Approved: Jan 27, 1999
Date

MINUTES OF THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION AND ELECTIONS.

The joint meeting with Senate Election and Local Government was called to order by Chairperson Sen. Hardenburger at 3:30 p.m. on January 25, 1999 in Room 519-S of the Capitol.

All House Committee members were present except: Representative John Topliker was absent

Committee staff present: Theresa Kiernan - Revisor , Mary Galligan - Research, Dennis Hodgins - Research, June Constable- Committee Secretary

Conferees appearing before the committee: Professor Richard Levy of Kansas University

Others attending: Eleven Guests registered to Guest List, attached to these Minutes.

Silent roll for the House Committee was taken by the Secretary of that Committee.

HB 2022 Campaign finance; independent expenditures:
Prof. Richard Levy gave an overview of the current campaign finance and reporting laws. Written testimony had been given to the Senate Committee during the interim meetings and he gleaned his presentation from that written testimony. He spoke at length upon the 1976 decision of the Supreme Court on Buckley v Valeo - at 424 U.S. 1 (1976), the central premise of that case was that campaign contributions and expenditures are a form of political speech and free speech. Also that contributions could be restricted to prevent contentions of the appearance of *quid pro quo.* He explained the difference of issue advocacy and **express** advocacy. He also addressed how the "magic words" worked in writing legislation, and how they could be abused. He lectured about several other established cases and various appeals, however the Buckley case alone tried to distinguish a Bright Line Test between issue advocacy and "express" advocacy. Corporation and Union donations were addressed in the Austin v Michigan Chamber of Commerce case.

Prof. Levy furnished each of the legislators a packet of documents containing the premise of his remarks. That packet is (Attachment #1) attached to these minutes and made a part hereof by reference.

Legislators Sen. Becker, Rep. Huff, Rep. O'Connor, Rep. Storm, Rep. Power, Rep. Gooch, Sen Huelskamp and Rep. Johnston asked questions of Prof. Levy concerning campaign finance reporting, timelines, language of the current statutes, and education of the public concerning campaigns. Prof. Levy addressed these questions individually. He answered questions differentiating the current Senate Bill and the current House Bill on Campaign Financing. It was his personal opinion that the Senate Bill was preferable - but the language needs to be clarified, "cleaned up", in both bills.

Chair Sen. Hardenburger asked for further questions, hearing none she thanked Prof. Levy for appearing before the committee as a neutral conferee and the meeting was adjourned..

Meeting adjourned at 5:35 pm.

June Constable, Secretary

House Governmental Organization
and Elections

Guest List

1-25-99

Your Name	Representing
Charisse Lavell	Kansas Bar Association
Jen Tyson	Intern
Derek A. Blaylock	Intern for Teresa Sittenauer
Nancy Sargent	League Women Voters KS
Brad Bryant	Sec. of State
Harriet Lange	Ks Assn Broadcasters
Marc Hamann	Div. of the Budget
Edward Rowe	League of Women Voters/ KS
John Smith	Tobacco Free Kansas Coalition
Vera Ranaway	GEC
Carol Williams	GEC

The Constitutional Parameters of Campaign Finance Reform
Written Testimony of Richard E. Levy Before the
Special Committee on Local Government

October 14, 1998

Few issues today are more controversial than campaign finance reform. Fueled by a widespread public belief that the political process has been improperly distorted by the immense costs of running for public office, and the resulting perception that those who make significant campaign contributions or independent expenditures may exert undue influence on the legislative process, a number of proposals for campaign finance reform have been introduced at both the federal and state levels. At the same time, however, government regulation of political campaigns raises concerns that lie at the core of the First Amendment's protection of freedom of speech. Uncertainty regarding the permissible constitutional parameters of campaign finance reform further complicates the already difficult task faced by legislative bodies considering campaign finance reform legislation.

The purpose of my testimony today is to help clarify these constitutional parameters for the Special Committee on Local Government, and thereby provide assistance to the legislature on this complex issue. My goal is not to advocate a particular position on the merits of campaign finance reform, but to explain the current state of the law in as neutral a manner as possible. In particular, the Committee has asked me to address the related subjects of "independent expenditures" and "soft money." In responding to this request, my testimony consists of three parts. First, I will review the United States Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which established the basic constitutional principles governing campaign finance regulation. Second, I will discuss the development of the *Buckley* principles in subsequent judicial decisions, with particular reference to the implications of the caselaw for regulation of independent expenditures and soft money. Finally, I will attempt to summarize the permissible scope of campaign finance regulation.

1. **THE *BUCKLEY* DECISION:**

In *Buckley*, the Supreme Court considered the constitutionality of the Federal Election Campaign Act (FECA), which was adopted in the wake of the Watergate scandal. FECA was a complex statute with several key components:

(1) it set contribution and expenditure limits for candidates and individuals or political groups that supported candidates;
(2) it imposed reporting and disclosure requirements on candidates, political committees, and individual contributors;
(3) it provided for public funding of presidential election campaigns, on the condition that recipients of public funds limit their total expenditures; and
(4) it established the Federal Election Commission (FEC) to implement and enforce the Act.

The Court upheld some of these provisions and struck down others, in the process establishing the key principles that constrain campaign finance reform.

House Gov. Org. & Elec.
Jan 25 1999
Attachment # 1
1-1

The central premise of *Buckley* is that campaign contributions and expenditures are themselves a form of political speech, which lies at the core of the First Amendment's protections. Moreover, since campaign finance regulations turn on the message of the speaker, they are "content based" restrictions that must survive the most rigorous First Amendment scrutiny to pass constitutional muster. The Court expressly rejected the arguments that campaign spending is a form of "conduct" or symbolic speech rather than "pure speech," and that campaign finance regulations should be regarded as "content neutral" time, place, or manner restrictions. Proceeding from its basic premise that campaign finance regulation is a content based restriction on political speech, the Supreme Court in *Buckley* evaluated FECA's contribution and spending limits, reporting and disclosure requirements, and public funding provisions separately.[1]

a. Contribution and Spending Limits

FECA placed strict limits on campaign contributions to, and expenditures on behalf of, candidates for federal office. Because these limits effectively prohibited speech based on its content, the Court applied "strict scrutiny." Under this test, which requires a content based restriction on speech to serve a "compelling" governmental interest, and to be "narrowly tailored" to serve that end, FECA's contribution limits were constitutional, but its expenditure limits were not.

The Court concluded that the contribution limits were narrowly tailored to serve a compelling governmental interest. The Court recognized that the interest in preventing the actuality or appearance of "quid pro quo" corruption; i.e., the procurement of legislative favors through large contributions, is compelling. And the limits imposed, which included a cap of $1,000 per candidate for an individual or group, $5,000 per candidate for a "political committee," and $25,000 overall per individual, were narrowly tailored in the sense that they did not severely impair the contributor's ability to communicate a given message. The Court reasoned that a contribution sends a largely symbolic message of undifferentiated support for a candidate, and that this message is not greatly enhanced by increased size. Moreover, the Court reasoned, contributors had ample alternative means of conveying their message because FECA's expenditure limits were invalid (see below).

FECA included limits on individual expenditures that paralleled the contribution limits described above, as well as limits on a candidates' expenditures from personal funds and limits on overall campaign expenditures. Although expenditures that were requested by or coordinated with a candidate could be characterized as contributions and thus be subject to FECA's limits, the limits were unconstitutional as applied to independent expenditures. First, the governmental interest in preventing the actuality or appearance of quid pro quo corruption was not compelling in the context of independent expenditures, because the danger of such corruption was much weaker when expenditures are independent. Second, the expenditure limitations were not narrowly tailored because they imposed direct and substantial restrictions on speech. Unlike contributions to

---

[1]The Court also held that certain powers could not constitutionally be granted to the FEC because its members were not appointed in accordance with Article II, Section 2, Clause 2, of the United States Constitution. This portion of *Buckley* applies only to the federal government and need not concern the Committee in this context.

1-2

1-2

candidates, which convey an undifferentiated symbolic message of support, expenditures convey a more focused message whose impact is greatly enhanced by greater expenditures. In addition, regulating expenditures greatly restricts the avenues of communication available to the speaker. Finally, the Court flatly rejected the idea that "leveling the playing field" could be a compelling governmental interest, reasoning to the contrary that the First Amendment was intended to prohibit precisely this kind of government effort to mute the message of some speakers while enhancing the message of others. Thus, FECA's limits on independent expenditures failed strict scrutiny and were unconstitutional.

b. Reporting and Disclosure Requirements

FECA also contained reporting and disclosure requirements designed to inform the voting public and to facilitate enforcement of the Act's substantive provisions by providing information to the FEC. One set of provisions required political committees, defined as groups that receive contributions or make expenditures in excess of $1,000 in a calendar year and under the control of a candidate or whose major purpose is the nomination or election of a candidate,[2] to report to the FEC the name of everyone contributing more than $10 in a year, and for contributors of over $100 in a year, to include the person's occupation and principal place of business. Another provision required every individual or group (other than a candidate or political committee) who makes contributions or expenditures of over $100 in a calendar year, other than by contribution to a political committee, to file a statement with the FEC. Because these provisions did not limit speech, they were not challenged as a direct infringement of First Amendment rights, but rather as vague and overbroad, on the theory that required reporting and disclosure would deter protected speech; i.e., would have a "chilling effect."

With regard to the reporting and disclosure requirements for political committees, the Court concluded that there was an insufficient showing of possible retaliation or intimidation against contributors to political committees and minor parties to support a facial challenge to the statute under the vagueness and overbreadth doctrines. The Court recognized that compelled disclosure of support for groups can have an unconstitutional chilling effect on associational rights under *NAACP v. Alabama*, 357 U.S. 449 (1958). But the Court distinguished *NAACP v. Alabama* on the ground that there had been a strong factual record supporting the fear of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" that would come with disclosure of membership. The Court indicated that the application of the reporting and disclosure requirements could be challenged as applied in individual cases, and expressed confidence that if the fear of reprisal is a realistic one, it would not be difficult to compile the necessary record.

