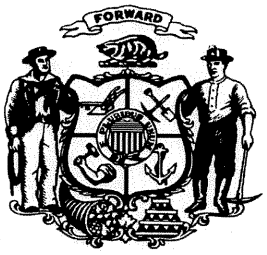
State of Wisconsin



GARY R. GEORGE
SENATOR

TO: Members, Senate Committee on Judiciary and Consumer Affairs

FROM: Dan Rossmiller, Clerk
Senate Committee on Judiciary and Consumer Affairs

RE: Drafts for Monday's Hearing and Executive Session

DATE: January 19, 2000

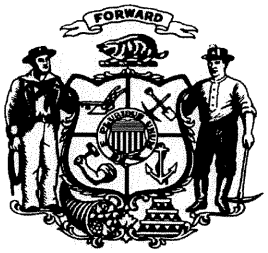
Attached please find a copy of the bill draft (LRB #1551/1) relating to campaign financing with respect to the office of Justice of the Supreme Court, making appropriations, and providing penalties. This bill draft is on the hearing agenda for Monday's hearing (1-22-2001).

Attached also please find a copy of an amendment to Senate Bill 2, which is also on the hearing agenda for Monday's hearing (1-22-2001). This amendment (LRB #a0014/1) is a technical amendment that conforms the definition of phone bank operator to the definition of "mass mailing" so that in either case there must be 50 or more substantially identical communications to trigger the effect of the bill.

There is one additional amendment to Senate Bill 2 that is still being drafted. We will try to get a copy to each committee member's office as soon as the draft is available.

Because Senate Bill 2 is introduced in support of an objection by the Joint Committee for Review of Administrative Rules to a proposed administrative rule, s. 227.19(6)(b), Stats. requires that it must be placed on the Senate calendar within 40 days of introduction. In order to meet this deadline, the Committee will have to take executive action on Senate Bill 2 in time for the Senate Organization Committee to schedule the bill for floor action on January 30th.

State of Wisconsin



GARY R. GEORGE
SENATOR

TO: Members, Senate Committee on Judiciary and Consumer Affairs

FROM: Dan Rossmiller, Clerk
Senate Committee on Judiciary and Consumer Affairs

RE: Drafts for Today's Hearing and Executive Session

DATE: January 22, 2000

Attached please find a copy of an amendment to Senate Bill 2, which is on the hearing agenda for today's hearing (1-22-2001). This amendment (LRB #a0019/1) changes the penalty for violating the reporting requirements for "issue ads" subject to regulation under the bill. Violators would be subject to civil not criminal penalties under this amendment.

Because Senate Bill 2 is introduced in support of an objection by the Joint Committee for Review of Administrative Rules to a proposed administrative rule, s. 227.19(6)(b), Stats. requires that it must be placed on the Senate calendar within 40 days of introduction. In order to meet this deadline, the Committee will have to take executive action on Senate Bill 2 in time for the Senate Organization Committee to schedule the bill for floor action on January 30th.

Rossmiller, Dan

From: Rossmiller, Dan
Sent: Thursday, March 15, 2001 5:38 PM
To: 'Mike McCabe'
Subject: RE: New Approach to Issue Ad Disclosure

Thanks.

-----Original Message-----
From: Mike McCabe [mailto:mccabe@wisdc.org]
Sent: Thursday, March 15, 2001 4:30 PM
To: Dan.Rossmiller@legis.state.wi.us
Subject: New Approach to Issue Ad Disclosure

I thought you might be interested in a report issued recently by the Campaign Finance Institute. It deals with issue ads at the federal level, but their recommendations could easily be adapted to the state level. Of particular note is the new wrinkle they're proposing to the context-based approach that is under discussion here. The report also contains a very thorough and thoughtful discussion of constitutionality. CFI's task force was a very diverse group - in fact, the head of CFI, Mike Malbin, is a former aide to Dick Cheney. So there's some real bipartisan weight to what they're suggesting. Below you'll find the press release CFI sent us. The report's available online at www.cfinst.org.

