocratic," Pugh said. "The First Amendment is in effect 365 days a year, and any effort by the Wisconsin Legislature to take away rights is definitely wrong for democracy."

Pugh predicted the courts would overturn the proposed issue-ad regulations, if enacted.

Wisconsin's court already have tackled the issue once.

In a case involving WMC's 1996 issue ads, the state Elections Board ruled that the group should have complied with reporting requirements that apply to campaign ads.

But the state Supreme Court in 1998 ruled that WMC didn't violate the law because the state had not adopted adequate standards beforehand to regulate the ads. The state's high court did not address the free speech issue, and instead said the state was engaging in retroactive rule-making.

Fifty-nine of Wisconsin's 72 counties will have an advisory referendum on the Nov. 7 ballot asking voters whether they support campaign finance reform.

MILWAUKEE
JOURNAL SENTINEL
THURSDAY, MAY 11, 2000 — STATE EDITION — WWW.ONWISCONSIN.COM

Key committee backs regulation of issue ads within 60 days of election

By Richard P. Jones
of the Journal Sentinel staff

Madison — On a strong bipartisan vote Wednesday, a key legislative committee recommended closing a major loophole in Wisconsin's campaign finance laws and regulating what reform advocates have labeled phony issue ads.

But the measure has little chance of becoming law before the fall elections.

Under the proposal, any group that runs a TV ad with the name or image of a candidate within 60 days of an election would have to register with the state Elections Board and list its contributors, just as all candidates and campaign committees must do now.

Voting 8-2, the Joint Committee for Review of Administrative Rules urged the Legislature to pass the measure. Barring a special or extraordinary session, however, the earliest opportunity for the Legislature to consider the bill would not come until January.

Still, Jay Heck, executive director of Common Cause in Wisconsin, hailed the vote as a significant victory.

James Buchen, vice president of Wisconsin Manufacturers and Commerce, doubted the bill would win the Legislature's approval and predicted the courts would reject it if the Legislature didn't.

The committee vote was the Legislature's last attempt at campaign finance reform before the election season begins, and it resulted from the committee's decision last month to suspend an Elections Board rule that attempted to address issue ads run by WMC and other groups.

The board wanted to incorporate a 1976 U.S. Supreme Court ruling into Wisconsin law. The board proposed a so-called magic words test, derived from a footnote in the Supreme Court ruling. If a TV ad or mass mailing used such words as "vote for," "elect," "defeat," "reject" or their "functional equivalents," the sponsors would be subject to state regulation.

However, critics said the board's rule would not deal effectively with the political attack ads that have avoided regulation because they don't tell people how to vote.

"This is a victory for the voters of Wisconsin," Heck said. "This now will level the playing field. This will require that corporations, or unions, or wealthy individuals can no longer dump unlimited, unregulated money during a campaign under the guise of phony issue advocacy."

While the 60-day rule won't apply to the fall elections, Heck said the proposal might have a tempering effect.

"What it does demonstrate to groups is that members of the Wisconsin Legislature will have the will to try to do something to close the biggest loophole in the law," Heck said.

Buchen said, however, that the proposal went beyond merely requiring disclosure.

"It's a flat prohibition on using corporate money for issue advocacy 60 days in front of an election," he said. "It's also flatly unconstitutional. It'll never stand up in court, if it ever had to go there."

Buchen said the committee's actions wouldn't influence WMC this fall.

"It's another of dozens of proposals that float around the Legislature," he said. "It's sort of the worst example of trying to regulate free speech."

Sen. Judy Robson (D-Beloit), committee co-chairman, offered the proposal, which she said was a key recommendation of Gov. Tommy G. Thompson's Commission on Campaign Finance Reform, the so-called Kettl Commission.

Rep. Glenn Grothman (R-West Bend), the other committee co-chairman, had offered a version that copied the Supreme Court's magic words footnote. Only Grothman and Sen. Bob Welch (R-Redgranite) voted against Robson's proposal.

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THE DAILY PRESS
Ashland, Wisconsin
NORTHERN WISCONSIN'S MORNING NEWSPAPER

State has chance to make campaign finance reform a reality

The Daily Press

With the start of its 2001 session, the Wisconsin Legislature has an opportunity to quickly take an important step in real campaign finance reform.

Last fall the bipartisan Joint Committee for Review of Administrative Rules developed new rules regulating issue advocacy ads -- ads that clearly advocate one candidate over another, but because they don't use the words "vote for" are exempt from state campaign finance regulations.

Since 1996, groups on both sides of the political aisle have increasingly used issue advocacy ads as a means of supporting candidates without having to disclose who paid for the advertisements.

"It's a bipartisan problem," said Jay Heck, the executive director of Common Cause In Wisconsin, a campaign finance reform advocacy organization.

Heck correctly notes that the spending on issue advocacy ads by "phantom groups" has contributed to spiraling campaign spending -- seen this past election in a $3 million state senate race.

The JCRAR is proposing that any issue advocacy ads running 60 days prior to an election must be regulated like any campaign advertising -- that means full disclosure of who is paying for the advertisement and those paying for the ads would be subject to campaign contribution limits.

Under Wisconsin statutes, the JCRAR must introduce its proposal in January as part of the regular legislative session. Each standing

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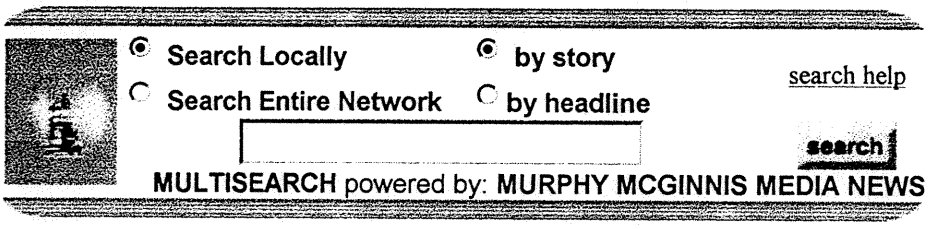
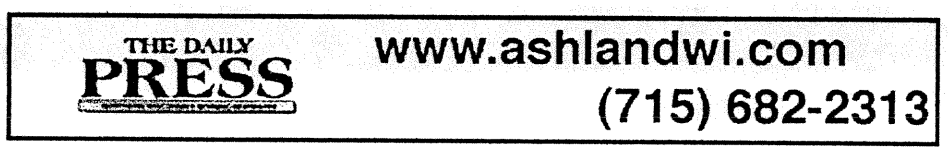
committee then has 30 days to review the proposed rules, and within 40 days the measure must be placed on the calendar of both the Assembly and the Senate for consideration.

Heck said Senate Majority Leader Chuck Chvala has promised to place measure on the Senate calendar. So far, he has received no such acknowledgement from House Speaker Scott Jensen.

It's clear the time is now to enact this critical piece of campaign finance reform legislation -- in a November advisory referendum, 90 percent of Wisconsin voters in 52 counties said they favored enacting campaign finance reform in the state.

Heck says Wisconsin has gone from being a leader in campaign finance to an "also-ran." This measure will go a long way to making Wisconsin a state where campaigns have no hint of underhandedness.





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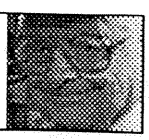

Our view: It's time for real reform of campaign finance laws

Tribune editorial

What if airlines ran attack ads against each other - complete with pictures of plane crashes and accusations that their rivals are unsafe? Wouldn't you think twice about ever flying again?

What if banks broadcast commercials accusing their competitors of not being a safe place to deposit money? Wouldn't that undermine consumer confidence in banks?

Remember those awful ads from the last election? The worst were placed by independent groups that do not have to abide by state election laws. Their negative, misleading ads have the effect of turning people off to politics and government.

Those were examples used at a breakfast meeting Monday by state Sen.-elect Mark Meyer, a La Crosse Democrat.

Meyer knows what he's talking about. He estimates that a total of somewhere between $1.5 million and $2 million was spent in the election contest between Meyer and Republican Dan Kapanke.

And most of that money was spent by independent groups. Neither candidate wanted the independent help. They didn't want to go negative, and in their own ads they kept the discussion on the issues. Not so the private groups. Because court rulings have equated the expenditure of money for election ads with free speech - and because of a loophole created by court cases - so-called independent groups don't have to reveal where they get their money, as politicians are required to do.

As long as the independent groups stop short of telling you to vote for or against someone (instead, they say something like, "Call Mark Meyer and tell him you want him to stop ...." doing whatever the ad accuses him of doing.)