The reporting and disclosure requirements, however, did have vagueness and overbreadth

---

[2]FECA itself did not require political committees to be under a candidate's control or to have the nomination or election of a candidate as the major purpose, but lower courts had imposed this narrowing construction on the Act, and the Supreme Court referred approvingly to it in explaining why reporting requirements relating to the expenditures did not pose the same vagueness and overbreadth problems as reporting and disclosure requirements for individual expenditures.

problems insofar as they applied to all expenditures "for the purpose of . . . influencing" the nomination or election of candidates for federal office. The Court reasoned that because "issue advocacy" often tends to support the election or defeat of a candidate, this provision might be read to place reporting and disclosure requirements on individuals and groups that were engaged solely in issue advocacy. To prevent the constitutional difficulties associated with such a reading, the Court construed the reporting and disclosure requirements for individuals and groups (other than candidates or political committees) as applying only to expenditures that were (1) earmarked for political purposes or authorized or requested by a candidate or a political committee; or (2) for communications that expressly advocate the election or defeat of a clearly identified candidate. This narrowing construction is generally understood as expressing the constitutional limits of reporting and disclosure requirements for political expenditures, even though its precise constitutional rationale remains unclear.

c. Public Funding

Because the public funding provisions upheld in *Buckley* are not directly relevant to the Committee's deliberations, I will summarize that aspect of the Court's decision only briefly. FECA provides public funding for presidential candidates on a sliding scale basis, with major party candidates receiving the largest funding, minor candidates with over 5 percent of the vote receiving some funding, and candidates below the 5 percent threshold receiving no funding. As a condition of public funding, the candidates must agree to limit total expenditures and fundraising to the public funding amounts.[3] The Court upheld the provision of public funding as consistent with the First Amendment because it facilitated speech rather than restricted it, and rejected the argument that the sliding scale funding improperly discriminated against smaller parties and candidates. In connection with its analysis of the latter point, the Court reasoned that while minor candidates would not receive funding, this disadvantage was counterbalanced by the fact that they would not have to accept fundraising and expenditure limits, thus implicitly approving the voluntary limits attached to acceptance of public funding.

2. POST-*BUCKLEY* DEVELOPMENTS

Under *Buckley*, there is a key distinction between contributions and expenditures. Contributions, which may include expenditures requested or coordinated by candidates, may be limited to prevent the actuality or appearance of quid pro quo corruption. Independent expenditures may not be limited. While reporting and disclosure requirements may have a somewhat broader reach than spending limits, they may be applied only to independent expenditures that expressly advocate the election or defeat of a clearly identified candidate, and may be unconstitutional as applied if the threat of reprisals in particular cases creates too great a chilling effect. While the Court in *Buckley* thus upheld some aspects of FECA, its invalidation of limits on independent expenditures

---

[3]Specifically, because the public funding is financed by a voluntary federal income tax check-off, there is no guarantee that there will be enough to fund the full amounts established under the statute. In such cases, candidates who accept public funding may engage in fundraising to reach the full amounts.

and imposition of restrictions on disclosure requirements for independent expenditures created opportunities for the evasion of the Act's permissible contribution limits, reporting and disclosure requirements, and voluntary spending limits attached to public funding. In particular, independent issue advertising is completely exempt from limits on contributions and expenditures, as well as reporting and disclosure requirements. This exemption allows political parties to collect "soft money" contributions to be used for independent expenditures that benefit their candidates. Campaign reform efforts since *Buckley* have generally focused on closing these loopholes or strengthening campaign finance regulation in other ways. In addressing the constitutionality of these reform efforts, subsequent decisions have clarified and extended the principles articulated in *Buckley*.

a. Contribution Limits

Although *Buckley* held that the contribution limits in question were constitutional, a number of issues have subsequently arisen concerning the scope of permissible contribution limits. These issues include how low limits on contributions may be, whether contributions for issue advocacy may be limited, and how broadly the concept of coordinated expenditures can be defined.

The Limits of Contribution Limits: *Buckley* involved limits of $1,000 per candidate for individuals and $5,000 for groups, but gave no indication of the extent to which lower contribution limits were permissible. *Buckley* reasoned that large contributions created a danger of the actuality or appearance of quid pro quo corruption, and that the principal communicative function of contributions was a symbolic one that was not significantly enhanced by contributions above that amount. This reasoning implies that contribution limits below a certain point would be unconstitutional because there is no danger of quid pro quo corruption and the lower limits significantly impair the symbolic value of contributions. *See Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied sub nom.* Nixon v. Carver, 518 U.S. 1033 (1996) (invalidating contribution limits of $100 and $300 to candidates for certain state offices); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) *petition for cert. filed* 67 U.S.L.W. 3177 (sept. 2, 1998) (same). Likewise, in *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), the court invalidated a ban on out-of-state contributions. On the other hand, a statute prohibiting gubernatorial slates from accepting outside contributions during the 28 days preceding an election was upheld in *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), although the court invalidated a similar prohibition on candidates' contributing to their own campaigns.

Contributions for Issue Advocacy: FECA only applied to contributions to candidates and political committees, which the Court in *Buckley* construed narrowly to apply only to groups whose primary purpose was the election or defeat of a candidate for public office. Although *Buckley* thus did not address the constitutionality of limits on issue advocacy, its reasoning implies that contributions respecting issue advocacy may not be limited. This implication was confirmed in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), which invalidated a municipal ordinance (adopted by referendum) limiting contributions respecting ballot initiatives. The Court distinguished *Buckley* on the ground that there was no danger of quid pro quo corruption from contributions to ballot initiatives, because such contributions do not directly benefit any candidate for public office who might reciprocate with special favors. The Court also reasoned that limitations

regarding ballot initiatives represent a greater restriction on speech than limits on contributions to candidates because ballot initiatives are focused as to message. For the same reasons, contributions to issue-oriented Political Action Committees (PACs) probably may not be restricted. *Buckley* narrowly construed the term "political committee" in FECA to include only committees controlled by a candidate or whose primary purpose is to secure the election or defeat of a candidate. Thus, it is generally assumed that limits on contributions to political committees may not be extended to PACs that do not have as a primary purpose the election or defeat of a particular candidate or candidates. On the other hand, the Court upheld limits on contributions to a PAC that supported multiple candidates in *California Medical Association v. FEC*, 453 U.S. 182 (1981).

This is one component of the "soft money" problem. While contributions to particular candidates can be limited, contributions to PACs and political parties for use in independent expenditures, issue advertising, and "party building" activities are exempt from these limits. (The freedom of such organizations from limits on expenditures, see below, is the other component.)

Expanding the Concept of Contributions: *Buckley* indicated that contributions could be defined, as under FECA, to include expenditures made on behalf of a candidate if they were under the control of or coordinated with the candidate or the candidate's campaign committee. In an effort to address the problem of soft money, the Federal Election Commission issued an interpretive ruling under which all expenditures by political parties were conclusively presumed to be coordinated with their political candidates. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), a state party ran campaign advertisements attacking the likely opposition candidate before their own nominating convention, and the FEC charged that these were coordinated expenditures in violation of FECA. The Court, without a majority opinion, held that the FEC could not proceed against the party. The plurality invalidated the FEC's conclusive presumption of coordination, which it regarded as plainly contrary to the actual facts of the case, but two concurring opinions would have decided the case on broader grounds. *See* below (discussing possibility that *Buckley* might be overturned or narrowed). *Colorado Republican Federal Campaign Committee* suggests that any effort to significantly expand the concept of coordinated expenditures so as to broaden the scope of permissible campaign contribution limits to encompass some independent expenditures would be unsuccessful.

b. Expenditure Limits

Buckley effectively precludes the imposition of limits on independent expenditures. As proponents of campaign finance reform have sought a means to address the problem of independent expenditures without running afoul of *Buckley*, a variety of issues have emerged. These issues include whether narrow limits on independent expenditures from particular sources are permissible, the use of voluntary expenditure limits for candidates, the constitutionality of alternative regulatory regimes, and whether *Buckley* may be successfully challenged.

Sources of Independent Expenditures: While *Buckley* invalidated limits on independent expenditures as applied to individuals and political parties, it did not address the question whether contributions from certain sources might present distinctive problems that would enable limitations on expenditures from these sources to survive strict scrutiny. With the proliferation of PACs in the

wake of *Buckley*, for example, the Federal Election Campaign Fund Act made it a crime for an independent PAC to make independent expenditures on behalf of a candidate for federal office who had accepted public funding. In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court relied on *Buckley* to invalidate this provision.

The regulation of contributions and expenditures by corporations and labor unions has also been an issue, because the legal advantages conferred on such organizations enables them to accumulate massive "war chests" whose use for political purposes may not be approved by all shareholders or members. As a general matter, it appears that corporations and unions may be required to finance political expenditures from voluntary contributions to segregated funds. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). This requirement, however, may not be applied to voluntary political associations that are incorporated but do not engage in business activities, have no shareholders or others with a claim on assets or earnings, and that are not a conduit for a business corporation or a union. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (distinguished in *Austin* on these grounds); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied sub nom. Holahan v. Day*, 513 U.S. 1127 (1995) (ban on corporate expenditures invalid as applied to nonprofit political corporation). In addition, corporations and unions may not be completely barred from spending on ballot initiatives. *See First National Bank v. Belotti*, 435 U.S. 765 (1978).