Mike McCabe

> Campaign Finance Breakthrough Proposal:
> Blue Ribbon, Bipartisan Commission Unveils
> Issue Ad Disclosure Plan
>
>
> February 22 - A high profile Task Force of former
> congressional and administration officials, political
> professionals, and election law experts issued a report
> proposing new standards for political advertising
> disclosure today.
>
> The report is available on the Web at www.cfinst.org.
>
> The proposal comes on the heels of the 2000 election, in
> which the amount of money spent on interest group issue
> advertising rivaled the total amount spent by any one

> of the national party House or Senate campaign
> committees.
>
> Members of the Campaign Finance Institute Task Force on
> Disclosure, include Jeffrey Bell, Capital City Partners;
> Becky Cain, past President of the League of Women Voters;
> Anthony J. Corrado, Professor of Government, Colby College;
> Ken W. Cole, Vice President for Government Relations,
> Honeywell Corporation; Kent Cooper, president, FECInfo; Vic
> Fazio, former Chair, Democratic House Caucus; Nicole A.
> Gordon, Executive Director, New York City Campaign Finance
> Board; George B. Gould, National Association of Letter
> Carriers; Kenneth Gross, Skadden, Arps, Slate, Meagher &
> Flom; Frances R. Hill, University of Miami School of Law;
> Ronald D. Michaelson, Executive Director, Illinois Board of
> Elections; and Phil Noble, president, PoliticsOnline.com; and
> Michael Malbin, Professor of Political Science, University at
> Albany (SUNY) and Executive Director, Campaign Finance
> Institute.
>
> "This Task Force was made up an extraordinarily diverse
> group: Republicans and Democrats, former candidates and
> consultants, corporate and labor executives, election
> lawyers and administrators," Malbin said. "It was
> remarkable to see them come together around such
> thoughtful ideas. They brought a lot of experience to the
> table. Task Force members have worked on presidential
> campaigns in every election since the Federal Campaign
> Act of 1974 became law."
>
> The CFI Task Force report recommends disclosure of political
> advertisers who sponsor campaign-related advertising within
> 60 days of an election when the advertising is targeted to
> specific voters. Unlike other proposals, the CFI proposal
> includes certain lobbying advertising exemptions and
> several provisions to target disclosure precisely to
> ensure it is constitutional.
>
> Disclosure emerged as a major issue in 2000. President
> George W. Bush became the first candidate to disclose
> all his contributors on his Web site; Congress enacted a
> disclosure bill that covered some of the newer issue ad
> groups; and issue ad groups, some of whom were criticized
> for not making adequate disclosure, spent substantially
> more than $60 million during the campaign. Meanwhile, the
> Congress is considering several bills that would regulate
> issue ad disclosure, and the Supreme Court has been asked

> to review its first case on the subject later this year.
>
> The CFI Task Force's proposal is more than just a new
> set of proposed rules It is based on a fundamental
> rethinking of the premises that have guided discussions
> in this arena down too many blind alleys. The Task
> Force specifically noted that the Supreme Court's
> "express advocacy" and "magic words" tests were not
> required by the Constitution. Rather, the Court
> developed those doctrines to make sense out of a vague
> law. Rather than patch up the law, which built
> around speakers' "purposes", the new approach put
> the voter at the center of the equation. The main
> point of disclosure is to help voters understand
> what they are hearing and seeing. "We do not need
> to know why a person shouts fire in a crowded theater,"
> the Task Force report says. "We only need to know it
> was done, and is likely to have a predictable effect."
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> "This is an important breakthrough in the way to think
> about these issues," said Malbin. "Campaign disclosure
> rules must recognize and respect political advertisers'
> rights of free speech and association, but it must also
> be based on the compelling public interest in getting
> key information to voters to let them judge political
> ads and make election decisions."
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>
> To unsubscribe from this group, send an email to:
> joycegrantees-unsubscribe@egroups.com
>
>
>
> Your use of Yahoo! Groups is subject to http://docs.yahoo.com/info/terms/
>
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Affiliated with The George Washington University

FOR IMMEDIATE RELEASE
February 22, 2001

CONTACT: Daniel Manatt
(202) 969-8890/ dmanatt@cfinst.org

Campaign Finance Reform Breakthrough:

Blue Ribbon, Bipartisan Commission Unveils Issue Ad Disclosure Plan

February 22 – A high profile Task Force of former congressional and administration officials, political professionals, and election law experts issued a report proposing new standards for political advertising disclosure today.