It's a loophole that should be closed. Campaign finance reform is badly needed in Wisconsin. We need to do something about independent expenditures, and we need to have immediate disclosure online of all campaign expenditures.

Here's the bottom line: Citizens have a right to know who is paying for political campaigns.

<<Back to opinion

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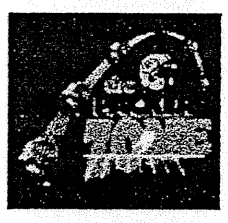
OPINION
Fri 21-Jul-2000

Elections Board fumbles chance to curb issue ads

Trying to get meaningful campaign finance reform OK'd is sometimes enough to make Pollyanna cynical.



WISinfo

The last hope for curbing the "phony issue ads" in this fall's campaign was dashed Wednesday when the state Elections Board on a 4-4 vote failed to approve a rule.

The rule would have required third parties to disclose that they paid for issue ads featuring the name or likeness of a candidate for state office within 60 days of an election. The rule also would have required the groups to pay for the ads through political action committees, which can accept contributions of no more than $10,000 from individuals under state law.

Phony issue ads are legal end-runs around election laws. A special-interest group can run ads that affect elections with few, if any, restrictions as long as they avoid phrases like "vote for," "vote against" "defeat," etc.

Wisconsin Manufacturers and Commerce, for example, targeted Sen. Chuck Chvala in a past election. It ran ads right before the election saying that Chvala had never seen a tax he didn't like, and called on people to let him know they didn't like this. This was ruled a legitimate issue ad by the state Supreme Court last summer.

Why is the board's failure to act important? It means we'll likely see more money spent on competitive races without the $10,000 limit. It means the ads we're likely to see will be more negative since the folks paying the bill for them can remain anonymous. It means special-interest groups, rather than the candidates, can shape the nature of the debate in a race by the issues they pick for their advertisements.

Jay Heck, executive director of Common Cause in Wisconsin, the nonpartisan citizens watchdog group, said Wisconsin has more phony issue ads than any other state.

Both Republicans and Democrats will have a good opportunity to do something about the campaign-finance mess for future elections early in the next legislative term.

But for this election, the orgy of money and unfettered mud-slinging can proceed with few limitations.

MILWAUKEE
JOURNAL SENTINEL

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MONDAY, MAY 22, 2000

EDITORIAL

Let's close this loophole

It didn't get much attention. Maybe that's because this Legislature, now in its final days, has done, and probably will do, nothing about campaign finance reform in Wisconsin.

Unless the governor orders a special session this month to consider reform, January is the Legislature's next chance. That's because on a strongly bipartisan vote, the Joint Committee on Administrative Rules recommended closing a loophole in existing law big enough for every special interest in the state to drive through.

Essentially, what the committee did was recommend curtailing so-called "issue ads," which profess to educate voters but actually are thinly disguised dodges around campaign disclosure laws.

It might be too late for the full Legislature. But the committee's action — and legislative protocol — does guarantee that reform will be high on the list for consideration early in the Legislature's next session.

Any political observer knows that issue ads are really fronts for groups that support a specific candidate for election. Because the ads refrain from using words such as "vote for" and "elect," even if they are clearly designed to elect or defeat someone, special interests are permitted to spend virtually unlimited amounts and still avoid disclosing the source of the money.

It's the kind of information voters might want. The fact that those special interests indulging in issue ads may not want their identities known is in itself disturbing.

So what the committee has recommended is quite simple: Groups that run television ads with the name or image of a candidate within 60 days of an election must register with the State Elections Board and list all their contributors, just as candidates and campaign committees do.

If the rule becomes law, no First Amendment guarantees will be broken. Rather, corporations, unions and the very wealthy will no longer be permitted to hide behind phony issue advocacy ads. The change would level the playing field all around.

MEMORANDUM

TO: Members of the Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform

FROM: Sandra George, for the Wisconsin Newspaper Association

RE: The "Issue Advocacy" Regulatory Scheme Contained in Senate Bill 2 Is Unconstitutional!

DATE: January 22, 2001

Senate Bill 2 would impose registration and reporting requirements upon individuals who and organizations which make a communication within 60 days of an election if the communication includes the name or likeness of a candidate who is running at that election. For the reasons outlined below, this provision will not withstand constitutional scrutiny and should be stricken from the bill.

The provision runs afoul of a long line of U.S. Supreme Court decisions which follow *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* is the landmark decision which established the principle that a government may only regulate communications which expressly advocate the election or defeat of a particular candidate. Under *Buckley*, speech which merely discusses public policy issues and which lacks the "express advocacy" described in the decision cannot be regulated.

Under Senate Bill 2, the mere mention of a candidate's name in a communication made with 60 days of an election invokes the heavy hammer of state regulation. The purpose of this portion of the bill is to lump a communication which merely uses a candidate's name into the same regulatory boat with a communication which implores those who read the words to vote in a particular manner. Under *Buckley*, it is clear that such a leap may not constitutionally be made.

It is important to note that, with very limited exceptions, a corporation may not engage in "express advocacy" under current Wisconsin law. (The exceptions cover such things as communicating exclusively with shareholders or members and with supporting or opposing a referendum.) Current law wisely places no restrictions of the discussion of public policy issues, so long as such communications do not advocate a vote for or against a particular candidate.

Finally, it should be pointed out that the current exception for the news media may be of little use here. When similar legislation was pending last session, the State Elections Board

informally opined that "Wisconsin law specifically exempts fair coverage of bona fide news stories, interviews with candidates, editorial comment and endorsements". One wonders what the words "fair" and "bona fide news stories" mean in this context. Such clarifications ('fair" and "bona fide") imply that a Wisconsin newspaper could not freely discuss public policy issues without interference from the "content police" if Senate Bill 2 is enacted in its current form!

Judith B. Robson
Wisconsin State Senator

Testimony of Senator Robson on Senate Bill 2
January 22, 2001

Senator George and Members of the Committee on Judiciary:

Thank you for the opportunity to present testimony on this important issue. Senate Bill 2 was authored by the Joint Committee for Review of Administrative Rules, of which I am the Senate co-chair. This bill will regulate so-called issue ads.

Issue ads are election advertisements that purport to avoid taking sides in an election. Their ostensible purpose is simply to present information to voters. Because the ads do not use phrases such as "vote for" or "defeat," they are not subject to the requirements of Wisconsin's campaign finance laws.

However, as we all know, the purpose of these ads is really to help elect or help defeat certain candidates. They are carefully scripted to portray a candidate in the best or worst possible light and are written to influence voters' views of the candidate. They only appear during election season. But because they do not use certain words, they are exempt from regulation.

The rationale for Senate Bill 2 is simple. Election related communications should be judged on their content and the circumstances in which they are made, not on the basis of specific words such as "vote for" or "elect." Political speech may advocate a specific vote even if certain "magic" words are not used. The dividing line between ads that are subject to Wisconsin's election laws and ads that are exempt should be the context and intent of the ad. The dividing line should not be an arbitrary one that ignores the purpose of an ad by focusing on whether certain words are used.

The reason why we need to regulate issue ads is equally simple. Issue ads deny voters the right to cast an informed vote because sponsors of these ads are not subject to disclosure. Voters simply do not know who is paying for an ad and therefore cannot judge the credibility of the ad.

This bill does not suppress speech, it merely gives voters the right to know who is speaking. Consider an analogy from a different context. Many states have "anti-mask" statutes. These statutes provide that anyone participating in a public demonstration cannot wear a mask. These laws were enacted to force the KKK to take off their hoods in public. The courts have upheld the constitutionality of these laws, saying that under the First

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Amendment the KKK has the right to speak, but does not have the right to speak anonymously. The same principle should guide our elections – let people advertise for and against the candidates they like and dislike, but let the public know who is paying for the ads.

Senate Bill 2 is based on a recommendation of the Governor's Blue Ribbon Commission on Campaign Finance Reform, the Kettl Commission. The Kettl Commission recommended that television and radio commercials, mass mailings and telephone banks that occur within 30 days of an election and that use the name or likeness of a candidate for office should be considered election-oriented activity and therefore subject to reporting and disclosure laws.

The Kettl Commission's report explains the rationale for this recommendation in the following way: "Everyone in electoral politics – candidates, political parties, PACs, and groups educating voters or exploring issues – ought all to be playing on a level field, in the clear light of day."

On a level playing field, in the clear light of day means that we must end the two-tier system that currently exists. Currently, candidates and political parties are subject to reporting and disclosure, but other groups are not. Because some groups are not subject to reporting and disclosure, voters have lost their right to make an informed choice since they do not know who is sponsoring many of the election communications that they see and hear. Subjecting everybody who advocates the election or defeat of a candidate to our reporting and disclosure requirements will give voters the information they need to make an informed choice.