Voluntary Candidate Expenditure Limits: *Buckley* suggested that FECA's limits on total campaign expenditures by candidates receiving public funding were permissible because candidates voluntarily accepted them as a condition of receiving public funding. This analysis was confirmed in *Republican National Committee v. FEC*, 445 U.S. 995 (1980) (summarily affirming lower court decisions at 616 F.2d 1 (2d Cir. 1980) and 487 F. Supp. 280 (S.D.N.Y. 1980)(three judge panel)). Thus, states may limit total campaign expenditures as a condition of public funding, but any such limits must be voluntarily accepted. *Compare Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996) (upholding voluntary scheme), *cert. denied* 117 S. Ct. 1820 (1997), *with Russell v. Burris*, *supra* (invalidating mandatory public funding scheme with total expenditure limitations). Thus, for example, in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied sub nom Nixon v. Shrink Missouri Government PAC*, 518 U.S. 1033 (1996), the court invalidated as unduly coercive a system of "voluntary" spending limits under which candidates were required to file an affidavit indicating whether they would comply with voluntary spending limits. Candidates who did not so pledge were subject to restrictions on contributions from corporations, unions, PACs, and political parties and also subject to reporting requirements for expenditures above the limits. Candidates who pledged to comply were freed from such restrictions, but subject to penalties for exceeding the limits.

Even voluntary candidate spending limits do not apply to independent expenditures, however, since independent expenditures are not made, requested or coordinated by the candidate or his or her political committee. *See National Conservative Political Action Committee*, *supra* (invalidating limits on independent expenditures made by PACs on behalf of candidates receiving public funding). This is the other component of the "soft money" problem -- although contributions to a candidate may be limited under *Buckley* and the candidate may accept spending limits as a condition of receiving public funding, independent expenditures are not subject to either limitation,

and can easily be used to evade these limits. One creative response to this problem was invalidated in *Day v. Holahan*, *supra*. Minnesota's campaign finance reform law provided that the public funding amounts and spending limits for a candidate would be increased when independent expenditures were made opposing his or her election or on behalf of his or her major party opponent. The United States Court of Appeals for the Eighth Circuit held that "the knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to one half of the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech." 34 F.3d. at 1360. The court went on to conclude that the statute was not narrowly tailored to meet a compelling government interest.

Challenging *Buckley*: Efforts to limit campaign spending and/or independent expenditures notwithstanding *Buckley* have met with no success. *See, e.g., National Conservative Political Action Committee*, *supra* (invalidating cap on independent PAC expenditures on behalf of candidates receiving public funding); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3187 (Sept. 16, 1998) (invalidating cap on total campaign expenditures for city council races); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (invalidating $1000 cap on independent expenditures). Some proponents of campaign finance reform have suggested that the time is right for the Supreme Court to reconsider *Buckley*, and a petition for writ of certiorari that challenges *Buckley* indirectly and directly has been filed in the *Kruse* case.

The indirect challenge to *Buckley* proceeds by advancing compelling governmental interests that were either not considered or not yet factually supported in *Buckley*. *Buckley* itself addressed only two interests: preventing quid pro quo corruption (which is a compelling interest, but with respect to which limits on candidate spending and independent expenditures are not narrowly tailored), and "leveling the playing field" (which is not a legitimate purpose under the First Amendment). In *Kruse*, the City argues that new facts justify a different conclusion as to the problem of corruption, and also advances two new governmental interests in support of capping candidate expenditures: freeing city council members from the burden of fundraising so that they can concentrate on their official duties, and preventing candidates with large sums of money from blocking other candidates from television advertising. These arguments were rejected by the court of appeals and the City has renewed them in its cert. petition.

The City in *Kruse* also challenges *Buckley* directly, arguing in the alternative that if limits on candidate expenditures are precluded by *Buckley*, the Court should "revisit" the decision in light of new facts and circumstances. There is, however, little indication that the Supreme Court is prepared to do so. In its most recent decision on campaign finance regulation, *Colorado Republican Federal Campaign Committee v. FEC*, *supra*, the Court invalidated an FEC interpretation that presumed party expenditures were "coordinated" with a candidate and therefore could be treated as contributions. The plurality opinion (written by Justice Breyer and joined by Justices O'Connor and Souter) held fast to *Buckley's* distinction between contributions and expenditures. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia filed a concurring opinion arguing that any restriction on expenditures by political parties -- even those coordinated with a candidate -- is unconstitutional. Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, wrote

a separate concurring opinion arguing that contribution limits are unconstitutional and that this aspect of *Buckley* should be overruled. Only the two dissenting Justices, Stevens and Ginsburg, would have upheld the FEC's interpretation, indicating some willingness to relax *Buckley*. The case certainly does not reflect any dissatisfaction with *Buckley's* invalidation of spending limits and, if anything, would tend to suggest the Court is prepared to broaden *Buckley*, rather than restrict it.

c. Reporting and Disclosure Requirements

Buckley indicates that the scope of permissible reporting and disclosure requirements is somewhat broader than permissible limits on contributions and expenditures because reporting and disclosure requirements are less restrictive of speech than spending limits. In particular, reporting and disclosure requirements may be imposed on independent expenditures (i.e., those that are not coordinated with a candidate) that "expressly advocate" the election or defeat of a "clearly identified candidate." The Court, however, also indicated that reporting and disclosure requirements could not be applied to "issue advocacy" and was especially concerned that express advocacy be clearly defined using a bright-line test to avoid vagueness and overbreadth problems. In addition, requirements that political groups disclose their contributors may have an unconstitutional chilling effect on associational rights. Insofar as direct limits on independent expenditures are generally unconstitutional, campaign finance reform efforts often focus on strengthening reporting and disclosure requirements. These efforts have raised issues involving the imposition of new and more stringent requirements and the use of broader definitions of express advocacy. Some cases have also found the application of requirements that political groups disclose their contributors to be unconstitutional as applied to particular groups.

New and More Stringent Requirements: Lower courts have generally indicated that new and more stringent reporting and disclosure requirements are permissible, if properly constructed. One fairly common requirement is that political advertisements expressly advocating the election or defeat of a clearly identified candidate must disclose the identity of the advertisement's sponsor. The Supreme Court invalidated a broad prohibition against anonymous political pamphlets in *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), indicating that compelled self-identification is more intrusive than mandatory reporting (as in *Buckley*). Nonetheless, lower courts have distinguished *McIntyre* and upheld more narrowly tailored requirements that apply only to express advocacy of the election or defeat of a clearly identified candidate. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.2d 637 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997) (disclosure requirement for advertisements containing express advocacy); *Vermont Right to Life Committee v. Sorrell*, ___ F. Supp. 2d ___, 1998 WL 601346 (D. Vt. Sept. 9, 1998) (upholding disclosure requirement as narrowly construed to apply only to express advocacy); *see also FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) (upholding disclosure requirement for solicitations of contributions for express advocacy but indicating that disclosure requirement for advertisements may be unconstitutional after *McIntyre*).

Another way of strengthening reporting and disclosure requirements is to lower the size of contributions that trigger the obligation of an individual or political committee to report contributions and expenditures. Lowering the amount that triggers reporting and disclosure would not present the same issues that lowering limits on contributions. Thus, the court in *Vote Choice,*

Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993), held that "first dollar" reporting requirements (i.e., all contributions of one dollar or more) were not per se invalid under the First Amendment, even though the governmental interest in informing the public through disclosure of contributors grew "somewhat attenuated" as the amount of contributions decreased, because there was still a compelling governmental interest in informing the voters of the identity of contributors. The particular statute in question, however, was unconstitutional because it applied only to PACs, and thus imposed a special burden on associational rights. Under *Vote Choice*, a more broadly applicable first dollar reporting requirement might be constitutionally valid.

Defining Express Advocacy: To avoid constitutional difficulties, *Buckley* imposed a narrowing construction on FECA's reporting and disclosure requirements that prevented their application to contributions and expenditures for issue advocacy.[4] First, reporting and disclosure requirements for political committees could only be applied to committees whose primary purpose was the election or defeat of a candidate or candidates. Second, individuals and groups could be required to report their own expenditures only if the expenditures were for "express advocacy" of the election or defeat of a "clearly identified candidate." These narrowing constructions are generally thought to reflect constitutional requirements. *See, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 3 F. Supp. 2d 675 (E.D. N. Car. 1998) (invalidating registration requirement for individuals and groups engaged in issue advocacy); *Virginia Society for Human Life, Inc. v. Caldwell*, 500 S.E. 2d 814 (Va. 1998) (construing state disclosure requirements narrowly to prevent application to groups engaged in issue advocacy); *see also FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (holding that FEC prosecution for failure to disclose expenditures for advertisement "implicitly" advocating defeat of President Clinton in 1992 campaign was so clearly outside scope of FECA as to justify award of attorney fees under the Equal Access to Justice Act).

The express advocacy test permits the circumvention of reporting and disclosure requirements through carefully worded independent expenditures. For example, the advertisement that was exempt from reporting and disclosure requirements in *Christian Action Network, supra*, was run just before the 1992 presidential elections and included the following text:

> Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

110 F.3d at 1050. Such cleverly worded advertisements do not expressly advocate the election or defeat of a candidate, but in context the message is fairly clear. Thus, many campaign reform proposals center around redefining express advocacy so that reporting and disclosure requirements apply to this kind of advertisement.

---

[4]Note that because coordinated expenditures are, in effect, contributions, reporting and disclosure requirements may apply to coordinated expenditures even if they only engage in issue advocacy.

The extent to which the concept of express advocacy may be redefined remains unclear, however. In *Buckley*, the Court emphasized the need for a bright-line test, and rejected any approach that would require a subjective evaluation of the message conveyed by an advertisement. In a footnote, the Court gave examples of words and phrases that would constitute express advocacy. In construing the scope of the Federal Election Commission's authority under FECA, lower courts have divided over whether it extends only to expenditures using *Buckley's* "magic words." *Compare Christian Action Network, supra* (implying that magic words are required) *and Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991) (same), *with Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (permitting prosecution for advertisements that did not contain magic words). These cases, however, only address *Buckley's* interpretation of FECA, and do not necessarily imply that the magic words are constitutionally required. Thus, campaign finance reform statutes probably do not have to limit reporting and disclosure requirements to advertisements that use the magic words, provided that the requirements do not apply to issue advocacy and incorporate a bright-line test that avoids unclear and subjective judgments.

