WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

TO: SENATOR JOANNE HUELSMAN

FROM: Ronald Sklansky, Senior Staff Attorney

RE: The Impact of 2001 Senate Bill 2 on a Corporation

DATE: January 18, 2001

This memorandum, prepared at your request, responds to a question you have raised regarding the potential impact of 2001 Senate Bill 2 on a corporation. Specifically, you have asked whether the enactment of Senate Bill 2 would result in prohibiting a corporation from making certain election-related communications.

Background

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

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

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

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

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

4. The communication 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.

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

Following the objection to Clearinghouse Rule 99-150, JCRAR recommended for introduction into both houses of the Legislature companion bills relating to the scope of regulation and reporting of information by nonresident registrants under the Campaign Finance Law. One of these bills, Senate Bill 2, briefly provides the following:

1. Campaign registration and reporting requirements under ch. 11, Stats., will be imposed on a person or entity that makes a communication, by means of one or more communications media or a mass mailing, or through a telephone bank operator, that is made during the period 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 whose name is certified to appear on the ballot of that election, an office to be filled at that election or a political party.

2. Nonresident registrants under ch. 11, Stats., will be required to report the same information as all other registrants.

Discussion

Senate Bill 2 imposes campaign registration and reporting requirements on a person or entity making the communications described above by adding to the current definition of the term "political purposes" in s. 11.01 (16), Stats. In other words, a person or entity that makes the defined communications during a period 60 days before an election, when the communication refers to a candidate, an office to be filled at that election or political party, is engaging in an activity for political purposes. When a person or entity accepts a contribution or makes a disbursement for political purposes, registration and reporting requirements of ch. 11, Stats., are triggered.

Senate Bill 2 has an additional impact. Section 11.38 (1) (a) 1., Stats., in part provides that no foreign or domestic corporation may make any contribution or disbursement for any purpose other than to promote or defeat a referendum. That is, a corporation may not, among other things, make any contribution or disbursement for political purposes. If a corporation may not make a contribution or disbursement for political purposes, then, if Senate Bill 2 is enacted, it will not be able to make a communication that has all of the following aspects:

1. Is made by means of one or more communications media or a mass mailing, or through a telephone bank operator.

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[However, a corporation under current law may continue to create a political committee to receive contributions from individuals and make disbursements.]

If I can be of any further assistance in this matter, please feel free to contact me.

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Bill limiting issue ads flawed, lawmakers told

By RICHARD P. JONES
of the Journal Sentinel staff

Last Updated: Jan. 22, 2001

Madison - Advocates for campaign finance reform urged lawmakers Monday to put an end to what they view as phony issue ads, but a leading attorney on constitutional law warned them that the courts clearly would reject such a law.

Under the bill, any organization running a TV or radio ad with the name or image of a candidate within 60 days of an election would be subject to the same disclosure requirements as candidates and other groups running campaign ads.

The state's largest business organization, Wisconsin Manufacturers and Commerce, and other groups have argued that as long as they don't tell people how to vote, the ads are protected under the First Amendment.

Following a public hearing, the Senate Judiciary Committee took no action on the proposal. But its chairman, Sen. Gary George (D-Milwaukee), said a committee vote could come as early as Wednesday.

Mike McCabe of the Wisconsin Democracy Campaign said record campaign spending last fall, particularly in the 10th Senate District race, underscored the need for the rule. In that race, Republican challenger Sheila Harsdorf of River Falls defeated Democratic incumbent Alice Clausing of Menomonie.

McCabe said when final figures are available, total spending by the candidates in that race and groups subject to disclosure requirements would exceed $2

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million, a new record. Add to that the estimated spending by unregulated groups on issue ads, and it's more than $3 million, he said.

"The rest of that money was under the radar, the sources of which will never be known because of the gaping loophole in our campaign finance law," McCabe said.

But attorney Brady Williamson, representing the Wisconsin Realtors Association, warned lawmakers against passing Senate Bill 2. The bill as written was unconstitutional and had no chance of surviving a court challenge, he said.

Appeared in the Milwaukee Journal Sentinel on Jan. 23, 2001.

BACK TO TOP

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Searching Archives
Site Topics
Table of Contents
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Issue ads bill on the fast track

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The state's largest business organization, Wisconsin Manufacturers and Commerce, and other groups have argued that as long as they don't tell people how to vote, their ads are protected free speech under the First Amendment.