Opponents of this bill will argue that it is unconstitutional. However, I have no doubt that the bill will pass constitutional muster. The United States Supreme Court has said that states have authority to regulate "express advocacy" – communications that advocate the election or defeat of a candidate. The legal question raised by this bill is how to define the term "express advocacy." Instead of relying on specific words, the bill takes the approach that "express advocacy" can be defined by the context in which a campaign ad appears.

This approach is consistent with the decision of the Wisconsin Supreme Court in the case *Elections Board v. Wisconsin Manufacturers and Commerce*. In that case, the Court said that no particular "magic words" are necessary for a communication to constitute express advocacy. The court declined to adopt a context-based definition of "express advocacy" but the members of the court did indicate that the Legislature could probably do so. Senate Bill 2 takes the court up on its invitation to define "express advocacy" based on the context in which an ad appears.

The JCRAR voted 8-2 to introduce SB 2. This vote shows bipartisan support for real change in the area of issue ads. Bipartisan support is not surprising – it is consistent with Wisconsin's proud tradition of open government.

With passage of SB 2, voters would once again regain their rightful place as the most important part of elections. Moreover, if this bill were passed, it would lay the groundwork for other bills. Success at the beginning of the session will make other campaign finance changes possible later in the session. Passage of this bill will set the tone and provide momentum for meaningful reform in other areas.

I urge you to give your approval to Senate Bill 2. Doing so will let voters know who is paying for election ads and will enable them to cast an informed vote.

Thank you.

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MEMORANDUM

TO: Wisconsin Realtors Association

FROM: Brady Williamson / Mike Wittenwyler
LaFollette Godfrey & Kahn

DATE: January 22, 2001

SUBJECT: Issue Advocacy Regulation

At your request, we have reviewed 2001 Senate Bill 2 ("Senate Bill 2") and its attempt to regulate issue advocacy.[1] The legislation, if enacted, would create a new standard for political communication to categorize it as either "express advocacy," subject to government regulation, or "issue advocacy," not subject to regulation. Specifically, the proposal would, by law, define as express advocacy *all* political communication that takes place in the 60 days prior to an election containing the name or likeness of a candidate or the name of a political party – even if the political communication did not expressly advocate the election or defeat of a clearly identified candidate.

Like other proposals to regulate issue advocacy, Senate Bill 2 raises First Amendment issues at the heart of the ongoing state and national controversy about money and politics. As you know well, the U.S. Supreme Court has concluded that some forms of political communication must remain unregulated and, as a result, federal and state courts have been very skeptical of any attempted regulation in this area. It is particularly important, therefore, that everyone involved in evaluating this legislation and similar proposals understand the constitutional framework for issue advocacy and the cases discussing it.

This memorandum provides an overview of the express advocacy / issue advocacy debate and the court decisions examining legislative and administrative attempts to regulate issue advocacy. Senate Bill 2 as drafted is, almost certainly, unconstitutional. It will, almost certainly, be challenged (and challenged successfully) if enacted – just like all of the other state and federal efforts to limit issue advocacy. While the outcome of such a challenge cannot be predicted with certainty, the judicial trend is unmistakable: to reject *any* regulation of issue advocacy to avoid any limitation on First Amendment rights.

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[1] Identical legislation has also been introduced in the 2001-2002 legislative session as Assembly Bill 18. For purposes of this memorandum, both bills are collectively referred to as "Senate Bill 2."

POLITICAL COMMUNICATION

Express Advocacy

The U.S. Supreme Court established the express advocacy concept 25 years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the landmark decision that concluded that government can regulate only those funds used for political communications expressly advocating a candidate's election or defeat. That is, the Court held in *Buckley,* the First Amendment precludes any regulation of political speech that does *not* "in express terms advocate the election or defeat of a clearly identified candidate . . . ." *Id.* at 44. While the concept of "express advocacy" appears in the Wisconsin Statutes, *see* § 11.01(16)(a)1., Stats., the term is not defined – *Buckley* and the state and federal court decisions applying it provide that definition.

Generally, express advocacy is any communication that expressly advocates the election or defeat of a clearly identified candidate. The most obvious form of express advocacy is a campaign advertisement produced and paid for by an individual candidate's campaign committee: "Re-elect Joe Smith. He's been a good legislator and deserves another term." Independent expenditures – spending for political speech, that is, by groups and individuals other than candidates – are often used for express advocacy as well. Those expenditures are perfectly legal as long as they are reported and not connected or coordinated with a candidate's campaign committee. Indeed, independent expenditures are recognized by state law, *see* § 11.06(7), Stats., and protected by the First Amendment.[2] *See Buckley*, 424 U.S. at 47-50.

Independent advertisements convey an election message, from a political action committee ("PAC"), for example, in express terms: "During his first term, Joe Smith has been good for working families. Because of his hard work, Joe Smith has gained the endorsement of the Working Families Association and deserves to be reelected." In Wisconsin, any entity engaging in express advocacy (whether a candidate, a political party or a PAC) must register with the Elections Board and comply with all applicable reporting requirements – including the obligation to disclose all of those who have contributed to the organization.[3]

Corporate Speech

Corporations are prohibited by Wisconsin law from spending *any* money (whether as "contributions" or "disbursements" as defined in § 11.01, Stats.) on express advocacy and, except through registered PACs, contributing to organizations engaged in express advocacy. *See*

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[2] The opportunity for individuals and groups to make unlimited (although reportable) independent expenditures on express advocacy, the Supreme Court has held, helps justify the stricter regulation of contributions to candidates and committees that, in turn, engage in express advocacy. *See* 424 U.S. at 28-29.

[3] If the express advocacy involves a federal election, of course, registration and reporting occur with the Federal Election Commission ("FEC").

§ 11.38, Stats. Under state and federal law, moreover, corporations cannot make independent expenditures. These statutory prohibitions are broad:

> No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any [state] political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

§ 11.38(1)(a)1., Stats. (Unlike Wisconsin, about 25 states do *not* prohibit corporate contributions and disbursements for political purposes.)

> It is unlawful for any . . . corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any [federal] political office . . .

2 U.S.C. § 441b(a).

While corporations are prohibited from engaging in express advocacy, "directly or indirectly," the First Amendment does not permit government to prohibit all corporate speech on public issues and candidates.[4] "The mere fact that the [respondent] is a corporation does not remove its speech from the ambit of the First Amendment." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).

In *Austin* as well as in *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978), the U.S. Supreme Court has recognized the right of corporations to engage in political speech, and the protection afforded political speech does not lessen merely because the speaker is a corporation.

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

435 U.S. at 777. The *Belotti* case involved corporate spending to influence the outcome of a referendum and, in *Austin*, the Supreme Court upheld a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures to elect or defeat

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[4] In addition to for-profit businesses, of course, the universe of "corporations" includes a wide range of nonprofit organizations such as Wisconsin Right to Life, Inc. and the Sierra Club with diverse political points of view. While the U.S. Supreme Court has developed a limited exception for certain ideological corporations to engage directly in express advocacy (*see FEC v. Massachusetts Citizens for Life, 479* U.S. 238 (1986); *infra,* p. 5), Senate Bill 2 would apply to *all* entities organized in the corporate form – regardless of their purpose or source of funding.

any candidate in elections for state office. Nevertheless, the Court in each case reaffirmed the First Amendment's protection for corporate political communication.

Issue Advocacy

In subjecting only express advocacy to regulation, the U.S. Supreme Court in *Buckley* concluded, in effect, that many forms of political communication will remain unregulated. Communication that does *not* expressly advocate the election or defeat of a clearly identified candidate – generally called "issue advocacy" – is not subject to any government regulation. By definition, issue advocacy avoids any explicit discussion of a candidate's election or defeat and, instead, provides information on a political issue or policy question associated with a candidate. The distinction between issue advocacy and express advocacy can be elusive, more easily stated in theory than made in practice, and it has led to a number of state and federal court cases. Yet it is a critical distinction with significant constitutional and political implications. For corporations, the difference between express advocacy and issue advocacy is nothing less, in this state, than the distinction between illegal conduct and legal conduct.