One proposal that might satisfy these requirements was incorporated into the McCain-Feingold Campaign Finance Reform Bill, which defined express advocacy to include (1) the use of the magic words; (2) the use of a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of a clearly identified candidate; (3) paid advertisements that expressly refer to one or more clearly identified candidates within 60 days of an election; or (4) any communication that expresses unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election. While some components of this definition may be problematic, it represents a potentially constitutional redefinition of express advocacy.

Disclosure of Contributors: Although *Buckley* rejected a facial challenge to FECA's requirement that political committees (narrowly defined to include only groups whose principal purpose is the election or defeat of a candidate) disclose their contributors, the Court recognized that such requirements may have a chilling effect on associational rights. Thus, such requirements may not be applied if disclosure would subject contributors to significant retaliation, but the burden is on the group in question to produce evidence that there is a realistic fear of retaliation. For cases finding a realistic fear of retaliation, see *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982).

d. Soft Money

As suggested by the foregoing discussion, soft money is not so much a distinct problem as a manifestation of the gaps in campaign finance regulation under FECA and the *Buckley* framework. In its narrowest sense, soft money refers to contributions and expenditures that are exempt from FECA's contribution and voluntary expenditure limits and reporting and disclosure requirements. In particular, soft money includes contributions to political parties and PACs to be used for expenditures that are not coordinated with a candidate's campaign and do not expressly advocate the election or defeat of a clearly identified candidate. The term is thus generally used in connection with federal campaign finance regulation, and soft money reform proposals are generally designed

(11

to bring soft money under the voluntary spending limits attached to public financing and/or to extend reporting and disclosure requirements to soft money. To the extent that state campaign finance regulation mirrors federal law, soft money could present a problem for states as well, however. Such proposals would be subject to the constitutional framework articulated in *Buckley* and its progeny, and the extent to which efforts to regulate soft money are constitutional remains unclear.

3. SUMMARY OF THE CONSTITUTIONAL LIMITS OF CAMPAIGN FINANCE REGULATION

Given the nature of constitutional decisionmaking, it is difficult to articulate precisely the constitutional rules governing campaign finance regulation. The principles involved are to some degree open ended and the cases are highly fact specific. Thus, the case law is subject to varying interpretations. Moreover, because lower court decisions are not binding on courts from other jurisdictions, not all courts would follow all of the decisions discussed above. With these caveats in mind, I offer the following summary of the constitutional parameters of campaign finance regulation:

- The state may limit contributions to candidates and their campaign committees, provided that the limits are not set too low.

- The state may not limit "independent" expenditures, including expenditures that expressly advocate the election or defeat of a clearly identified candidate.

- The state may apply contribution limits to expenditures that are coordinated with, requested by, or under the control of candidates or their campaign committees.

- The state may not limit contributions to groups engaging in issue advocacy or supporting or opposing ballot initiatives.

- The state may require corporations and labor unions (except voluntary political associations not engaged in business activities, without shareholders or others with a claim on assets or earnings, and not serving as a conduit for a business corporation or a union) to make political expenditures from a segregated political fund containing only voluntary contributions.

- The state may set voluntary spending limits for candidates, including limits attached to receipt of public funding, but nominally voluntary schemes may be invalid if they are coercive.

- The state may require political groups whose primary purpose is the election or defeat of a candidate or candidates to disclose their contributors unless the groups produce evidence of a reasonable fear of retaliation as a result of disclosure.

- The state may require reporting and disclosure of independent expenditures that expressly advocate the election or defeat of a clearly identified candidate, provided that express advocacy is defined through an objective bright line test and does not include "issue advocacy."

Senate Bill No. 432 and House Bill No. 2662 (1998 Session)
Supplemental Written Testimony of Richard E. Levy
Submitted to the Special Committee on Local Government, November 4, 1998

Introduction:

At the close of my October 14, 1998 testimony before the Special Committee on Local Government on "The Constitutional Parameters of Campaign Finance Reform," I was asked to comment on the constitutionality of House Bill No. 2662 and Senate Bill No. 432. Both of these bills were introduced in the 1998 Session of Kansas Legislature. House Bill No. 2662 was adopted and is now the law of the State of Kansas. Senate Bill No. 432 was originally proposed by the Governor, and did not pass.

I have had an opportunity to review these pieces of legislation, and have some observations concerning potential constitutional issues raised by each of them. I will begin with the House Bill because it passed. I will not give full citations to cases that were cited in my earlier written testimony.

House Bill No. 2662:

This statute addresses several interrelated topics concerning governmental ethics, and includes some provisions on campaign finance reform. Many of the changes made by this provision are relatively minor editorial and technical corrections that do not raise significant issues. Some of the provisions of this statute, however, are potentially problematic.

1. Contribution Limits:

House Bill No. 2662 expands the definition of contribution in K.S.A. 25-4143(e)(1) in a manner that, when read in conjunction with the contribution limits included in K.S.A. 25-4153, raises serious constitutional problems. Under *Buckley v. Valeo*, contributions to political candidates can be limited in the interest of preventing "quid pro quo" corruption. Expenditures that are requested or controlled by, or coordinated with, a candidate or a candidate committee may be treated as contributions. But the definition of contribution cannot include independent expenditures. *See Colorado Republic Federal Finance Committee v. FEC.*

The expanded definition of contribution in K.S.A. 25-4143(e)(1), as amended, includes two provisions that are not limited to coordinated expenditures:

a. Subparagraph (A) includes as contributions "[a]ny advance, conveyance, deposit, distribution, gift, loan or payment of money or any other thing of value given to a candidate, candidate committee, party committee, or political committee for the express purpose of nominating, electing, or defeating a clearly identified candidate for a state or local office."

Because party committees and political committees are not necessarily controlled by a candidate under the definitions in K.S.A. 25-4143(i) and (k) (as amended), expenditures made by such committees will not necessarily be "coordinated" with a candidate, even if the committee expressly advocates the nomination, election, or defeat of a clearly identified candidate.

b. Subparagraph (B) includes as contributions "[a]ny advance, conveyance, deposit, distribution, gift, loan or payment of money or any other thing of value made to expressly advocate the nomination, election, or defeat of a clearly identified candidate for a state or local office." These expenditures are also not necessarily coordinated with a candidate.

The expanded definition of contributions would not be problematic if only reporting and disclosure requirements were involved, because reporting and disclosure requirements may be applied to independent expenditures for express advocacy. However, the contribution limits K.S.A. 25-4153(a) apply not only to candidates for local or state office and their committees, but also "to all party committees and political committees" without regard to whether such committees are controlled by a candidate or otherwise coordinate their expenditures with a candidate. Insofar as the contribution limits appear to apply to political and party committees making only independent expenditures that are not coordinated with a candidate (K.S.A. 25-4143(e)(1)(A)), or to individuals making independent expenditures that are not coordinated with a candidate (K.S.A. 25-4143(e)(1)(B)), they would appear to run afoul of *Buckley* and its progeny. *See FEC v. National Conservative Political Action Committee* (invalidating contribution limits on political action committees).

2. Reporting and Disclosure Requirements:

House Bill No. 2662 also makes some changes concerning reporting and disclosure requirements. Under *Buckley* and its progeny, reporting and disclosure requirements may be imposed on (1) candidates and candidate committees, (2) committees whose primary purpose is express advocacy of the nomination, election or defeat of a candidate or candidates, and (3) individuals whose expenditures involve express advocacy of the nomination, election or defeat of a clearly identified candidate, including independent expenditures not controlled by or otherwise coordinated with a candidate. The reporting and disclosure requirements of House Bill No. 2662 raise several potential issues.

First, while requirements that party and political committees report their contributors are generally constitutional, they may be invalid as applied to particular groups if the group establishes a reasonable fear of retaliation against its contributors.

Second, the new definition of expenditures in K.S.A. 25-4143(g) may not be sufficiently clear to satisfy the requirements of *Buckley*. The definition of expenditures incorporates the concept of express advocacy as outlined in *Buckley*, and the related definition of express advocacy in K.S.A. 25-4143(h) uses the sort of "magic words" offered as examples of express advocacy in *Buckley*. These new definitions bring the language of the statute closer into line with *Buckley* and thus are clearly an

improvement over the previous language, which was probably too broad and vague to pass muster (at least in the absence of a drastic narrowing construction). There is, however, a potential problem because the definition of express advocacy incorporates but is "not limited" to the magic words. This makes sense, since the statute would otherwise be easily evaded. Because there is no further definition of express advocacy, however, the statute leaves unclear when communications that do not use the magic words will be considered express advocacy.

The potential difficulties with this situation are illustrated by the recent Governmental Ethics Opinion, No. 1998-22 (September 23, 1998), which involves an advertisement that mentions two candidates by name, compares one favorably to the other, and refers indirectly to the election campaigns, but does not use any of the magic words. The Commission indicated that the advertisement will be "viewed as a whole" to determine whether it "leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office." Applying this standard, the commission concluded that the advertisement constituted express advocacy. This is certainly a defensible position as a matter of statutory construction and constitutional limits. But *Buckley* requires that the statutory definition of express advocacy to use an objective, "bright-line" test that cannot be extended to encompass issue advocacy. The statute certainly does not contain such a definition -- whether or not the advertisement constituted express advocacy was not clear until the Ethics Commission had ruled. And the Ethics Commission's construction arguably does little to clarify the statute. A court, if confronted with a challenge to the express advocacy provision, might provide a narrowing construction, as did the *Buckley* Court with respect to the Federal Election Campaign Act. But this is not certain, especially if the court involved is a federal court being asked to construe state law. In the end, it would be a good idea to supplement the definition in some way so as to avoid these problems.