The proposal comes on the heels of the 2000 election, in which the amount of money spent on interest group issue advertising rivaled the total amount spent by any one of the national party House or Senate campaign committees.

Members of the ***Campaign Finance Institute Task Force on Disclosure***, include ***Jeffrey Bell***, Capital City Partners; ***Becky Cain***, past President of the League of Women Voters; ***Anthony J. Corrado***, Professor of Government, Colby College; ***Ken W. Cole***, Vice President for Government Relations, Honeywell Corporation; ***Kent Cooper***, president, FECInfo; ***Vic Fazio***, former Chair, Democratic House Caucus; ***Nicole A. Gordon***, Executive Director, New York City Campaign Finance Board; ***George B. Gould***, National Association of Letter Carriers; ***Kenneth Gross***, Skadden, Arps, Slate, Meagher & Flom; ***Frances R. Hill***, University of Miami School of Law; ***Ronald D. Michaelson***, Executive Director, Illinois Board of Elections; and ***Phil Noble***, president, PoliticsOnline.com; and ***Michael Malbin***, Professor of Political Science, University at Albany (SUNY) and Executive Director, Campaign Finance Institute.

"This Task Force was made up an extraordinarily diverse group: Republicans and Democrats, former candidates and consultants, corporate and labor executives, election lawyers and administrators," Malbin said. "It was remarkable to see them come together around such thoughtful ideas. They brought a lot of experience to the table. Task Force members have worked on presidential campaigns in every election since the Federal Campaign Act of 1974 became law."

The CFI Task Force report recommends disclosure of political advertisers who sponsor campaign-related advertising within 60 days of an election when the advertising is targeted to specific voters. Unlike other proposals, the CFI proposal includes certain lobbying advertising exemptions and several provisions to target disclosure precisely to ensure it is constitutional.

Disclosure emerged as a major issue in 2000. President George W. Bush became the first candidate to disclose all his contributors on his Web site; Congress enacted a disclosure bill that covered some of the newer issue ad groups; and issue ad groups, some of whom were criticized for not making adequate disclosure, spent substantially more than $60 million during the campaign. Meanwhile, the Congress is considering several bills that would regulate issue ad disclosure, and the Supreme Court has been asked to review its first case on the subject later this year.

The CFI Task Force's proposal is more than just a new set of proposed rules It is based on a fundamental rethinking of the premises that have guided discussions in

based on a fundamental rethinking of the premises that have guided discussions in this arena down too many blind alleys. The Task Force specifically noted that the Supreme Court's "express advocacy" and "magic words" tests were not required by the Constitution. Rather, the Court developed those doctrines to make sense out of a vague law. Rather than patch up the law, which built around speakers' "purposes", the new approach put the voter at the center of the equation. The main point of disclosure is to help voters understand what they are hearing and seeing. "We do not need to know *why* a person shouts fire in a crowded theater," the Task Force report says. "We only need to know it was done, and is likely to have a predictable effect."

"This is an important breakthrough in the way to think about these issues," said Malbin. "Campaign disclosure rules must recognize and respect political advertisers' rights of free speech and association, but it must also be based on the compelling public interest in getting key information to voters to let them judge political ads and make election decisions."

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The Campaign Finance Institute
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Washington, DC 20036

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E-mail:info@CFInst.org

EXECUTIVE SUMMARY

Disclosure – the Crumbling Cornerstone

Disclosure has rightly been called the "cornerstone" of campaign finance law. Based on the idea that voters should be able to judge who is behind an election, disclosure enjoys wide public support. Yet other than the most general agreement, policy makers are sharply divided about the specifics of a disclosure system. Campaign innovations and legal developments since the 1974 Federal Election Campaign Act have meant that a lot of candidate-specific issue advertising and other election activity are no longer subject to disclosure law. The question behind this report is whether these activities should be disclosed and, if so, how disclosure may be implemented constitutionally, and in a way that will provide accurate, useful and timely information to voters.