Consider the broad range of political communication. At one end is communication that obviously supports or opposes a clearly identified candidate: "Vote for Joe Smith." Communication that contains language such as "elect," "defeat," or "vote for" is almost always express advocacy. At the other end of the continuum is the political communication that does not explicitly address the election or defeat of a particular candidate or even mention a candidate: "Taxes are bad. We should just say 'no' to tax increases." That, undoubtedly, is protected issue advocacy. Between the two are the political communications that arguably could fall into either category depending on the perspective of the listener or viewer – an advertisement broadcast two weeks before an election, for example, stating: "Taxes are bad. Joe Smith keeps supporting higher taxes. Give Joe Smith a call and let him know how you feel about taxes and his votes for higher taxes."

In a variety of proceedings, over the last 15 years, both the State Elections Board and the Federal Election Commission ("FEC") have argued that a subjective, context-based inquiry is necessary to determine the proper legal category for a particular political communication. The courts almost invariably have rejected that argument, however, concluding that the First Amendment requires that express advocacy be an extremely narrow category, which includes *only* those communications that in express words call for the election or defeat of a clearly identified candidate. And government, the courts have held, can only regulate express advocacy.

Any expansion of the political communication subject to regulation in Wisconsin will inevitably lead to a ban on constitutionally-protected corporate political speech. That is, if the definition of "political purpose" under state law is expanded to include issue advocacy that contains so much as "the name of a political party" or "the name or likeness of a candidate" – proposed in Senate Bill 2 – any corporate expenditures for such political communication within 60 days of an election will be a "contribution" or a "disbursement." *See* §§ 11.01(6), 11.01(7), 11.01(16), Stats. Corporations, however, are flatly prohibited from making "contributions" or

"disbursements." *See* § 11.38, Stats. And the penalty for violating that prohibition is serious: "Whoever intentionally violates . . . [sec.] 11.38 . . . may be fined not more than $10,000 or imprisoned for not more than 4 years and 6 months or both" – a penalty that makes corporate spending on express advocacy a felony. *See* § 11.61(1)(b), Stats.

THE *BUCKLEY* STANDARD: "Magic Words"?

In *Buckley*, the U.S. Supreme Court concluded that the compelling governmental interest in preventing corruption or the appearance of corruption justifies the regulation of express advocacy (but not issue advocacy). *See* 424 U.S. at 45. In theory, the funding for a political communication that explicitly advocates the election or defeat of a particular candidate, in contrast with a message that merely discusses issues and candidates, will more likely be perceived as a *quid pro quo* arrangement between the candidate and the donor. Given this potentially corrupting influence, the Court held that those who make contributions to fund express advocacy may be subject to regulation while, necessarily under the First Amendment, no aspect of issue advocacy may be regulated.

The Court in *Buckley* referred to these forms of regulated political communication as "express advocacy" to focus on "the actual language used in an advertisement" and preclude regulation based on its context or its subjective interpretation. *FEC v. Christian Action Network*, 894 F. Supp. 946, 952 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1996)(per curiam)(unpublished). While "the distinction between discussion of issues and candidates and advocacy of election or defeat may often dissolve in practical application," the Court's bright-line standard avoided restricting, in any way, discussion of public issues. 424 U.S. at 42. The Court amplified that rule 10 years later in another significant political speech decision:

> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of *issues and candidates* from more pointed exhortations to vote for particular persons.

FEC v. Massachusetts Citizens For Life, 479 U.S. 238, 249 (1986) ("*MCFL*") (emphasis added).

When MCFL, a nonprofit corporation, was penalized for publishing a newsletter that identified "pro-life" candidates and urged readers to vote "pro-life" in an upcoming primary election, the Supreme Court faced for the first time the question of whether a particular form of political communication was express advocacy. The Court determined that the newsletter was express advocacy but that the federal ban on corporate independent expenditures could not constitutionally be applied to MCFL, a nonprofit, non-stock corporation with an ideological purpose. MCFL, the Court emphasized, did not rely on contributions from either for-profit corporations or from labor organizations and, as a result, "there is no need for the sake of disclosure to treat MCFL any differently than [PACs] that only occasionally engage in independent spending on behalf of candidates." *See id.* at 262-63 (citation omitted).

In footnote 52 of the *Buckley* decision, the Court had described express advocacy as any political communication that contains terms such as "elect," "defeat," "vote for," or "vote against." 424 U.S.

at 44. Since then, the overwhelming majority of courts has concluded that these words, or words like them, must be used in a way that expressly advocates the election or defeat of a specific candidate to qualify as express advocacy. A few courts, however, have held that contextual factors – factors other than the words themselves – may convert protected political speech into regulated express advocacy.

For most courts, "express advocacy is language which 'in express terms advocates the election or defeat of a clearly identified candidate' through use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' and 'reject.'" *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991), *cert. denied*, 502 U.S. 820 (quoting *Buckley*, 424 U.S. at 44 n. 52). The long line of decisions adopting a similar interpretation of the *Buckley* standard invariably emphasizes the critical importance of the First Amendment. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 928 F.2d at 471 (quoting *Buckley*, 424 U.S. at 14-15). Permitting the regulation of only political speech that employs clear terms calling for a specific candidate's success or defeat, it is argued, establishes a clear, categorical standard defining what government can regulate as "express advocacy." Everything else is protected speech.

Few people would argue that the "express advocacy" standard is satisfying – either conceptually or practically. Yet, it does provide a "bright line," and the Constitution always has required a bright line when government attempts to regulate political speech.

> The advantage of this rigid approach, from a First Amendment point of view, it that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited.

Maine Right to Life Comm. v. FEC, 914 F.Supp 8, 12 (D.Me. 1996), *aff'd* 98 F.3d (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997).

In a few cases, however, courts have given a broad construction to *Buckley*. They consider the so-called "magic words" in footnote 52 only one consideration in the analysis, not determinative of express advocacy. Political speech must be viewed in its entirety, these courts have held, considering not just the language employed but also the *context* in which the communication occurs: "[S]peech is 'express'... if its message is unmistakable, ...it presents a clear plea for action . . ., and [it is] clear what action is advocated," regardless of the presence or absence of certain "magic words." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

ATTEMPTED REGULATION OF ISSUE ADVOCACY: WISCONSIN

WMC Issues Mobilization Council, Inc. ("WMC-Issues"), a group affiliated with Wisconsin Manufacturers & Commerce, the state's pre-eminent business lobby ("WMC"), engaged in an issue advocacy campaign during the fall of 1996. The political communication consisted of television and radio ads that highlighted the voting record of six incumbent legislators (in

contested races for re-election) and encouraged viewers and listeners to contact the legislators to express their approval or disapproval of the legislators' position.

WMC-Issues did not consider the ads express advocacy and, accordingly, the corporation did not register with the Elections Board, nor did it disclose the source of the funds used to pay for the campaign.[5] (The group freely acknowledged that it had raised corporate funds to pay for the advertisements.) The Elections Board disagreed. Since the ads had the "political purpose of expressly advocating" the defeat or re-election of the state senators and representatives named in the ads, the Elections Board maintained, the group and its contributors were subject to regulation including full disclosure of those contributors. Eventually, the Elections Board charged WMC-Issues with various violations of the campaign finance laws[6] – including, of course, the absolute prohibition on corporate contributions in § 11.38, Stats. – but the Dane County Circuit Court dismissed the case.[7]

Elections Board v. WMC

In 1999, the Wisconsin Supreme Court upheld the circuit court's dismissal, concluding in a split decision that WMC-Issues lacked fair notice that the ads could be considered express advocacy under a context-based analysis. *See Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999).[8] The Elections Board had engaged in what the Court considered "in effect, ... retroactive rule-making," and the Court found that a violation of the constitutional right to due process. *Id.* at 678. WMC-Issues could not be prosecuted for the advertisements.

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[5] In addition to support from Wisconsin Manufacturers & Commerce itself, WMC-Issues received financial support from the ABC Corporation (a WMC member), the XYZ Corporation (a non-member) and other corporations. WMC-Issues used pseudonyms for its corporate supporters to avoid disclosing their identities. Its supporters, WMC-Issues maintained, had a constitutional right to privacy unless and until the State Elections Board could prove that the group had engaged in express advocacy.

[6] The Elections Board also named WMC itself, ABC Corporation, and XYZ Corporation in its complaint. The parties are collectively referred to as "WMC-Issues" in this memorandum.

[7] In 1998, four state legislative candidates filed a new series of administrative complaints with the Elections Board about new political broadcasts sponsored by WMC – Issues and, again, litigation followed almost immediately. The Elections Board dismissed the complaints outright, this time, because it concluded that the political speech was not express advocacy. On review, the Dane County Circuit Court rejected the candidates' request to enjoin WMC – Issues from broadcasting its political commercials, concluding that the commentary was not express advocacy and that, in any event, prior restraint of political speech is unconstitutional. *See Erpenbach v. IMC* (Case No. 98 CV 2735), Bench Decision, Transcript, pp. 6-17.