Third, among the disclosure requirements in House Bill No. 2662 is an expanded requirement that political materials identify themselves as advertisements and include the identity of the group or individual providing the advertisement. K.S.A. 25-4156(b)(1), as amended, now requires such disclosure not only on newspaper or magazine advertisements (Subparagraph (A)) and radio or television advertisements (Subparagraph (B)), but also on brochures, fliers, or other political fact sheets that involve express advocacy (Subparagraph (C)). This new requirement, however, does not apply to individuals making aggregate expenditures of less than $2500 in a year. As I indicated in my previous testimony, the constitutionality of such "self-identification" requirements is not entirely clear. In *McIntyre v. Ohio Election Commission*, the Supreme Court indicated that compelled self-identification is more burdensome than reporting requirements, and invalidated a ban on anonymous political pamphlets. Some lower courts, however, have distinguished *McIntyre* and upheld self-identification requirements as applied to paid political advertisements involving express advocacy. While the weight of authority seems to tilt in favor of self-identification requirements as applied to express advocacy, the extension of the requirement to pamphlets may make this statute more similar to the one in *McIntyre* and there is, in any event, no controlling authority on the issue.

Senate Bill No. 432

This Bill was introduced by the Governor in the 1998 session and was not adopted. The Bill contains expanded reporting and disclosure requirements that are applied to a broader definition of express advocacy. The issues raised by the Bill generally fall into three categories.

1. Definition of Expenditures:

As noted above, under *Buckley* reporting and disclosure requirements may be applied to independent expenditures involving express advocacy, provided express advocacy is defined using an objective, bright-line test that does not reach pure issue advocacy. Senate Bill No. 432 would define expenditures to include "[a]ny purchase, payment, distribution, loan, advance, deposit or gift of money or any other thing of value made for the purpose of influencing or attempting to influence the nomination, election or defeat of any individual to state or local office or providing information which has the effect of influencing or attempting to influence the nomination, election or defeat of any individual to state or local office." Proposed 25-4150(b)(2)(A)(i). Similar language is also used to limit exceptions to this provision. Standing alone, the language "for the purpose of influencing or attempting to influence" and having "the effect of influencing or attempting to influence" would probably violate *Buckley*, because these phrases are both vague and broad enough to encompass issue advocacy. In particular, *Buckley* explicitly indicated that the subjective purpose of expenditures could not be used as the touchstone for express advocacy.

However, the concept of expenditure is limited by two other provisions of the Bill. First, reporting and disclosure requirements are applied to persons, who are defined as those making contributions or expenditures above specified amounts within the time period beginning 60 days prior to a primary and ending on the day of the next general election. *See* proposed K.S.A. 25-4150(b)(1). Second, the phrase "influencing or attempting to influence" is limited to communications that (1) contain "words of express advocacy"; (2) contain "the name or a picture of a candidate"; or (3) in which "the identity of a candidate is apparent by unambiguous reference." Proposed K.S.A. 25-4150(b)(3). These additional limitations avoid the most obvious problems under *Buckley*, but the Bill as a whole would extend reporting and disclosure requirements beyond the traditional "magic words" of express advocacy. Essentially, it defines "express advocacy" as any advertisement that identifies a candidate during the period preceding an election. This approach is similar to the one proposed in the McCain-Feingold Bill that was introduced in Congress last year. As I indicated in my previous written testimony, such an approach might satisfy the *Buckley* requirements. It is a bright line test and does not turn on the intent of the person making the expenditure. Thus, for example, under this definition there could be no doubt that the advertisement at issue in Governmental Ethics Opinion No. 1998-22 was express advocacy because it named two candidates and was run during the campaign season. In addition, any clear reference to an identifiable candidate during campaign season arguably must be construed as an effort to help or hinder his or her chances of election. Put differently, it is hard to see how pure issue advocacy would ever require the identification of particular candidates during the campaign season. However, I am not aware of any case directly addressing this sort of definition of express advocacy, and there is certainly no definitive ruling on the question.

1-16

2. Prior Statement of Intended Expenditures:

Although the particular issue has not, to my knowledge, been raised previously, the Bill's requirement that any person must file a statement at least seven days before making an expenditure, *see* proposed K.S.A. 25-4150(c), might present some problems. This requirement would apply to "persons," defined in proposed K.S.A. 4150(b)(1) as individuals making contributions or expenditures of $1000 or more for candidates for local office or $2500 or more for candidates for state office. Thus, if an individual wanted to make a contribution or expenditure that would place his or her total contributions at or above either of these amounts, he or she would have to file a statement and wait for at least seven days before making the contribution or expenditure. The imposition of such a waiting requirement might be seen as an impermissible burden. More significantly, perhaps, the individual who does not decide to make such a contribution or expenditure until the last week of a campaign would effectively be precluded from doing so. Since there is no case law on this issue, it is difficult to predict how a court would rule, but I think there is a good chance that the provision would be struck down, at least as applied to effectively prohibit individuals from deciding to make last-minute independent expenditures.

3. Threshold for Reporting Requirements:

As proposed under Senate Bill No. 432, K.S.A. 25-4150(d) would require "every person" who makes contributions or expenditures to file statements as required by K.S.A. 25-4148. As noted above, under proposed 25-4150(b)(1) "person" is defined in terms of those who make contributions or expenditures above certain threshold amounts: $1000 for local and $2500 for state office. Thus, the provision would seem to raise the threshold from the $100 threshold requirement under current law, to $1000 and $2500 for local or state office, respectively. Notwithstanding the definition of person, however, there may be some ambiguity because proposed K.S.A. 25-4150(d) would apply to "[e]very person . . . who makes contributions or expenditures." The phrase, "who makes contributions or expenditures" is redundant if the term "person" is already limited by the definition in proposed K.S.A. 25-4150(b)(1), and the phrase might therefore be read as intended to make the threshold amounts in the definition section inapplicable to the reporting requirements. If so, the Bill would require reports for every contribution, however small, which might be seen as an excessive burden as imposed on individuals, although there is also some support for the idea that candidates and their committees can be required to disclose all contributions, however small. *See Vote Choice, Inc. v. DiStefano*. In any event, this ambiguity should be clarified if some version of the Bill is adopted in the future.

Conclusion

I hope that these comments on House Bill No. 2662 and Senate Bill No. 462 are helpful to the Committee. Given the time constraints involved, I did not do any comprehensive research on the specific questions raised by the statutes, and I may have missed some potential issues or problems. In any event, since this is an area of the law that is not entirely clear, none of my comments should be taken as definitive and other observers may legitimately disagree with my assessments. If there are any questions or if I can be of any further assistance to the Committee, please do not hesitate to ask.

1-17

SOFT MONEY CONTRIBUTIONS AND INDEPENDENT EXPENDITURES IN KANSAS ELECTIONS

CONCLUSIONS AND RECOMMENDATIONS

The Committee makes no recommendations concerning independent expenditures because of pending litigation on this issue (*Kansans For Life, Inc. v. Diane Gaede, et al.* (98-4192, RDR)). The Committee thinks that the influence of soft money is not a significant issue in Kansas elections and makes no recommendation at this time.

BACKGROUND

The study was requested by the Kansas Governmental Ethics Commission based upon its belief that more disclosure should be made by those individuals who make expenditures that directly or indirectly influence the nomination or election of a candidate for state or local office. In addition, the Commission recommends studying the aspects and impact of soft money on Kansas elections.

The following is a brief description of terms and statutes that apply to soft money contributions and independent expenditures.

Soft Money Contributions

Soft money includes moneys contributed to, and expended by, political parties from unions, individuals, corporations, and trade associations that are exempt from the Federal Election Campaign Act's (FECA) contribution and expenditure limits and reporting and disclosure requirements. Soft money contributions were originally intended to be used for such expenditures as party building activities that were not coordinated with a candidate's campaign and did not expressly advocate the election or defeat of a clearly identified candidate. This money generally is contributed to a national party committee and then, in return, given to a state party committee. Because the Federal Election Commission (FEC) did not define party building activities, this money found its way into advertisements for campaigns at the national level. A national party committee is required to disclose how much money it raised, but it does not have to report who and how much was contributed to the committee. Due to inadequate disclosure requirements, tracking soft money from the national party committee to the state party committee level is a difficult task.

Independent Expenditures

Independent expenditures are moneys spent on communications to the public that directly advocates the nomination, election or defeat of a clearly identified candidate. Often the communications contain the "magic" words such as: "vote for" or "vote against." The communications are made without the coordination or consultation with the candidate. Independent expenditures, similar to issue ads, are not subject to candidate contribution limits, but unlike issue ads, these expenditures are required to disclose how they spend their money. This form of advertising is often referred to as express advocacy. Independent expenditures are becoming more prevalent in state campaigns. K.S.A. 25-4150 requires any person who makes an independent expenditure in an amount of $100 or more to disclose the amount and source of that expenditure.

Issue Advocacy or Issue Advertising

Issue advocacy or issue advertising is communication for the purpose of addressing a particular policy or idea. These ads may address a candidate indirectly, but do not expressly advocate that candidate's nomination, election, or defeat. Traditionally, issue advertising has been done by

third parties and organizations other than political action committees (PACs).

Buckley v. Valeo 424 U.S. 1 (1976)

The United States Supreme Court in *Buckley v. Valeo* 424 U.S. 1 (1976) considered the constitutionality of FECA which, among other things, placed contribution and expenditure limits for candidates and individuals or political groups that supported candidates. FECA also imposed reporting and disclosure requirements on candidates, political committees, and individual contributors.

The central premise of *Buckley* is that campaign contributions and expenditures are themselves a form of political speech, which lies at the core of the protections of the First Amendment. The Court recognized that contributions could be limited to prevent government contentions of the appearance of "*quid pro quo*" corruption. The *Buckley* decision tried to clearly distinguish a "bright-line" test between "issue advocacy" and "express advocacy" advertisements so that advertising solely engaged in issue advocacy would not be subject to reporting and disclosure requirements. The Court ruled that any limitation of independent expenditures uncoordinated with a candidate is a violation of First Amendment rights. This case allowed unlimited spending independent of the candidate.