This report contains a factual review of the current state of political campaigning, an analysis of policy goals and constitutional law, and a series of recommendations. It is not a complete report on disclosure. It is about one key threshold question: how to define the boundary between what the law may and may not cover. We divided this question from the others because of its timeliness. We need to emphasize, however, that this report cannot stand by itself. Without adequate real-time enforcement, the best rules will be abused. Informing voters means using the Internet and other new technologies to improve the timeliness and quality of information, while safeguarding accuracy. Unless Congress comes to grips with these other matters, resolving the constitutional question will still not produce adequate disclosure. The Campaign Finance Institute's Task Force on Disclosure plans to address these additional topics in coming months.

Section 1: Overview of Recent Campaigns

Section 1 provides a survey of the rapid growth in campaign spending outside the Campaign Act's disclosure system. This section, supplemented by Appendix I, provides the factual basis for why reform is needed. The most important conclusions are:

- The order of magnitude of undisclosed communications puts them in a league that rival what was raised and spent by any one of the four Democratic or Republican congressional campaign committees. These undisclosed

communications are major forces in U.S. elections, not little oddities or blips on the screen.

- To the average recipient, these messages are indistinguishable from ones coming from the candidates or parties. They are perceived, regardless of their source, as being about the candidates and as providing generally equivalent information that will shape the recipients' opinions about the candidates.

Section 2: Constitutional Background and Policy Goals

Any disclosure law must be consistent with the First Amendment's guarantees of free speech and free association. Mindful of Supreme Court precedent, the Task Force therefore sought to craft a proposal that:

1. Serves a sufficiently important or compelling public interest -- specifically, the three legitimate interests the Court has recognized in the disclosure context, (1) serving the voters' need for information relevant to their voting decisions; (2) safeguarding against corruption or the appearance of corruption; and (3) deterring and detecting campaign finance law violations.
2. Is not overbroad, i.e. does not cover communications that are not campaign related, or pose an undue burden to communication that is campaign related.
3. Is not vague, i.e., clearly marks what is and is not required to be disclosed.

This is what the First Amendment requires. However, the Supreme Court has never said that the "express advocacy" standard was the only constitutionally permissible standard for disclosure. That standard was a means to an end – a way to fix an otherwise vague and overly broad statute in a situation in which the underlying statute (the Federal Election Campaign Act) focused on the speaker's purpose instead of the purpose of disclosure, which relates more to a communication's effects on voters.

We recommend that it is not useful or important to focus on the speaker's intentions. We do not need to know why a person shouts fire in a crowded theater; we only need to know it was done, and is likely to have a predictable effect. Similarly, we do not need to know whether a speaker intends to lobby, influence an election, or both. All we need to know is whether we can narrowly, with precision, and in a manner that is content-free, define the kinds of communications that are most likely to affect voters' judgments, so the voters can be told who is paying for them. To reach this point, it is important for Congress to get courts beyond express

advocacy statutory interpretations by giving them clear and narrowly tailored statutory language, based on new findings of fact.

Section 3: Problems with Approaches Now on the Table

In light of these constitutional and policy goals, the Task Force considered and rejected three of the major approaches most frequently cited in current debate. The Task Force thought a fourth approach was on the right track, but narrowed it.

- The "magic words" express advocacy formulation was rejected because it no longer captures most campaign related communication. It fails, therefore, to meet the first of the three tests. It is as if the Court had said that the definition of a comedy were something that told the audience, in so many words, when it should laugh
- The "reasonable person" test that is in some proposed bills, and Federal Election Commission regulations, was rejected because it fails to meet the no-vagueness criterion.
- Entity-based rules, which base disclosure obligations on organizational structure, were rejected because organizations can change their legal forms too easily and because the public's interest in disclosure stems from the character and amount of communication activity, not from any characteristic of the sponsoring organization.
- Finally, some recent bills use a bright line test. The Task Force supported this approach, but thought it needed to be narrowed, as described below.