Following a public hearing, the Senate Judiciary Committee took no action on the proposal. But its chairman, Sen. Gary George (D-Milwaukee), said a committee vote could come as early as Wednesday.

The measure is on a fast track and could go to the full Senate for a vote next week without a recommendation from George's committee. Lawmakers face a deadline for action because last spring they suspended an Elections Board rule dealing with issue ads.

In its attempt to resolve the protracted dispute over issue ads, the Elections Board had adopted an administrative rule that would have incorporated a 1976

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U.S. Supreme Court ruling into Wisconsin law.

But critics said the rule would not deal effectively with the political attack ads that don't tell people how to vote.

Such criticism prompted the Joint Committee for Review of Administrative Rules last spring to suspend the rule, proposing a new one covering ads and mailings that name or picture a candidate within 60 days of an election.

Mike McCabe of the Wisconsin Democracy Campaign said record campaign spending last fall, particularly in the 10th Senate District race, underscored the need for the rule. In that race, Republican challenger Sheila Harsdorf of River Falls defeated Democratic incumbent Alice Clausing of Menomonie.

McCabe said when final figures are available, total spending by the candidates in that race and groups subject to disclosure requirements would exceed $2 million, a new record. Add to that the estimated spending by unregulated groups on issue ads, and it's more than $3 million, he said.

"The rest of that money was under the radar, the sources of which will never be known because of the gaping loophole in our campaign finance law," McCabe said.

McCabe said voters have a right to know who is behind such groups as People for Wisconsin's Future, the Alliance for Working Wisconsin, Independent Citizens for Democracy, and Project Vote Informed when they run such ads.

But attorney Brady Williamson, representing the Wisconsin Realtors Association, warned lawmakers against passing Senate Bill 2. Sometimes lawmakers must make close calls, he said, but he added that the bill as written had no chance of surviving a court challenge and would be unconstitutional.

Williamson said the 1976 Supreme Court ruling has been roundly criticized but remained the law.

Appeared in the Milwaukee Journal Sentinel on Jan. 23, 2001.

BACK TO TOP

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Searching Archives
Site Topics
Table of Contents
Contact Staff
Subscriptions

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[However, a corporation under current law may continue to create a political committee to receive contributions from individuals and make disbursements.]

If I can be of any further assistance in this matter, please feel free to contact me.

WISCONSIN RIGHT TO LIFE

Life without limits

State Affiliate of the National Right to Life Committee, Inc., Washington, DC 36004-1193

Wisconsin Right to Life, Inc.
10625 W. North Ave., Suite LL
Milwaukee, WI 53226-2331
Ph: 414-778-5780
Fax: 414-778-5785
Toll Free: 877-855-5007
Home Page: www.wrtl.org

January 19, 2001

TO: Members of the Senate Judiciary Committee

FROM: Susan Armacost, Legislative Director

RE: Senate Bill 2 and LRB-1551

Wisconsin Right to Life **strongly opposes** Senate Bill 2 and LRB-1551.

Senate Bill 2 would place unconstitutional and burdensome restrictions on the First Amendments rights of citizens' groups. The U. S. Supreme Court has repeatedly and emphatically ruled that the First Amendment provides and *absolute* constitutional shield for ***issue advocacy***, regardless of whether that commentary reflects favorably or unfavorably on particular office holders of office seekers or whether a citizens' group is motivated by the intention of influencing elections.

Yet, SB 2 would force citizens' groups to report all ***issue advocacy*** activities to the State Elections Board as if it were ***express advocacy***. Citizens' groups would be forced to provide donor information to the State where it would become a matter of public record. Our donors expect that their donor information will remain strictly confidential and would strongly object to their contributions being made public. But even beyond those important privacy concerns remains that fact that **it is none of the State's business who contributes to Wisconsin Right to Life, Inc. or any other citizens' group in the state.**

Senate Bill 2 would also chill the right of many ordinary citizens to engage in ***issue advocacy***. This would certainly be the case for our chapters who are located in communities throughout the state. Our chapters are not political action committees and they are made up of ordinary citizens. To comply with complicated election laws is not a practical option for individuals who distribute issues advocacy pieces from their homes. Rather than risk violating election laws, they will likely refrain from commenting on office holders and office seekers, which is precisely what campaign "reformers" want.