COMMITTEE ACTIVITIES

A one-day meeting was held in October where eight conferees testified on the topic. A second meeting day was held in November to discuss the constitutional interpretation of Substitute for H. B. 2662 (H.B. 2662) and S.B. 432. H.B. 2662 was enacted into law during the 1998 Session. The Committee heard from three University of Kansas professors: two from the Department of Political Science and one from the School of Law, the Kansas Governmental Ethics Commission, Kansans For Life, the Christian Coalition, the *Kansas Lawyer*, and the Kansas Alliance for Campaign Finance Reform.

The two professors from the Department of Political Science explained the concepts of soft money and independent expenditures as they applied to federal and state campaigns. Both professors favored the idea of strengthening reporting and disclosure laws; however, they cautioned the Legislature that these laws would have to be carefully crafted to avoid being declared unconstitutional. They testified that further reducing expenditure limits may be ruled unconstitutional because the courts could construe that as an infringement on free speech. They thought that Kansas elections are relatively free of, or clean, in respect to the inflow of soft money into campaigns because soft money is more of a federal issue rather than a state issue. They felt that the national trend of soft money expenditures in campaigns eventually will trickle down to the state level considering the high costs of campaigns.

They both agreed that special interest groups are spending more money to advocate the defeat or election of a candidate, and as a result, independent expenditures have become more prevalent in state elections. They thought that special interest groups can dictate the issues in a campaign, so that a campaign may become more special interest-controlled rather than candidate-controlled. As a result, candidates have to spend their time and money defending themselves against these independent advertisements and have less time to devote to the issues. They said that PACs have become vendors for special interest groups, because interest groups give large contributions to PACs who in turn make decisions where the money will be spent, with full knowledge of what the special interest groups want.

They reported that the influx of soft money and independent expenditures are a way to circumvent the limitations imposed by the state Campaign Finance Act.

The professor from the KU School of Law clarified the permissible parameters of campaign finance reform under the *Buckley v. Valeo* decision and subsequent U.S. Supreme Court and lower court decisions. He testified that restric-

tions and limitations on independent expenditures were ruled unconstitutional under the *Buckley* decision because the Court ruled that it was an infringement on free speech. He suggested that the Legislature should not place limits on independent expenditures, unless it can show a compelling interest for disclosure to prevent *quid pro quo* corruption or it should be prepared to challenge the *Buckley* decision to the U.S. Supreme Court. He stated that another problem arises in imposing disclosure requirements in some cases where, if the contributor was known, then some kind of retaliation may occur. The courts have ruled that disclosure requirements in these circumstances are unconstitutional.

He testified that the *Buckley* decision tried to clearly distinguish a "bright line" test between issue advocacy and express advocacy advertisements by stating that reporting and disclosure requirements could not be applied to groups solely engaged in issue advocacy, but groups that engaged in expressly advocating the nomination, election, or defeat of a clearly identified candidate, could be made subject to these requirements. He said the Court ruled that expenditure for express advocacy could be subject to disclosure requirements only if it included magic words such as "vote for" or "vote against." He stated that several lower court cases have relied on the Supreme Court's "bright line" test to determine the constitutionality of the imposition of reporting and disclosure requirements. The court decisions have varied as to agreement with the *Buckley* decision and there has been pressure exerted by some lower courts for the U.S. Supreme Court to reconsider its decision.

The law professor testified on the constitutionality of H.B. 2662 which was enacted by the 1998 Legislature and S.B. 432 which was proposed by the Governor but not enacted. He said that some provisions in H.B. 2662 were problematic because contribution limits that apply to individuals, political and party committees making only independent expenditures that are not coordinated with a candidate, are subjected to reporting and disclosure requirements under state laws. The *Buckley* decision and its progeny (*FEC v. National Conservative Political Action Committee*) ruled this type of regulation was unconstitutional. Also, he said that although the definition of "expenditure" in H.B. 2662 brings the language of the statute closer in line with the *Buckley* decision, the bill presents problems because the definition of express advocacy goes beyond the "magic" words by including language which states that express advocacy advertisements are not limited to the magic words. The professor said that, as a result, persons who advocate are unclear if their communications will be subject to the reporting and disclosure laws since they cannot be sure if the words they use may be interpreted as expressly advocating.

He questioned the expanded disclosure requirements in H.B. 2662 requiring all political materials in excess of a threshold amount to be identified as advertisements and include the identity of the group or individual providing the advertisement. These requirements of "self-identification" has been ruled by the Supreme Court (*McIntyre v. Ohio Election Commission*) to be more burdensome than reporting requirements and the Court has invalidated a ban on anonymous political pamphlets. Some lower courts, however, have upheld self-identification requirements as applied to paid political ads involving express advocacy.

The professor said that S.B. 432 would avoid most of the obvious problems under the *Buckley* decision because it establishes contribution and expenditure limitations within a specified time frame before an election. It also would require a communication that expressly advocates the nomination, election, or defeat of a clearly identified candidate (defined as "influencing or attempting to influence") be reported. He stated that it would be difficult to envision pure issue advocacy advertisement which identified a particular candidate during the campaign season. He felt that the bill was problematic because it would extend reporting and disclosure requirements beyond the traditional magic words of express advocacy, but does not stipulate what words constitute express advocacy. In addition, he thought that requiring a person to file a statement at least seven days prior to a contribution or an expenditure may be construed as an impermissible burden on that

person's right of free speech. The professor said that there is no case law on this issue and it is difficult to predict how the courts would rule, but he thinks there would be a good chance that the provision would be struck down.

A representative of the Kansas Governmental Ethics Commission felt that the problem of soft money was not germane to Kansas elections. She said the Commission had to interpret the new law (H.B. 2662) as it might apply to several public advertisements during the Kansas primary elections and determine if the advertisements met the express advocacy definition in the bill. She testified that in Opinion No. 98-22, the Commission opined that a political advertisement issued by Kansans For Life was subject to the reporting and disclosure requirements specified in the bill because it was "[a] communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office," and therefore, is deemed to expressly advocate.

The professor from the KU School of Law stated that the statute which the Ethics Commission's opinion is based upon does not contain a "bright line" test for the definition of express advocacy as required by the *Buckley* decision and the Commission's ruling does little to clarify the statute. He testified that he is not certain how the court would rule on the Commission's interpretation, but he felt that it would be a good idea to supplement the definition in some way, so as to avoid potential constitutional problems.

Representatives from Kansans For Life, the Kansas Christian Coalition, and a publisher of the *Kansas Lawyer* felt that they should not be subjected to reporting and disclosure requirements for issue advocacy advertisements by their organizations. They stated that their advertisements were protected under the Constitution by the First Amendment and their organizations were protected by the right of association. The Kansans For Life have filed a lawsuit against the Kansas Governmental Ethics Commission based upon the Commission Opinion No. 98-22 (*Kansans For Life, Inc. v. Diane Gaede et al.*).

A representative for the Alliance for Campaign Finance Reform felt that an alternative to the influx of large amounts of independent and soft money into Kansas elections would be the implementation of public financing.

CONCLUSIONS AND RECOMMENDATIONS

The Committee does not make any recommendations concerning independent expenditures because of pending litigation on this issue (*Kansans For Life, Inc. v. Diane Gaede et al.* (98-4192, RDR)).

The Committee does not think that soft money has a significant impact on Kansas elections and therefore, makes no recommendations at this time.

The University of Kansas

School of Law

November 30, 1998

Dennis Hodgins
Legislative Research Department
State of Kansas
300 SW 10th Street, Room 545N
Topeka, Kansas 66612

Dear Dennis:

I recently received a letter from James R. Mason, III, who represents Kansans for Life in the litigation concerning the recent Governmental Ethics Commission Opinion regarding express advocacy. He called my attention to two cases, *Right to Life of Michigan v. Miller*, 1998 WL 743712 (W.D. Mich. Sept. 16, 1998) and *Planned Parenthood Affiliates of Michigan v. Miller*, 1998 WL 682940 (E.D. Mich. Sept. 21, 1998), in which federal district courts invalidated as overbroad an administrative rule adopting a definition of express advocacy that incorporated the use of a name or likeness of a candidate within a specified time period. The definition in these cases related to a ban on the use of general corporate funds for express advocacy expenditures, which were required to be made through a segregated political fund. The courts in these cases concluded that the "name or likeness" test would apply to many legitimate, nonadvocacy expenditures, such as nonpartisan fact sheets.

Although these are district court decisions with limited precedential weight, they nonetheless may be persuasive and indicate that any statute incorporating a name or likeness test would have to be carefully drafted to avoid problems. I continue to believe that a carefully drawn statute requiring disclosure of expenditures based on a name or likeness test can be constitutional. It might be advisable, however, to limit the test to prevent overbreadth, either by incorporating exceptions for uses that are purely informative (e.g., nonpartisan fact sheets) or adding a requirement that the use of a name or likeness, when viewed objectively, conveys a message of support or opposition. In any event, the "educational" purpose of a particular expenditure should not preclude the conclusion that it constitutes express advocacy. Most good advocacy is educational; we persuade in part by giving our audience information designed to convince them of our point of view. Moreover, as the Supreme Court made clear in *Buckley*, it is the message of an expenditure, viewed objectively, that determines whether it constitutes express advocacy. The key question for overbreadth purposes would be whether a particular definition of express advocacy reaches a substantial body of speech that is not express advocacy.

Please convey this information to the Special Committee on Local Government. I would be happy to provide the Committee whatever additional assistance I can.

Sincerely,

Richard E. Levy
Professor of Law

Green Hall • Lawrence, KS 66045-2380 • (785) 864-4550 • Fax: (785) 864-5054

1-22

RIGHT TO LIFE OF MICHIGAN, INC., Plaintiff,
v.
Candice MILLER, in her official capacity as the Michigan Secretary of State; and Frank Kelly, in his official capacity as the Michigan Attorney General, Defendants.

No. 1:98-CV-567.

United States District Court, W.D. Michigan.

Sept. 16, 1998.

Donald E. Duba, Flickinger & Plachta, PC, Grand Rapids, MI, Glenn M. Willard, Bopp, Coleson & Bostrom, Terre Haute, IN, for Right to Life of Michigan, Inc., pltf.