Section 4: New Facts and New Tests

In essence, we would narrow the "bright line" test by looking at four criteria: (1) communications that mention a clearly identified candidate, (2) using specified media or crossing a cost threshold, (3) in the time before an election, and (4) targeted at the relevant constituency. The first three have been offered before; the "targeting" test is new. We offer these not as tests of a speaker's purpose, but as descriptions of communications that are relevant to voters' choices during the election season. Whatever a speaker's purpose, these criteria will select messages that the preponderance of political science research shows will affect voters, and about which voters therefore need more information to evaluate. After more than a quarter century of experience under the old statute, there is now a solid record based upon which we feel comfortable stating the following:

> As a diverse and experienced group of professionals with broad experience in this field, after having considered the relevant research and bringing our extensive observations to bear, we conclude – and believe Congress has an ample basis for concluding – that these four criteria do a

basis for concluding that these four criteria do a better job of delineating electorally relevant communications than do the existing standards. They are also narrowly tailored and clear, and otherwise meet the Constitution's requirements.

Based on these conclusions we make the following recommendations.

Section 5: Proposal

Section 5 provides, with some legislative language, a proposal for greater disclosure in light of the above First Amendment imperatives.

The Task Force would require disclosure from any person or organization spending $50,000 per year or more on electorally relevant communications.

An electorally relevant communication is defined as one that:

- Refers to a clearly identified candidate.
- Appears within sixty days of a primary or general election; (but, because the presidential primary, convention and general election periods form one continuous election season, the covered period for that office would last for the full year;)
- Appears on specified media (e.g., radio, TV, phone bank, direct mail); and
- Is targeted – i.e., a substantial portion of the expenditure must be aimed at the constituency of the candidate(s) to which the communication refers.

The purpose of the targeting test is to allow scope for lobbying communications that mention the sponsors of bills, or that appear in national outlets. Because "targeting" represents a significant innovation, not in current proposals, a detailed definition is offered in this section of the report. (Note that targeting is not part of the test we would apply for presidential elections because of that election's national scope).

Section Six: Conclusion

These recommendations represent the Task Force's best judgments about how to get voters the information they need today, without overly broad or vague rules. Policies should be fact-driven if Congress is to preserve the rights of speech and association while getting needed information out to the voters. We recognize, however, that the value of our approach, like others, could be eroded by time. Laws cannot be like geometric axioms. A good definition will be the best

description we can muster, for now, of a changing reality. They can never be perfect. If you try to include everything, you will include too much. If you try to exclude all ambiguous cases, you will be left with no disclosure. The best that human nature can manage is to describe the world as it is, and then come back after a while, take another look, and describe it again. There are no perfect, permanent resting points in this world, but some resting places can serve the public's interest well for a while. The old legal standards for disclosure may have once served a purpose. That day is over. It is time for a new start, based on the new facts of political campaigning.

* * * * *

Next Steps for the Task Force

The recommendations in this report describe the first step in the long chain of a disclosure system in which information travels from the campaign to the voter. It prescribes how to decide what activities should be covered under a disclosure regime. However, these recommendations do not encompass all necessary aspects of a disclosure regime. A general statement does not accomplish anything by itself. The hard work comes when it is time to talk about the particulars. The following issues all have to be addressed:

- How can the system best provide accurate and useful information to voters in a timely way?
- How can one ensure compliance, through real-time enforcement that takes notice of sophisticated evasions, without unduly burdening political participation?
- In general, how can you administer an effective disclosure regime, while simultaneously protecting the freedoms of speech and association?

These topics will be covered in future reports of the Task Force on Disclosure.

TASK FORCE MEMBERS<==BACK	FORWARD ==> INTRODUCTION

The Campaign Finance Institute
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FINDINGS OF FACT

1. **Spending and contribution levels for Supreme Court elections have escalated sharply since 1989:** The 1997 election set a record for candidate fund-raising of $888,924. In 1999, just two years later, the Abrahamson-Rose race shattered the newly-set record by $508,000, as $1.37 million was contributed to the two candidates.

2. **The rising cost of elections has meant that candidates have come to depend overwhelmingly on large individual contributions from a tiny number of wealthy couples and individuals.** *Just 34 couples or individuals*--an infinitesimal .0003 of 1% of the voting public in Supreme Court elections-- provided 18.5% of individual donations between 1989 and 1999.