[8] The Court's plurality opinion was authored by Justice Crooks, joined by Justice Steinmetz. Justices Bablitch and Prosser, in separate concurrences, agreed with the Court's conclusion but (for very different reasons) not with its reasoning. Justice Bradley and Chief Justice Abrahamson, in dissent, found that the advertisements did amount to express advocacy – under a context-based analysis. *See* 227 Wis. 2d at 694-96, citing *Buckley* and *MCFL*. The seventh member of the Court, Justice Wilcox, did not participate in the decision.

Having reached its decision on a procedural ground, the Court did not explicitly decide whether the ads were – or were not – express advocacy, nor did it establish a prospective standard for "express advocacy." Rather, the Court left that to the state legislature or the Elections Board. To provide guidance, the Court did reiterate that "the definition of the term express advocacy is not limited to the specific list of 'magic words' [identified in footnote 52 in the *Buckley* decision] such as 'vote for' or 'defeat.'" Without dismissing the idea of a context-based analysis, the Court did note that a number of courts had rejected just that approach and that, consistently with *Buckley* and *MCFL*, any legislative or administrative definition of express advocacy must be "limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 682 (quoting *Buckley*, 424 U.S. at 43).

Elections Board's Proposed Regulation

Following the Wisconsin Supreme Court's decision in *WMC*, the Elections Board began a formal rule-making process to try to clarify the distinction between issue advocacy and express advocacy for Wisconsin.[9] *See* Clearinghouse Rule 99-150 ("CR 99-150").

The proposed rule provided that individuals, other than candidates, and committees, other than PACs, would be subject to the record-keeping and campaign disclosure requirements of Chapter 11 of the Wisconsin Statutes (and, not incidentally, to the prohibition of § 11.38, Stats., on corporate contributions and disbursements for a political purpose) if the person or committee makes a communication that:

1. Makes a reference to a clearly identified candidate;
2. Expressly advocates the election or defeat of the candidate;
3. Unambiguously relates to the campaign of a candidate; and,
4. Contains the phrases or terms "vote for," "elect," "support," "cast your ballot for," "Smith for Assembly," "vote against," "defeat," or "reject" or the *functional equivalents* of these phrases or terms.

(Emphasis added.) The standing committees in the Senate and the Assembly that then evaluated the rule promptly objected to it and, under § 227.19(5)(a), Stats., the proposed rule was referred to the Joint Committee for Review of Administrative Rules (the "JCRAR").

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[9] In drafting the rule, the Elections Board appears to have followed the advice in Justice Prosser's concurring opinion in *WMC*:

> Wisconsin Statutes regulating political expression must be very narrowly construed. If the term "express advocacy" encompasses more than the magic words enumerated in footnote 52 of *Buckley v. Valeo*, the additional words and phrases should be explicitly disclosed. Those words and phrases must advocate the election or defeat of a clearly identified candidate by urging citizens how to vote or directing them to take other specific action unambiguously related to an election.

227 Wis. 2d at 686 (citations omitted).

JCRAR

On April 11, 2000, the JCRAR held a public hearing on the rule as proposed by the Elections Board. *See JCRAR Report to the Legislature on Clearinghouse Rule 99-150*, LRB 99-4936/1. To some, the rule was unnecessary and redundant. It merely reflected in general, if not precisely, the Supreme Court's decision in *Buckley*. That is, the rule defined express advocacy as political speech that contained the "magic words" from footnote 52. The proposed rule also used the phrase "functional equivalent" to suggest that express advocacy, quite properly, can include synonyms for the eight examples provided by the U.S. Supreme Court. (No one has seriously argued that only the words listed in footnote 52 qualify as "express advocacy.") To others who testified at the hearing, the rule was not strong enough to be effective. Merely reflecting current law, some argued, the Elections Board proposal was too weak because it did not address the context in which the communication occurred.

On April 14, 2000, the JCRAR voted unanimously to concur in the bicameral objections of the standing committees to the Elections Board's proposed rule. The proposed rule, the JCRAR simply and briefly concluded, was "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." *See JCRAR Report* at 4.

Senate Bill 2

As required by § 227.19(5)(e), Stats., the Joint Committee voted on May 10, 2000 to introduce companion bills in both chambers of the legislature to support its objections to CR 99-150 and to replace the proposed administrative rule with legislation that addressed the context (not just the words) of political communication. Introduced in the 2001-2002 legislative session, the alternative legislation is Senate Bill 2 and Assembly Bill 18.[10] (They would make several changes in the state's campaign finance law in Chapter 11, Stats., but this memorandum only addresses their impact on the definition and regulation of issue advocacy.)

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[10] The legislation was introduced after February 1, 2000 – by definition, before the start of the next legislative session. Accordingly, the JCRAR was required by statute to reintroduce the alternative proposal on the first day of the next regular session of the legislature, January 3, 2001. By law, if bills "are introduced on or after February 1st of an even-numbered year and before the next regular session of the legislature commences, . . . the [JCRAR] shall reintroduce the bills on the first day of the next regular session of the legislature . . . ." *See* § 227.19(5)(g), Stats. The presiding officer of each chamber must then refer the bill to the appropriate standing committee within 10 working days after its introduction. *See* § 227.19(5)(e). If either chamber "adversely disposes" of the bill, the Elections Board may promulgate the proposed rule. *See* § 227.19 (5)(g). Notwithstanding the statutory command, the alternative proposal was not introduced in the Senate until January 12 (S.B. 2) and not introduced in the Assembly until January 16 (A.B. 18), well after the "first day" of the 2001-2002 legislative session. According to the Legislative Council, the failure to introduce both bills on January 3 may not invalidate or adversely affect either bill.

As drafted, Senate Bill 2 is significantly more expansive than the rule proposed by the Elections Board. The bill would expand the forms of political communication subject to regulation and, through § 11.38, Stats., prohibit the very kind of "issue advocacy" engaged in by WMC-Issues and other corporations. The legislation would broaden the statutory definition of "political purposes" to include all communications "beginning on the 60th day preceding an election and ending on the date of that election and that includes a name or likeness of a candidate... or the name of a political party." *See* Senate Bill 2, Section 2.

Under this proposal, issue advocacy that contained a name or likeness of a candidate or the name of a political party would be regulated (regardless of whether it met the constitutional standard of "express advocacy") and, necessarily, a substantial amount of corporate speech would be banned under § 11.38, Stats. Under the proposal, corporate expenditures on political communication within 60 days of an election would be considered a "contribution" or "disbursement" for a "political purpose." *See* §§ 11.01(6), 11.01(7), 11.01(16), Stats. Corporations are flatly prohibited, of course, from making "contributions" or "disbursements." *See* § 11.38, Stats. A corporation, under this prohibition, could *only* communicate "with its members, shareholders or subscribers to the exclusion of all other persons, with respect to the endorsement of candidates...." *See* § 11.29(1), Stats.

Senate Bill 2's proposed pre-election regulation of issue advocacy that contains " the *name of a political party*" would be unprecedented. No other legislative proposal or law has ever attempted to regulate such issue advocacy. On its face, it directly contradicts the scope of regulated speech established in *Buckley* by the U.S. Supreme Court: political communication that expressly advocates the election or defeat of a clearly identified *candidate*. Nowhere in *Buckley* or in any of the subsequent judicial decisions, including the Wisconsin Supreme Court's decision in *WMC*, is there the slightest suggestion that express advocacy can ever include a political communication that merely mentions a "political party."

ATTEMPTED REGULATION OF ISSUE ADVOCACY: FEDERAL AND STATE

The attempt in Senate Bill 2 to establish a rule based on the timing or the context, as opposed to the text, of a political communication is not a novel idea. There have been similar efforts to regulate issue advocacy by other states as well as by the FEC. In the 25 years since *Buckley*, more than a dozen courts have reviewed statutory and administrative attempts to regulate speech discussing political issues and candidates by modifying the *Buckley* definition of express advocacy. *All of these attempts have failed.*[11] In the absence of speech that expressly advocates the election or defeat of a clearly identified candidate, the courts have consistently held, the First Amendment prohibits any regulation of political communication.

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[11] Only in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), has a court accepted the FEC's expanded definition of express advocacy. The agency's attempt to codify that decision, in an administrative rule, *see* 11 C.F.R. § 100.22(b), however, was found unconstitutional. *See Maine Right to Life Comm. v. FEC,* 98 F.3d 1 (1st Cir. 1996) *cert. denied*, 522 U.S. 810 (1997); *infra*, p. 13.