Gary P. Gordon, Asst. Atty. General, Katherine C. Galvin, Frank J. Kelley, Attorney General, Public Employment & Elections Division, Lansing, MI, for Candice Miller, in her official capacity as the Michigan Secretary of State, deft.

Gary P. Gordon, Asst. Atty. General, Katherine C. Galvin, (See above), for Frank Kelly, in his official capacity as the Michigan Attorney General, deft.

OPINION

BELL, J.

***1** In this action for declaratory and injunctive relief, Plaintiff Right to Life of Michigan, Inc. challenges the constitutionality of an administrative rule, Rule 169.39b, promulgated by the Michigan Secretary of State on July 27, 1998, pursuant to her authority to implement the Michigan Campaign Finance Act, M.C.L.A. § 169.215(1)(e); M.S.A. § 4.1703(15)(1)(e). The Rule took effect on August 12, 1998. Plaintiff contends the Rule is facially invalid because it is overbroad and violates the First Amendment. Plaintiff seeks to have the rule declared unconstitutional and to have its enforcement enjoined.

On August 27, 1998, this Court granted Plaintiff's motion to consolidate the hearing on Plaintiff's motion for preliminary injunction with the trial on the merits of its verified complaint. A hearing on the merits was held on September 10, 1998.

I.

Rule 169.39b prohibits corporations, domestic dependent sovereigns, joint stock companies, and labor unions, [FN1] from using general treasury funds to pay for communications, made within 45 days prior to an election, that contain the name or likeness of a candidate. [FN2] The rule is subject to specific exceptions that are not at issue here. [FN3] Violators of the rule are subject to civil and criminal penalties. See M.C.L.A. §§ 169.215(8) & 169.254(4).

Plaintiff contends that the Rule is constitutionally overbroad because it impermissibly regulates "issue advocacy," that is, advocacy on politically or socially relevant issues that are not associated with express advocacy in support of specific candidates or electoral outcomes.

According to Defendants Secretary of State Candice Miller and Attorney General Frank Kelly (hereinafter collectively referred to as the "State"), the Rule does not suffer from constitutional overbreadth because it is content neutral, and is narrowly tailored to serve a compelling state interest in the integrity of the electoral process.

The rule at issue in this case, Rule 169.39b, is an administrative rule promulgated by the Secretary of State pursuant to her authority to implement the Michigan Campaign Finance Act ("MCFA"). "Any judicial consideration of the constitutionality of campaign finance reform legislation must begin with and usually ends with the comprehensive decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)]." Kruse v. City of Cincinnati, 142 F.3d 907, 911 (6th Cir.1998). In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court addressed the constitutionality of contribution and expenditure limitations on individuals and groups under the Federal Election Campaign Act of 1971 ("FECA"). The Court observed that the Act's limitations operate in an area of the most fundamental First Amendment activities:

> 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. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social

changes desired by the people."
*2 Id. at 14 (quoting Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).

Because of the vital importance in protecting such speech, the Buckley Court articulated what has come to be known as the "express advocacy" test. Limitations on expenditures are constitutionally permissible only for communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44. Application of the expenditure limitations would be limited "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' " Id. at 44 n. 52. Issue advocacy cannot constitutionally be subject to the same spending limitations.

The Supreme Court recognized the possibility that issue advocacy might incidentally tend to influence the election or defeat of a candidate. "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Id. at 42.

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

Buckley, 424 U.S. at 42 n. 50 (quoting Buckley v. Valeo, 519 F.2d 821, 875 (D.C.Cir.1975)).

The Supreme Court reaffirmed the express advocacy requirement in Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("MCFL "). "Buckley adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." Id. at 249. A corporation's expenditure must constitute "express advocacy" in order to be subject to the restriction on independent spending contained in § 441b of FECA. Id. See also Maine Right to Life Committee, Inc. v. Federal Election Com'n, 914 F.Supp. 8, 12 (D.Me.) ("What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."), aff'd, 98 F.3d 1 (1st Cir.1996), cert. denied, --- U.S. ----, 118 S.Ct. 52, 139 L.Ed.2d 17 (1997); Federal Election Com'n v. Christian Action Network, 894 F.Supp. 946, 953 (W.D.Va.1995) ("Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute "express advocacy" as that term is defined in Buckley and its progeny."), aff'd, 92 F.3d 1178 (4th Cir.1996).

*3 The State suggests that the Court should follow the Ninth Circuit and apply a more lenient interpretation of the "express advocacy" rule. In Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir.1987), the Ninth Circuit did not reject Buckley's express advocacy requirement. The Ninth Circuit held, however, that to be subject to reporting requirements under FECA, "speech need not include any of the words listed in Buckley to be express advocacy under the Act." Id. at 864. Nevertheless, "it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation than an exhortation to vote for or against a specific candidate." Id. at 864.

For purposes of this action, this Court need not determine whether "express advocacy" is to be measured strictly by the words used or by a more lenient contextual analysis as suggested in Furgatch. The language of Rule 169.39b does not even pass muster under Furgatch.

Through this Rule the State has chosen to subject soft money used to pay for issue advocacy advertisements to the disclosure requirements of the MCFA if the ads include the name or likeness of a specific candidate 45 days prior to an election. The Rule is based upon the assumption that when advertisements mention the name of a candidate, they are not issue ads but rather candidate ads. Rule 169 .39b, however, does not limit its application to those names or depictions of candidates which, read as a whole, are "susceptible of no other reasonable interpretation but as an exhortation to vote for a specific candidate." Rule 169.39b applies to all references to candidates, whether or not the reference can be construed as an exhortation to vote for or against the candidate. The Court cannot accept the State's assumption that any mention of a

candidate within 45 days of an election necessarily falls within the scope of express advocacy.

The Rule prohibits a corporation from naming a candidate within 45 days of an election without regard to the content in which the name is found. The Rule prohibits statements urging the election or defeat of a candidate. In addition to prohibiting express advocacy, the Rule prohibits issue advocacy and non- advocacy as well. The Rule prohibits a statement that Candidate X introduced or sponsored specific legislation; that Candidate Y voted against specific pending legislation; or that Candidate Z had a birthday, was in an accident, or died. Because such information does not fall within even the broadest definition of "express advocacy," the Rule is clearly overbroad. The Rule prohibits any mention of a candidate's position on issues, and prohibits any mention of a candidate's stance with respect a vote that is to be held within the 45-day period.

In this case the censorial effect of the Rule on issue advocacy is neither speculative nor insubstantial. Samples of Plaintiff's communications published within 45 days of elections reveal that a wide range of topics that have previously been discussed would be prohibited by Rule 169.39b, including articles that mention the sponsors, authors and supporters of specific pending bills, identification of those who testified at hearings, and interviews with candidates.

***4** In light of the guidance given in Buckley and its progeny, there can be no real dispute that Rule 169.39b is constitutionally overbroad. Rule 169.39b does not merely prohibit communications that expressly advocate the election or defeat of a clearly identified candidate. It prohibits any mention of the name of a candidate within 45 days of an election, regardless of the context in which that name is mentioned.

Notwithstanding the fact that the Rule clearly impacts protected issue advocacy, the State contends that any overbreadth is not sufficiently real or substantial to support facial invalidation, and that any overbreadth should be dealt with on a case-by-case basis.

In Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Supreme Court noted that facial overbreadth adjudication is "strong medicine," and should be employed "sparingly and only as a last resort." Id. at 613. A state should not be prohibited from enforcing a statute against conduct that is admittedly within its power to proscribe, particularly where conduct and not merely speech is involved, unless the overbreadth is not only real, but substantial as well. Id. at 615.

The State contends that the overbreadth doctrine should not be applied to Rule 169.39b because the rule is a content-neutral, noncensorial regulation of conduct which reaches a whole range of easily identifiable and constitutionally proscribable conduct and does not satisfy the rigorous substantial overbreadth requirement established by the United States Supreme Court. Rule 169.39b only covers a limited time period; it does not prohibit corporations from using general treasury funds for issue advocacy (as long as individual candidates are not named or pictured); and it does not prohibit a corporation from using a candidate's name or likeness within this critical pre-election period as long as such communications are funded through a separate segregated fund. According to the State, these narrowly tailored restrictions serve the compelling state interest of preserving the integrity of the electoral process.

The State correctly asserts that the Rule covers conduct that is within the State's power to proscribe. There is no question that the State can prohibit express advocacy by corporations. This is the subject of § 54 of the MCFA, and the constitutionality of this section has been established by the Supreme Court in Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). To the extent the Rule legitimately prohibits express advocacy, the Rule is redundant of the statutory prescription against expenditures and is unnecessary. The purpose of the Rule is clearly to reach those areas that are not covered by the statute. In these areas the Rule reaches too far.

The State has come forward with no authority in support of its proposition that the limited time period justifies the restriction on issue advocacy. Moreover, while the time period is short, it could involve a critical time period for communications. If the legislature is in session and there is pending legislation, that is the time when an issue oriented organization's efforts to promote grassroots lobbying is most important. It is the Rule's impact on legitimate advocacy on pending legislation that the Court finds most disturbing. A 45-day blackout on using names would protect incumbents seeking re-election from grassroots lobbying efforts on pending

legislation, and incumbents would soon learn to schedule votes on controversial legislation during this time period and thus avoid unwanted publicity and attention.

*5 The State contends that the Rule permits issue advocacy, but merely restricts the use of candidates' names. The ban on the use of candidates' names is a heavy burden on highly protected First Amendment expression. Voters have an interest in knowing what legislators are associated with pending litigation, and an organization's ability to educate the public on pending legislation is unduly hampered if they are unable to name the legislators involved.

The State contends that the overbreadth of the Rule is not substantially burdensome because a corporation can still issue communications using a candidate's name or likeness through its segregated political fund. In Austin the Supreme Court noted that the segregated fund requirement burdens the exercise of expression. Under the MCFA the segregated fund must have a treasurer, must keep detailed accounts of contributions, must file a statement of organization, and may only solicit contributions from limited sources. M.C.L.A. §§ 169.221-.225. Austin, 494 U.S. at 658. "Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. Thus, they must be justified by a compelling state interest." Id. (citations omitted).