The speech of citizens' groups cannot be censored and their speech cannot be rationed in order to be "allowed" to participate in the political process. Citizens, and the organizations they join, do not need the "permission" of lawmakers to freely engage in issue advocacy. The Bill of Rights has already granted them that permission.

LRB 1551/1 would use monies derived from general revenue (taxpayer dollars) to fund the campaigns of candidates for State Supreme Court. **This would place taxpayers in the position of being forced to**

fund the campaigns of candidates with whom they may disagree and not want elected. The members and supporters of Wisconsin Right to Life would adamantly object to their tax dollars supporting candidates who support legalized abortion!

LRB 1551/1 would add insult to injury by awarding additional monies to tax-funded candidates if non-tax-funded candidates raise more money than the tax-funded candidate receives.

The very notion that the State of Wisconsin would award "benefits" to candidates who have done nothing to earn them is appalling. The non-funded candidate who works hard to raise campaign funds is penalized under this proposal and the opponent who does not have to life a finger to raise funds is rewarded! Something is very wrong with this picture!

Wisconsin Right to Life urges you to reject Senate Bill 2 and LRB 1551/1.

Thank you.

WISCONSIN RIGHT TO LIFE
Life without limits
State Affiliate of the National Right to Life Committee, Inc., Washington, DC 20004-1193

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OPERATOR: PLEASE NOTIFY THE PERSON NAMED BELOW THAT THIS FAX HAS ARRIVED. THANK YOU

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10625 W. North Ave., Suite LL
Milwaukee, WI 53226-2331
Ph: 414-778-5780
Fax: 414-778-5785
Toll Free: 877-855-5007
Home Page: www.wrtl.org

Important Notice: The information contained in this transmission is intended for the specific person(s) addressed. If you have received this fax in error please contact us immediately at the phone number below. Thank You !

TO (Name): Dan Rossmiller

LOCATION: ~~Office of Sen. Gary George~~

AT FAX #: (608) 266-7381 AT PHONE#

FROM: Susan Armacost

WRL Fax: 414/778-5785
WRL Phone: 414/778-5780

Date Sent: January 19, 2001

Pages: 3 (including this cover sheet)

Time Sent: a.m. / p.m.

MESSAGE: Dan...this is the memo for distribution to the Judiciary Committee members regarding the campaign finance bil on the schedule for January 22. Thanks very much.

LAFOLLETTE
GODFREY
& KAHN
ATTORNEYS AT LAW

ONE EAST MAIN STREET
POST OFFICE BOX 2719
MADISON, WI 53701-2719
TEL 608-257-3911
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www.gklaw.com

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MILWAUKEE
APPLETON
GREEN BAY

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.

[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.

Rossmiller, Dan

From: Sklansky, Ron
Sent: Thursday, January 18, 2001 10:36 AM
To: Burnett, Douglas; Rossmiller, Dan
Subject: news media exemption

Doug and Dan:

See s. 11.30 (4), Stats., on the news media exemption we talked about yesterday. The second sentence provides:

> This chapter shall not be construed to restrict fair coverage of bona fide news stories, interviews with candidates and other politically active individuals, editorial comment or endorsement. Such activities need not be reported as a contribution or disbursement.

I'll have this hand on Monday, if the question arises.

Ron

Rossmiller, Dan

From: Sklansky, Ron
Sent: Thursday, January 18, 2001 11:06 AM
To: Burnett, Douglas; Rossmiller, Dan
Subject: express advocacy and criminal penalties

Doug and Dan:

You asked about the possible application of criminal penalties to persons who might run afoul of the provisions of 2001 Senate Bill 2.

If enacted, a person who engages in the defined communication presumably will be accepting contributions or making disbursements for political purposes. That triggers the requirement in s. 11.05 (2), Stats., that the person file a statement with the appropriate filing officer. Section 11.61 (1) (a), Stats., provides that whoever intentionally violates this filing requirement may be fined not more than $10,000 or imprisoned for not more than 4 years and 6 months or both.

In addition, since a corporation may not make a contribution or disbursement for political purposes under s. 11.38 (1) (a) 1., Stats., a corporation making the described communication would be subject to s. 11.61 (1) (b), Stats., which provides generally that an intentional corporate violation may result in a fine of not more than $1,000 or imprisonment not more than 6 months or both.

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