An extremely select 4.1% of donors (a very small subset of Wisconsin citizenry, since less than 2% of voters donate to Supreme Court elections) provided over half of donations (50.7%)

3. Candidates' self-contributions have increased 150 times since 1989.
In the four elections from 1989 through 1994 the candidates contributed $16,092 to their own campaigns. Since then, candidates have contributed $815,700 of their own money to their committees. The rapidly-growing importance of candidates' personal wealth has raised the disturbing spectre of a Supreme Court increasingly closed to those who lack such financial resources of their own..

4. Personal wealth and/or the ability to raise large amounts of money has become a *de facto* qualification for the Supreme Court. This new reality was driven home when someone with the prominence of Donald Bach, former legal counsel to Gov. Thompson and a finalist for a previous Supreme Court vacancy, took himself out of the running for a recent opening. "I simply do not have that kind of personal wealth to put into a campaign," he explained.

5. Supreme Court candidates are heavily and disproportionately dependent on lawyers and lobbyists.
Lawyers and lobbyists provided 29.5% of all contributions of $100 or more from 1989 to 1999. In fact, lawyers and lobbyists provided 36.1% of all contributions of $100 or more to incumbent Supreme Court justices. This dependence on lawyers and lobbyists is also disproportionate: in the 1989-99 period lawyers and lobbyists provided legislative candidates and the governor with 10.3% and 7.5% of all such contributions.

6. Big law firms' donations play an indispensable role: Of the $413,475 in contributions from "lawyers and lobbyists," nearly one third, or $135,910, has come from attorneys affiliated with just 10 law firms. Moreover, donations from members of these 10 law firms alone accounted for nearly one-tenth (9.7%) of all individual contributions.

7. The reliance on lawyers for funding is particularly corrosive to the public's faith in the fariness of the judicial system. As the bi-partisan Fairchild Commission on Supreme Court Elections and Ethics stated after their two-year study,

"Soliciting money from others, most of who will be lawyers who practice in the court to which the

candidates seeks election, inevitably compromises the judicial candidates' appearance of independence."

8. Supreme Court candidates have drawn a disproportionately large share of their funding from wealthy, overwhelmingly white areas while depending on communities of color for a disportionately small share of funding. For example, while 10 wealthy and largely-white zip codes provided 43.3% of all contributions to Supreme Court candidates 1989-99, the 10 Wisconsin zip codes where people of color comprise the majority donated only 1.8%.

9. There is a stark disproportion between the racial composition of Wisconsin's bench and that of Wisconsin's prison population. No person of color has ever sat on Wisconsin's highest court, and the combined 263 members of the Supreme Court, Appeals Courts, and Circuit Courts of Wisconsin are 97% white. Meanwhile, 58% of the prisoners in the state's correctional facilities are people of color.

10. The system of private-interest funding has created widespread perceptions of conflicts of interest by justices benefiting from contributions. After Justice Jon Wilcox was aided by purportedly independent expenditures of more than $200,000 by pro-"school choice" forces, his vote in support of public funding of parochial-school "choice" program generated accusations of a severe conflict of interest. Schools Superintendent John Benson charged that the expenditures were intended to influence Wilcox's position, stating:

> **"More than $200,000 was illegally spent to push a philosophy at the expense of our state constitution and public schoolchildren's education. ...Every day in public-school civics classrooms all over Wisconsin, teachers tell children that justice is blind and isn't for sale. This lawsuit suggests just the opposite—enough money spent in the right places and at a critical time can influence even the state's highest court.".**

11. The current system of private-interest funding has created conflicts of interest which have made it impossible for the Supreme Court to operate at times. Wisconsin Supreme Court justices recused themselves 106 times between 1993 and 2000, according to the Office of the Supreme Court. When a controversy arose over controversial contributions (now under investigation both by the State Elections Board and civil courts) by pro-"school choice" forces aimed at assisting Justice Jon Wilcox, a majority of justice recused themselves from hearing the case.