Federal Election Commission

The FEC has been trying to redefine the express advocacy standard almost since its creation. Defeated in a series of lawsuits, however, it has been singularly unsuccessful in expanding its regulatory authority beyond political communication that expressly advocates the election or defeat of a clearly identified candidate. Most recently, in a case discussed below, the U.S. Court of Appeals has harshly criticized the FEC because its regulatory crusade "simply cannot be advanced in good faith." *See FEC v. Christian Action Network,* 110 F.3d 1049, 1064 (4th Cir. 1997). These are the important cases:

FEC v. Central Long Island

In *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 51 (2d Cir. 1980), the FEC began prosecuting an organization affiliated with the John Birch Society for spending $135 in October, 1976 to prepare and distribute pamphlets that criticized an incumbent legislator for supporting "Higher Taxes and More Government" based on specific votes he had cast. Applying federal law, the U.S. Court of Appeals held that political communication that employs a candidate's likeness but does *not* expressly advocate the election or defeat of that candidate cannot be considered express advocacy for the purpose of regulation. *Id.* at 53.

Under *Buckley*, "speech not by a candidate or political committee could be regulated only to the extent that the communications 'expressly advocate the election or defeat of a clearly identified candidate.'" *Id.* at 52 (citation omitted). The court stressed "the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution." *Id.* at 53. In response to the FEC's argument that the pamphlet seemed specifically designed to unseat "big spender" candidates, the court commented: "[T]he FEC would apparently have us read [the *Buckley* Court's phrase] 'expressly advocating the election or defeat' to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the [holding of] . . . *Buckley*. . . . The [FEC's] position is totally meritless." *Id.*

FEC v. Furgatch

The FEC has prevailed in one case, *FEC v. Furgatch*, 807 F.2d 857, that has become the jurisprudential foundation for those advocating an expansive, context-based application of *Buckley*.[12] In *Furgatch*, the Court of Appeals recognized that "[t]he short list of words included

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[12] The case involved a newspaper advertisement critical of President Carter's 1980 campaign strategy. The ad concluded:

> If he succeeds[,] the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.
>
> DON'T LET HIM DO IT.

807 F.2d at 858.

in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. . . . A proper understanding of the speaker's message can best be obtained by considering speech as a whole." *Id.* at 863.

The *Furgatch* court concluded that context (not just text) is indeed relevant in determining express advocacy: if the message (1) is "unmistakable and unambiguous," and (2) "presents a clear plea for action," and (3) is clear in "what action is advocated," then speech may fall into the category of express advocacy even absent the use of "magic words." *Id.* at 864. Notably, in *dicta*, the court also stated, "[o]ur conclusion is reinforced by consideration of the timing of the ad. . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed [to vote against a particular candidate]." *Id.* at 865.

The Court of Appeals upheld the FEC's conclusion that the political communication at issue satisfied the express advocacy standard, even though it was not "clear what action [was] advocated," *id.* at 864, but the court added an important qualification:

> [T]his advertisement was not issue-oriented speech of the sort that the Supreme Court was careful to distinguish in *Buckley*, and the Second Circuit found to be excluded from the coverage of the [Federal Election Campaign] Act in *Central Long Island Tax Reform*. The ad directly attacks a candidate, *not because of any stand on the issues of the election*, but for his personal qualities and alleged *improprieties in the handling of his campaign*.

Id. at 865 (emphasis added).[13]

While the *Furgatch* decision tried to expand the *Buckley* standard for express advocacy, as would Senate Bill 2, the Ninth Circuit acknowledged that there can be no express advocacy without a "clear plea for action" at an election. *Id.* at 864. Senate Bill 2 does not make a similar demand on the speech it purports to regulate and prohibit; instead, the bill would impose a blanket prohibition on *all* corporate speech that included the name or likeness of a candidate or even use the name of a political party, regardless of the content of the speech, within 60 days of an election.

Faucher v. FEC

The FEC next challenged the right of corporations to engage in issue advocacy by adopting a regulation permitting corporations to prepare and distribute only "nonpartisan voter guides" that do "not suggest or favor any position on the issues covered" and that express "no editorial opinion concerning the issues presented." *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991). The rule was unconstitutional. The U.S. Court of Appeals held, again, that "trying to discern when

[13] Surprisingly and significantly, the Ninth Circuit did not even mention the Supreme Court's decision in *MCFL*, 479 U.S. 238, decided nearly a month earlier, the only FEC enforcement action in which the U.S. Supreme Court has squarely addressed *Buckley's* express advocacy standard.

issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*." *Id.* at 472.

> The highest court of this land has expressly recognized that as a nation we have a "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Buckley* and *Massachusetts Citizens for Life* ensured that right for corporations as well as individuals by limiting the scope of the [Federal Election Campaign Act] to express advocacy.

Id. (citation omitted).

Maine Right to Life v. FEC

In 1995, the FEC attempted to use some of the language from *Furgatch* in a regulation designed to permit it to consider "external factors such as proximity to an election" to determine whether speech was or was not express advocacy and, accordingly, subject to regulation. *See* 11 C.F.R. § 100.22(b). The U.S. Court of Appeals invalidated the FEC's contextual definition of express advocacy as inconsistent with the Supreme Court's "bright line" regulatory standard. *See Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997). The appellate court affirmed the district court's conclusion that the restriction of election activities should not be permitted to intrude *in any way* upon the public discourse of political issues:

> What the Supreme Court did [in *Buckley* and affirmed in *MCFL*] 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 Comm. v. FEC, 914 F.Supp. 8, 14 (D. Me. 1996), *aff'd*, 98 F.3d 1.

FEC v. Christian Action Network

Most recently, the U.S. Court of Appeals in *FEC v. Christian Action Network* concluded that the "bright line" created by the Supreme Court in *Buckley* properly avoids any restriction on the discussion of issues of public importance, holding that "an argument . . . that no words of advocacy are necessary to expressly advocate the election of a candidate simply cannot be advanced in good faith." 110 F.3d at 1055, 1064. The case involved the FEC's attempt to apply a contextual standard for express advocacy based on *Furgatch*. Acknowledging that even though the context in which political communication occurs may send an unmistakable message supporting or opposing a particular candidate, the court still concluded that:

> The Supreme Court of the United States [has] held . . . that corporate expenditures for political communications violate [federal election law] only if the communications employ "explicit words," "express words," or "language"

> advocating the election or defeat of a specifically identified candidate for public office.

Id. at 1050 (quoting *Buckley*, 424 U.S. 1, and *MCFL*, 479 U.S. 238).

> That is, the Court held that the [federal law] could be applied consistently with the First Amendment only if it were limited to expenditures for communications that literally include *words which in and of themselves* advocate the election or defeat of a candidate.

Id. at 1051(emphasis added).

> [T]he [Supreme] Court concluded, plain and simple, that absent the bright line limitation [of the express advocacy standard], the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled.

Id.

Finding the position taken by the FEC in the litigation "foreclosed by clear, well-established Supreme Court caselaw," *id.* at 1050, the Court of Appeals ordered the FEC to pay all of the group's legal fees and costs.

> In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that "no words of advocacy are necessary to expressly advocate the election of a candidate," simply cannot be advanced in good faith. . . . "Explicit words of advocacy of election or defeat of a candidate," "express words of advocacy," the Court has held, are the constitutional minima.

Id. at 1064 (citations omitted).

The federal court decisions discussed in this memorandum do not exhaust the list of cases applying the *Buckley* standard.[14] They are, however, the principal decisions on point, illustrative of the virtually unbroken line of cases refusing to expand the definition of "express advocacy."

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[14] *See also, FEC v. Nat'l Organization for Women,* 713 F. Supp. 428 (D.D.C.1989); *Clifton v. FEC,* 114 F.3d 1309 (1st Cir. 1997), *cert. denied,* 522 U.S. 1108 (1998); *Minnesota Citizens Concerned for Life v. FEC,* 113 F.3d 129 (8th Cir. 1997); *Right to Life of Dutchess County v. FEC,* 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Kansans for Life, Inc. v. Gaede,* 38 F. Supp.2d 928 (D. Kan. 1999).

McCain-Feingold: Snowe-Jeffords Amendment

Any discussion of issue and express advocacy would be incomplete without a reference to the pending McCain-Feingold bill, soon to be addressed by Congress. In addition to a much publicized ban on "soft money," the bill is likely to include a provision dealing with advertisements that refer to a clearly identified federal candidate (although not a political party) and are broadcast during the same 60-day window offered by Senate Bill 2.

