Drafter's Note
from the
Legislative Reference Bureau

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Senator Erpenbach:

1. Proposed s. 11.01 (16) (a) 3. of this draft would extend this state's campaign finance reporting system to include reporting of certain mass communications occurring within a specified proximity to an election regardless of whether they would be reportable currently. In *McConnell v. F.E.C.*, 124 S.Ct. 619 (2003), at pp. 696–697, the U.S. Supreme Court sanctioned analogous provisions in the Federal Election Campaign Act in the face of a First Amendment challenge because the reporting was considered to be the functional equivalent of express advocacy, which, since *Buckley v. Valeo, et al.* 96 S.Ct. 612 (1976), has been judicially sanctioned as reportable activity. However, in *F.E.C. v. Wisconsin Right to Life, Inc.,* 127 S.Ct. 2652 (2007), the U.S. Supreme Court, at p. 2667, adopted such a narrow view of the functional equivalent of express advocacy as to in effect overrule the *McConnell* decision in all but the narrowest of circumstances. Both the *McConnell* and the *Wisconsin Right to Life* decisions were 5 to 4 decisions. The *Wisconsin Right to Life* case specifically relates to a publication issue rather than a reporting issue. Proposed s. 11.38 (2m) of this draft attempts to address the publication issue by permitting corporations and cooperatives to make expenditures for certain election–related communications if they are reported. How the *Wisconsin Right to Life* case will be applied to the disclosure issue and how it will be applied to the noncorporate context remains to be decided.

2. You may wish to reflect on proposed s. 11.05 (3) (s) of the draft, which requires a new registrant to disclose any mass communication, as defined in proposed s. 11.01 (16) (a) 3. of the draft, that the registrant made prior to registration at the time that the registrant registers and how this provision should apply to a corporation or cooperative that registers after the day that the act resulting from this draft becomes law.

3. This draft includes two appropriations for which I have specified "$–0–" for expenditure in fiscal years 2007–08 and 2008–09. When you know the dollar amounts that you need to include in the proposal, contact me and I will either redraft the proposal or draft an amendment, whichever is appropriate.

4. In *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1151 (1995), the U.S. Supreme Court found unconstitutional, under the First Amendment, a statute that prohibited publication or distribution of any material designed to promote the nomination or election of a candidate or the adoption or defeat of any issue or to influence the voters

at any election without identification of the name and address of the person who publishes or distributes the material. The court, however, indicated that a state's interest in preventing fraud might justify a more limited disclosure requirement (115 S. Ct. at 1522). Further, the court indicated that it still approved of requirements to disclose independent expenditures, which it upheld in *Buckley v. Valeo*, et. al., 96 S. Ct. 612, 661–662 (1976), (*McIntyre*, 115 S. Ct. at 1523). In view of this opinion, the constitutionality of disclosure statutes such as proposed s. 11.522, relating to labeling of certain political communications by candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit is not clear at this point. We will have to await further decisions from the court before we know the exact limits of a state's ability to regulate in this field.

5. The lower federal courts have disagreed as to whether statutes such as proposed ss. 11.50 (9) (ba) and (bb), 11.512 (2), and 11.513 (2), which increase the public financing benefit available to a candidate for the office of justice of the supreme court when independent disbursements are made against the candidate or for his or her opponents, or when the candidate's opponents make disbursements exceeding a specified level, may result in an abridgement of the First Amendment rights of the persons making the disbursements. See *Day v. Holahan*, 34 F. 3d 1356 (8th Cir., 1994), in which a Minnesota law that included provisions similar to proposed ss. 11.512 (2) and 11.513 (2) was voided. See also *Daggett v. Comm. on Governmental Ethics and Election Practices*, 205 F. 3d 445, 463–65, 467–69 (1st Cir., 2000), in which a similar law in Maine was not found to abridge the First Amendment. The U.S. Supreme Court has not yet spoken on this issue.

6. Proposed ss. 11.12 (8) and 11.512 (1), which impose additional reporting requirements upon candidates for state office who fail to qualify for a grant from the Wisconsin election campaign fund or a public financing benefit from the democracy trust fund, may raise an equal protection issue under the 14th Amendment to the U.S. Constitution. One lower federal court has held that such a provision does not contravene equal protection requirements. See *Assn. of American Physicians and Surgeons v. Brewer*, 363 F. supp. 2d 1197 (D.C., Ariz., 2005). Once again, the U.S. Supreme Court has not ruled on this issue.

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