While some conflict-of-interest situations are unavoidable under any circumstance (as when a justice had previously worked for a law firm involved in a case), there are other instances where justices appear to be recusing themselves because they received funds from a source with a strong interest in the outcome. For example, in one instance, Judge Ann Walsh Bradley recused herself from a crucial decision on "school choice," evidently because of the source of some of her campaign funding from the state's largest teachers' union. .

12. In other states, big donors have begun directly intervening to influence judges' outlook on fundamental issues, especially those relating to economic issues. A corporation called Koch Industries, the ***Wall Street Journal***, rates judges on their "pro-business" views and these ratings have then become central in attracting donations to Supreme Court candidates in Texas, Louisiana, Alabama, Mississippi, West Virginia, and Kansas. For Supreme Court justices who are perceived by Koch as "anti-business," a corporate foundation offers seminars on "free-market" economics as a first-step corrective. Those justices who fail to absorb the lessons from these seminars may then be targeted by donations from corporate executives recruited by Koch. This strategy raises the spectre of Supreme Court justices rendered accountable exclusively and directly answer to corporate donors, rather than to the law and the needs of the citizenry as a whole.

13. The present system of partial-public funding has broken down and is no longer a significant source of campaign funding. The pioneering system of partial public funding implemented by Wisconsin in the late 1970's was intended to provide candidates with at least partial independence from special interest financing and influence. But because funding for the Wisconsin Election Campaign Fund has fallen sharply from 19.9% in 1979 to under 9% in recent years, the impact of public funding has severely diminished. It has declined from 43.7% of all contributions to a mere 2.6% in 1999. For the 2000 Supreme Court race, under $27,000 was available for the two candidates.

14. The rising levels and private sources of funding have severely undermined public confidence and trust in Wisconsin's courts. An October, 1999 poll of 600 Wisconsin adults conducted by Chamberlain Research revealed these sentiments among the public:

- **77%** of those surveyed believe "campaign contributions to judges from lawyers and plaintiffs in high-profiles cased influence these judges' decisions in court."
- **81%** believe that "Because of campaign contributions, special interest groups get better treatment in our courts and by our elected officials than do regular people."

15. A system of partial-public funding will not restore public faith in the independence of Supreme Court justices. Even a re-invigorated version of the existing partial-public funding does not erase the fundamental problem of Supreme Court candidates' reliance on a relatively small number of large donors, and the resulting public perceptions of improper influence.

In fact, partial-public funding can be viewed as merely providing a discount to special interests on the perceived purchase of influence rather than decisively breaking the link between campaign financing and judicial decisions.

This insight is borne out by public-opinion polling among likely Wisconsin voters showing an overwhelming 52%-20% preference for full rather than partial public funding.

16. Massive public support exists for full public funding of judicial elections among all sectors of the Wisconsin electorate. An Oct. 1999 poll by Chamberlain Research showed the following levels of support for full public funding of Supreme Court elections:

Republican voters: 69.5%
Democratic voters: 71%
Independent voters 73%
Christian Right voters 77%

17. Public support for full public funding remains very high even when voters are told the $1 million annual cost of the plan estimated by the State Elections Board. This was true among all categories of voters: tested

Republican voters: 66%
Democratic voters: 69%
Independent voters 68%
Christian Right voters 76%

18. The most direct and certain source of funding for Supreme Court elections is General Purpose Revenues. As noted above, the current system of allocating funds based on income-tax checkoffs has seriously deteriorated,

and in any case, this system still allocates funds from GPR. A direct allocation from GPR would impose only very minimal costs on Wisconsin citizens –about a quarter per year for each of our 3.8 million eligible voters.

19. **The concept of full public funding of Supreme Court elections was supported by the bi-partisan Commission o Judicial Elections and Ethics after two years of deliberations by a distinguished and diverse panel of 27 Wisconsin citizens.** The "Fairchild Commission," as it has been known, cited an "immediate and urgent need" for such a plan. Specifically, the commission's report declared:

    "The Commission recommends full public financing of Supreme Court elections as soon as practicable.".