Under the "Snowe-Jeffords" amendment, the term "electioneering communication" would be expanded to include all broadcast advertisements that refer to a "clearly identified candidate for Federal office" made "60 days before a general, special, or runoff election for such Federal office or 30 days before a primary or preference election." *See* S. 79, 106th Cong. § 2 (1999). While the constitutionality of such a provision has been subjected to serious question and criticism, some supporters of McCain-Feingold view it as necessary to ensure the bill's passage. *See* "Cochran Announces Support of Reform Bill; McCain Insists on Debate after Inauguration," *BNA Money & Politics Report* (Jan. 5, 2001); "One of President-Elect Bush's First Efforts as President May Be Dealing with Campaign Finance Reform," *National Public Radio: Morning Edition* (Jan. 2, 2001).

State Regulatory Attempts

A number of state legislatures also have attempted to expand the express advocacy standard. Without exception, however, these efforts have been consistently rejected by the courts as an unconstitutional expansion of *Buckley* and an impermissible regulation of issue advocacy. These are the important cases:

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. 919 F.Supp. 954, 956 (S.D. W.Va. 1996). 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*." *Id.* at 959.

The challenged provisions categorically presumed that any entity engaging in the publication or distribution of any "written analysis" of a candidate's position on an issue (e.g., scorecards, voter guides) – within 60 days of an election – was engaging in that activity "for the purpose of advocating or opposing the nomination, election or defeat of any candidate." *Id.* at 956. Further, the statutes required full disclosure of "the party responsible" for the publication and distribution of voter guides or other written analyses of candidate positions within 60 days of an election. *Id.* The federal district court held, however, that the statutory presumption that a voter guide was express advocacy collided with the First Amendment. *Id.* at 959.

> The effect of West Virginia's presumption is to regulate political advocacy which the Supreme Court has stated is protected by the First Amendment. Obviously, a state legislature cannot alter the Supreme Court's interpretation of the Constitution [in *Buckley* and affirmed in *MCFL*].

Id.

The issue advocacy provisions of Senate Bill 2 are not limited to voter guides. Indeed, the bill is not even limited to communications that discuss candidates. It applies a statutory presumption of express advocacy based on the timing of the communication, however, just like the West Virginia statute. Such presumptions fail the test of constitutionality. As the court in *West Virginians for Life* suggested, "[i]nstead of creating a presumption which applies to all political advocacy, [a state] should examine such advocacy on a case-by-case basis, and apply the bright-line rule of *Buckley* and *Massachusetts Citizens for Life* to each case." *Id.* Categorical presumptions are convenient. They are, however, rarely constitutional.

Michigan

Addressing Michigan law, a federal court considered the constitutionality of an administrative rule almost identical to Senate Bill 2's proposal in *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766, 767 (W.D. Mich. 1998). The rule imposed a prohibition on corporate communications employing a candidate's name or likeness within the 45 days prior to an election. *Id.* 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." *Id.* at 771. The state did *not* appeal the court's decision.

Senate Bill 2 is even more restrictive than the rule renounced in *Miller*: it would apply not just to corporations but to individuals as well, regulate speech about political parties, not just candidates, and impose an even longer time period for regulated and prohibited speech.

Iowa

In *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), Iowa's administrative definition of express advocacy was declared unconstitutional as well. Instead of turning on express words of advocacy, the administrative code adopted an expansive and subjective definition that focused on what "reasonable people or reasonable minds would understand by the communication." *Id.* at 969. Such a definition unfairly places a political speaker wholly at the mercy of the understanding of his audience, however, the court held:

> [A]bsent the bright-line limitation in *Buckley*, "the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the rights of citizens to engage in the vigorous

> discussion of issues of public interest without fear of official reprisal would be intolerably chilled."

Id. at 970 (citation omitted).

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." Although VRLC had not been charged with violating the law, it claimed that its issue advocacy activities failed to comply with the disclosure and reporting requirements. Until the provisions were declared unconstitutional and the threat of civil sanctions thereby removed, VRLC argued it would have to cease engaging in issue advocacy communications.

Enacted in 1997, the Vermont law contained two disclosure requirements. First, all "political advertisements" must carry the name and address of the person who paid for the advertisement, and the definition of "political advertisement" included any communication "which expressly or *implicitly* advocates the success or defeat of a candidate." Vt. Stat. tit. 17, §§ 2881-2882 (emphasis added). Second, anyone who made an expenditure totaling $500 or more on "mass media activities" within 30 days of an election was required to report those expenditures within 24 hours to the state and to any candidate whose name or likeness was included in the activity. Vt. Stat. tit. 17, § 2883.

While recognizing the constitutional issues raised by the requirements, the federal district court in Vermont was willing to construe the law very narrowly and, in 1998, upheld the provisions. The U.S. Court of Appeals disagreed with the lower court's narrow reading, however, finding the disclosure requirements "facially invalid under the First Amendment."

> The obvious and only purpose for the Vermont General Assembly's use of the word "implicitly" in § 2881 was to make clear that all communications that advocate the success or defeat of a candidate, including issue advocacy that implicitly endorses a candidacy, come within the disclosure requirements. The provision cannot be saved by construction from violating the First Amendment.
>
> ....
>
> Like §§ 2881 and 2882..., § 2883 is [also] unconstitutional on its face. The section apparently requires reporting of expenditures on radio and television advertisements devoted to pure issue advocacy in violation of the clear command of *Buckley*.... [A]n advertisement about a law or proposal popularly known by the name of the legislator who happened to be seeking re-election..., expenditures

> on advertisements urging people to contact a candidate, or publicizing a news item containing the candidate's name, would have to be reported under § 2883 even if the advertisement does not expressly advocate the election or defeat of the candidate. Because of this broad reach..., § 2883 is unconstitutional under *Buckley*.

Vermont Right to Life at 388-89 (citations omitted).

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. *See Washington State Republican Party v. Washington State Public Disclosure Commission*, 4 P.3d 808 (Wash. 2000).

During the weeks preceding the 1996 general election, the Washington State Republican Party (the "WSRP") broadcast two television advertisements critical of a gubernatorial candidate. The advertisements were nearly identical – except that the spots mentioning the candidate's campaign for governor were paid for with state-regulated "hard money" while the advertisements paid for with funds from the WSRP's "soft money" account did not directly mention the campaign although they named the candidate. After a complaint was brought against the WSRP for using "soft money" for some of the advertisements, the WSRP filed a lawsuit alleging that any enforcement action would violate its right to engage in free speech through issue-oriented political advertisements.

In a 6-3 decision, the Washington Supreme Court concluded that the WSRP "soft money" advertisement was issue advocacy and, therefore, protected from *any* government regulation under the First Amendment:

> The most important thing to bear in mind when addressing the issue advocacy/express advocacy distinction is that to preserve core First Amendment freedoms, the standard applied is an exacting one, with any doubt about whether a communication is an exhortation to vote for or against a particular candidate to be resolved in favor of the First Amendment freedom to freely discuss issues.
>
> If speakers are not granted wide latitude to disseminate information without government interference, they will "steer far wider of the unlawful zone," thereby depriving citizens of valuable opinions and information. *This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and*

> *almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized.*
> ....
>
> We disagree with this [context-based] approach. *Buckley* intended to protect issue advocacy which discusses and debates issues in the context of an election. *Issue advocacy thus does not become express advocacy based upon timing.* The right to freely discuss issues in the context of an election, including public issues as they relate to candidates for office, is precisely the kind of issue advocacy the Court recognized was beyond the reach of regulation. ... The most effective political speech respecting issues vis-à-vis candidates may well occur in the thick of the election campaign...[, but it cannot be regulated.]

4 P.3d at 820-21(citations omitted) (emphasis added) On August 2, 2000, the State Public Disclosure Commission voted unanimously to recommend that the decision not be appealed.

The court noted, correctly, that "[m]ost circuits adhere to the narrow view of express advocacy identified in *Buckley*," *id.* at 820, and found that the *Furgatch* context-based approach invited excessive regulatory and judicial assessment of the meaning of political speech. *Id.* at 821. Thus, despite the state's protests about the simultaneous broadcast of two very similar commercials before the election, one express advocacy and one issue advocacy, the Supreme Court of Washington found the contextual approach, particularly when based on temporal proximity to an election, unconstitutional and incompatible with *Buckley*.

Mississippi

There was another example last year of the post-*Buckley* jurisprudence addressing the distinction between issue and express advocacy, *Chamber of Commerce v. Moore*, Civil Action No. 3:00-CV-778WS (S.D. Miss. 2000), a federal district court decision from Mississippi. The state attorney general argued there that several advertisements constituted impermissible corporate independent expenditures – express advocacy, that is, *not* issue advocacy. The advertisements contained the images and names of candidates and general language, both spoken and written, praising them such as "Lenore Prather – using common sense principles to uphold the law" and "Judge Keith Starrett – he knows victims (sic) rights count!" *Id.*, slip opinion, pp. 6-7.

Ultimately, the court held that these forms of advocacy were not issue advocacy because they contained "no true discussion of issues." *Id.* at 25. None of the advertisements contained any of the magic words of *Buckley*, and the district court held that "a finding of any use of 'magic words' becomes unnecessary when an advertisement clearly champions the election of a particular candidate. . . ." *Id.* at 26. In determining that the communications were express advocacy, the court considered the timing of the advertisements in relation to election day. *Id.* at 25. While the timing of the advocacy is a "useful element" in such determinations, the court said, it also emphasized that "timing itself is no talisman of express advocacy." *Id.* n.14.

This is the most pro-regulatory issue advocacy decision reported since *Furgatch*. The court did look at the context and the implications (not just the language) of the broadcast advertisements in state judicial races to conclude that they were express advocacy. On November 3, the case was appealed to the U.S. Court of Appeals.

Unlike the court's decision in *Moore*, however, the Senate Bill 2 proposal does use the timing of communications in a "talismanic" fashion, not merely as a "useful element" in the analysis. That is, under Senate Bill 2, any issue advocacy using the name or likeness of a candidate (or the name of a political party) is automatically express advocacy solely because of its timing in relation to election day. Timing is not just *a* factor: it is *the* factor. In contrast, the Mississippi attorney general made his determination on a case-by-case basis under the existing "independent expenditure" statute and, for the court, the timing of the advertisements was only one factor in its evaluation.

Colorado

The most recent judicial analysis of issue advocacy came less than a month ago in the U.S. Court of Appeals' decision in *Citizens for Responsible Government State PAC v. Davidson*, Case Nos. 99-1570, 99-1574 (10th Cir. 2000). The plaintiffs in this case challenged various provisions of Colorado law, including the definitions of "independent expenditure" and "political message" as well as the state's notice and reporting requirements. *Id.* at 22. In its December 26, 2000 opinion, the court found the statutory definitions of "political message" and "independent expenditure" unconstitutional.

These provisions, the court held, impermissibly extended the reach of Colorado's Fair Campaign Practices Act "to advocacy with respect to public issues, which is a violation of the rule enunciated in *Buckley* and its progeny." *Id.* at 47 (citation omitted).

> [In *MCFL*], the Court clarified that express words of advocacy were not simply a helpful way to identify "express advocacy," but that the inclusion of such words was constitutionally required.

Id. at 25.

As written, the unconstitutional statutory definitions in Colorado were:

> ["Independent expenditure" means] payment of money by any person[15] for the purpose of *advocating* the election or defeat of a candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of such candidate. "Independent expenditure" includes expenditures for political

[15] "Person is defined as 'any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons.'" *CRG*, 2000 U.S. App. LEXIS at 10 n.6 (quoting Colo. Rev. Stats. § 1-45-103(9)).

> messages which *unambiguously refer to any specific public office or candidate* for such office, but does not include expenditures made by persons, other than political parties and political committees, in the regular course and scope of their business and political messages sent solely to their members.

Id. at 26 (emphasis added).

> ["Political message," as used in the above definition of "independent expenditure," means] a message delivered by telephone, any print or electronic media, or other written material which *advocates* the election or defeat of any candidate *or which unambiguously refers to such candidate.*

Id. (emphasis added).

Like Senate Bill 2, the Colorado law attempted to place unregulated issue advocacy in the category of regulated express advocacy by expanding the state statutory definition of political communication. As the Tenth Circuit held, however, even the narrowest construction of such statutorily-expanded definitions fails to save their constitutionality.

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 . . . ." *See* N.C. Gen. Stats. § 163-278.12A.

After the "Farmers for Fairness" group ("Farmers") purchased advertisements critical, by name, of certain members of the state legislature, but which did not include any "magic words" of express advocacy, the North Carolina State Board of Elections initiated an enforcement action that resulted in a federal suit challenging the statutes as facially unconstitutional. *See Perry v. Bartlett*, 231 F.3d 155, 159 (4th Cir. 2000).

Farmers candidly and openly acknowledged that its issue advocacy could – and, sometimes, did – influence the outcome of an election. Considered in the context of Farmers' admission of attempting to influence an election, the state argued, the advertisement should be treated as express advocacy – subject to government regulation. *Id.* at 161. The U.S. Court of Appeals, however, rejected the state's argument:

> The State does not cite any authority in support of its theory. In essence, the State is asking this court to recognize an exception to the "express advocacy" test [of *Buckley*] when the entity admits, outside of the advertisement, that it is trying to defeat a particular candidate.

> The State's position is undermined by *Buckley* and its progeny. The Supreme Court developed the express advocacy test to focus a court's inquiry on the language used in the communications; any other test would leave the speaker "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." *Buckley*, 424 U.S. at 43.
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> . . . .
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> Consequently, we decline the State's offer to abandon the rule of *Buckley* and allow the State of North Carolina to regulate political expression, which on its face is issue advocacy, when the speaker acknowledges an intent to influence the outcome of an election. 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.

Id. at 161-62.

Given the Fourth Circuit's clear rejection of North Carolina's issue advocacy disclosure requirement, other portions of the statute are now being challenged. The North Carolina statute includes a context-based definition of issue advocacy under the rubric of "communications [that] support or oppose the nomination or election of one or more clearly identified candidates." N.C. Gen. Stats. § 163-279.14.A. In defining regulated political speech, the North Carolina legislature also provided that the following "evidence" may prove that an entity acted to expressly advocate the election or defeat of a candidate:

> Evidence of financial sponsorship of communications whose essential nature expresses electoral advocacy to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, *contextual factors* such as the language of the communication as a whole, *the timing of the communication in relation to events of the day*, the distribution of the communication to a significant number of voters for that candidate's election, and the cost of the communication [all] may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

N.C. Gen. Stats. § 163-278.14A(2). This statutory provision has been challenged in *North Carolina Right to Life, Inc. v. Leake* in the U.S. District Court for the Eastern District of North Carolina (Case No. 5:99-CV-798-BO(3)).

Connecticut

Connecticut has enacted a statute similar to the Senate Bill 2 proposal with an even longer pre-election period of time as its cornerstone. On June 29, 1999, House Bill 6665 was signed into law, treating all advertisements referring to a candidate during the 90-day period before an election as regulated campaign expenditures. The relevant provision of the Connecticut statute defines a regulated "expenditure" as:

> Any advertisement that (A) refers to one or more clearly identified candidates, (B) is broadcast by radio or television other than on a public access channel, or appears in a newspaper, magazine or on a billboard, and (C) is broadcast or appears during the *ninety-day period preceding the date of an election*, other than a commercial advertisement that refers to an owner, director or officer of a business entity who is also a candidate and that had previously been broadcast or appeared when the owner, director or officer was not a candidate. . . .

Conn. Gen. Stats. § 9-333c(a)(2).

The 90-day provision of the Connecticut statute has yet to be challenged in court. However, this restriction on political speech suffers from the same constitutional infirmities addressed in *West Virginians for Life* (where a 60-day rule was held unenforceable) and *Right to Life of Michigan* (where a 45-day rule was held facially unconstitutional). Any attempted restriction on issue advocacy that depends on broad categorizations and presumptions – especially based on a pre-election period of time, and especially based *only* on a pre-election period time – collides with the bright line rule of *Buckley*.

CONCLUSION

Any express advocacy determination should turn only on the expressed content of the political communication – not its timing or context. Senate Bill 2 seeks to expand the definition of express advocacy and, as a result, restrict the ability of corporations to speak freely on public issues and candidates – indeed, to even speak at all about political parties and party principles. Such legislation, as the FEC and state agencies and legislatures across the country have painfully learned, almost surely will be challenged and, if the judicial trend on issue advocacy regulation continues, it almost surely will be found unconstitutional. While these government efforts are no doubt well-meaning, the First Amendment prohibits any regulation, the courts have held – forcefully, repeatedly, recently and virtually unanimously – unless the speech expressly advocates the election or defeat of a clearly identified candidate. That is the constitutional standard, the only standard.