20. **The concept of full public funding of Supreme Court elections, known as the Impartial Justice idea, has won the editorial praise of 20 of the state's 35 mass-circulation daily papers.**

21. **The Impartial Justice concept is supported by approximately two dozen of the state's most prominent and diverse citizen organizations and numerous distinguished business leaders and elected officials.** The organizations include the League of Women Voters, Wisconsin Bar Association, NAACP, AFL-CIO, and many others.

22. **The Impartial Justice plan is backed by leading voices of the legal profession.** Two former Supreme Court justices, six former candidates, numerous judges and law professors, and organizations such as the Wisconsin Bar Association and Wisconsin Academy of Trial Lawyers are among the supporters. They all concur with the assessment of former Wisconsin Chief Justice Nathan S. Heffernan:

    "It would be entirely appropriate, indeed it is necessary, for the state tio finance 100% of judicial campaigns with a reasonable statutory limit on state funding. Assuring the continuation of an honorable, independent, and qualified judiciary is a public purpose for which tax money may be properly used."

SOURCES

1. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999,"* report by Wisconsin Citizen Action, April 1999.
2. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999.,"*
3. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999."*
4. *Milwaukee Journal Sentinel* Aug. 7,1999
5. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999."*
6. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999."*
7. Report of the Commission on Supreme Court Elections and Ethics , pages 5-6
8. *"Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999,"*
9. Office of the Wisconsin Supreme Court, Oct. 5, 1999; Wisconsin Department of Corrections data as of April 30, 1999.
10. **SOURCE FOR BENSON QUOTE NEEDED**
11. Source on recusals: Wisconsin Supreme Court information officer, Oct., 2000
12. *Wall Street Journal* Aug. 9, 1999
13. *Courting the Supremes: Big Money in Wisconsin State Supreme Court Elections 1989-1999,"*
14. Oct. 1999 poll by Chamberlain Research of 600 likely Wisconsin voters, sponsored by Wisconsin Citizen Action.
15. Feb., 1999 poll by Chamberlain Research of 600 likely Wisconsin voters, sponsored by Wisconsin Citizen Action.
16. Oct. 199 poll by Chamberlain Research of 600 likely Wisconsin voters, sponsored by Wisconsin Citizen Action.
17. Oct. 1999 poll by Chamberlain Research of 600 likely Wisconsin voters
18. Official $1 million annual cost estimate by State Elections Board
19. Report of Commission, page 4
20. Newspapers editorializing in praise of Impartial Justice plan:

Appleton Post-Crescent:
Ashland Daily News:
Capital Times (Madison):
Chippewa Herald Telegram
Daily Jefferson County Union (Fort Atkinson)
Daily Tribune (Wisconsin Rapids):
Eau Claire Leader-Telegram:
Green Bay Press-Gazette:
Janesville Gazette
LaCrosse Tribune:
Marinette Eagle-Herald
Oskkosh Northwestern
Racine Journal Times:
Shawano Leader:
Sheboygan Press
Stevens Point Journal
The Reporter (Fond du Lac)
Waukesha Freeman
West Bend Daily News
Wisconsin State Journal

WISC-TV of Madison has also editorially endorsed the bill.

21. Organizations endorsing Impartial Justice:

Clean Water Action Council
Dane County SOS
Gray Panthers
IMPACT
Interfaith Conference of Greater Milwaukee
League of Women Voters of Wisconsin
Lutheran Office on Public Policy
National Association of Social Workers—Wisconsin chapter
Racine Dominican Sisters

Sierra Club, John Muir Chapter
United Auto Workers
United Electrical Workers Local 1111 political action committee
Wis. Academy of Trial Lawyers
Wis. AFL-CIO
Wis. Bar Association
Wisconsin Citizen Action
Wis. Council of Senior Citizens
Wis. Counties Association
Wis. Environmental Decade
Wis. Federation of Nurses and Health Professionals
Wis. Federation of Teachers
Wis. Retired Educators Association
Wis. State Conference of the NAACP

22. Nathan S. Heffernan, "Judicial Responsibility , Judicial Independence, and the Election of Judges," ***Marquette Law Review,*** v. 80, No. 4, Summer 1997.

WISC-TV (Madison)

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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.

[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.
>
> . . . .
>
> 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.