Finally, the State contends that it has a compelling state interest in preventing corporations from unfairly using unregulated or soft money to pay for advertisements that are thinly disguised as issue ads but which are in fact and in effect express advocacy in support or opposition of candidates.

In Austin the Supreme Court upheld § 54(1) of the Michigan Campaign Finance Act which prohibits corporations from directly supporting candidates through general treasury fund expenditures. [FN4] While observing that the restriction burdens a corporation's First Amendment right to free speech and association, 494 U.S. at 658, the Supreme Court held that the burden was justified by a compelling state interest in ensuring that expenditures reflect actual public support for the political ideas espoused by corporations. Id. at 660. The Court noted that the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Id. "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." Id.

The purpose of the Rule is to address the problem of unregulated expenditures by corporations for candidate communications that are made under the guise of issue advocacy but which in fact and in effect are express advocacy communications. Based upon the Supreme Court's recognition of the potential evils associated with the infusion of corporate funds into the election process, the State would have this Court ignore the express advocacy distinction set forth in Buckley and adopt instead a less stringent rule that would allow state regulation of all corporate speech in the 45 days prior to an election that names or depicts a candidate, regardless of the content of the message, on the basis that it might constitute indirect advocacy on behalf of or against a candidate.

*6 This Court is not convinced that Austin invites such a departure from Buckley. The mere fact that we are dealing with a corporation rather than an individual does not remove its speech from the ambit of the First Amendment. Austin, 494 U.S. at 657. Austin does not invite the Court to permit regulation of anything other than express advocacy by corporations. Austin only addressed § 54(1) of the MCFA which prohibited "expenditures," i.e., payments in assistance of or in opposition to the nomination or election of a candidate. M.C.L.A. § 169.206(1). Under Buckley, the expenditures referenced in § 54(1) must be read to apply only to express advocacy. Austin did not purport to undermine the express advocacy requirement of Buckley. While Austin found that the state had a compelling interest in restricting corporations from using their general treasury funds for express advocacy, the Court made no comment that could be construed as a retreat from the express advocacy rule.

Upon careful review of the issues presented by this case, this Court is convinced that Rule 169.39b is facially invalid on overbreadth grounds.

> The overbreadth doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to 'chill' the exercise of free speech and expression." Leonardson v. City of E. Lansing, 896 F.2d 190, 195 (6th Cir.1990); Broadrick v. Oklahoma, 413 U.S. 601,

612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). A statute is unconstitutional on its face on overbreadth grounds if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court...." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)).
Dambrot v. Central Michigan University, 55 F.3d 1177, 1182 (6th Cir.1995).

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

Accordingly, the Court declares that Rule 169.39b is unconstitutional on its face, and the Court enjoins the State from enforcing Rule 169.39b.

An order and declaratory judgment consistent with this opinion will be entered.

ORDER AND DECLARATORY JUDGMENT
In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that JUDGMENT is entered in favor of Plaintiff Right to Life Michigan in this action for declaratory and injunctive relief.

*7 IT IS FURTHER ORDERED that the Court DECLARES that Michigan Administrative Rule 169.39b is facially unconstitutional and the Secretary is ENJOINED from enforcing Rule 169.39b.

FN1. Hereinafter the Court will use the term "corporation[s]" to refer to all of these organizations collectively.

FN2. The first paragraph of Rule 169.39b states:
Except as otherwise provided in this rule, an expenditure for a communication that uses the name or likeness of 1 or more specific candidates is subject to the prohibition on contributions and expenditures in section 54 of the act if the communication is broadcast or distributed within 45 calendar days before the date of an election in which the candidate's name is eligible to appear on the ballot.
Section 54 of the Act, M.C.L.A. § 169.254, prohibits corporations from making expenditures in support of or in opposition to any candidate in elections for state office.

FN3. One exception is for qualified non-profit organizations. Plaintiff asserts that it does not qualify under this exception due to its business activities and the fact that its purposes are not limited to political goals.

FN4. Section 54(1) of the MCFA generally prohibits corporations from making expenditures in support of or in opposition to any candidate in elections for state office. Corporations are allowed, however, to expend funds "for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." M.C.L.A. § 169.255(1).

END OF DOCUMENT

PLANNED PARENTHOOD AFFILIATES OF MICHIGAN, INC., a Michigan non-profit corporation, Plaintiff,
v.
Candice S. MILLER, Secretary of State of Michigan, Defendant.

No. 98-73301-DT.

United States District Court,
E.D. Michigan,
Southern Division.

Sept. 21, 1998.

Nonprofit corporation brought suit seeking declaration that Michigan campaign finance regulation violated the First Amendment. On motion for permanent injunction, the District Court, Hood, J., held that Michigan regulation prohibiting the use of a candidate's name or likeness in corporate communications forty-five days prior to an election, unless the corporation used separate segregated funds for such communications, was facially overbroad.

Motion granted.

CONSTITUTIONAL LAW ⚿90.1(1.2)
92k90.1(1.2)
Michigan regulation prohibiting the use of a candidate's name or likeness in corporate communications forty-five days prior to an election, unless the corporation used separate segregated funds for such communications, was facially overbroad; rule did not limit its reach to those expenditures that urged voters to vote for or against a specific candidate, but infringed on protected speech by prohibiting expenditures for issue advocacy. U.S.C.A. Const.Amend. 1; M.C.L.A. § 169.215(1)(e); Mich.Admin. Code r. 169.39(b).

ELECTIONS ⚿317.2
144k317.2
Michigan regulation prohibiting the use of a candidate's name or likeness in corporate communications forty-five days prior to an election, unless the corporation used separate segregated funds for such communications, was facially overbroad; rule did not limit its reach to those expenditures that urged voters to vote for or against a specific candidate, but infringed on protected speech by prohibiting expenditures for issue advocacy. U.S.C.A. Const.Amend. 1; M.C.L.A. § 169.215(1)(e); Mich.Admin. Code r. 169.39(b).

Robert A. Sedler, Detroit, MI, Michael J. Steinberg, Detroit, MI, Mark Granzotto, Detroit, MI, for Plaintiff.

Gary P. Gordon, Katherine C. Galvin, Assistant Attorneys General, Lansing, MI, for Defendant.

MEMORANDUM ORDER AND OPINION

HOOD, District Judge.

I. INTRODUCTION

*1 Plaintiff Planned Parenthood Affiliates of Michigan (hereinafter "PPAM") brought this Motion for Preliminary Injunction and Immediate Hearing seeking injunctive relief in connection with its Complaint for a Declaratory Judgment that Rule 169.39(b) of the Michigan Administrative Code is unconstitutional on its face. Rule 169.39(b) was promulgated by Defendant Candice Miller, Michigan Secretary of State, pursuant to her authority to implement the Michigan Campaign Finance Act. The Rule prohibits the use of a candidate's name or likeness in communications made by a corporation forty-five days prior to an election, unless the corporation uses separate segregated funds for such communications. PPAM asserts that if Rule 169.39(b) is enforced, its constitutional rights under the First Amendment will be violated.

II. BACKGROUND

PPAM is a not-for-profit corporation organized under Michigan law exclusively for charitable, religious, educational, and scientific purposes. PPAM qualifies as a tax-exempt organization under § 501(c)(3) of the United States Internal Revenue Code, which is subject to the provisions of M.C.L. 169.254. M.C.L. 169.254 prohibits corporations from making contributions or expenditures in political campaigns. Consistent with 26 U.S.C. §§ 501(h) and 4911, which permits public charities to carry on certain grass roots lobbying activities, PPAM communicates frequently with the public to urge them to contact legislators to support or oppose legislation of interest to PPAM. Often this grass roots lobbying is carried on forty-five days before an election, and some of the legislators whose votes or positions are reported upon or whom the public is urged to contact, may at that time be candidates for public office. The Plaintiff brings a facial challenge

to the rule, alleging that it is unconstitutionally overbroad under the First Amendment. The Plaintiff asserts it will refrain from making expenditures for such communications because the threatened enforcement of the rule, and as a result will suffer irreparable injury to its First Amendment rights. The Plaintiff seeks injunction and declaratory relief in order to make the necessary plans regarding any expenditures for communications on issues relating to reproductive health services during the fall 1998 session of the Michigan Legislature. If this court does not enter a permanent or preliminary injunction enjoining the enforcement of Rule 169.396, the Plaintiff will refrain from making any such expenditures.

Defendant Michigan Secretary of State promulgated Rule 169.39(b) pursuant to her authority to implement and enforce the Michigan Campaign Finance Act (MCFA). M.C.L. 169.215(1)(e); M.S.A. 4.1703(15)(1)(e). Rule 169.39(b) requires corporations [FN1] use a separate segregated fund, not the general treasury fund, for communications that use the name or likeness of a candidate made forty-five days prior to an election.

Rule 169.39(b) provides in part:

> Except as otherwise provided in this rule, an expenditure for a communication that uses the name or likeness of 1 or more specific candidates is subject to the prohibition on contributions and expenditures in Section 54 of the Act, if the communication is broadcast or distributed within 45 calendar days before the date of an election in which the candidate's name is eligible to appear on the ballot.

***2** Section 54 of the Act, M.C.L. § 169.254 prohibits corporations from making expenditures to support or defeat any candidate for election to state office. Rule 169.39(b) excepts certain non profit organizations. However, Plaintiff does not meet the qualifications for a non profit organization under the Act. Rule 169.39(b) went into effect August 12, 1998, and will become enforceable on September 19, 1998, forty-five days prior to the 1998 general election. [FN2]

III. STANDARD OF REVIEW

Plaintiff requests a preliminary injunction pursuant to Federal Rules of Civil Procedure 65. The Sixth Circuit has identified four criteria for evaluating a motion for a preliminary injunction:

> 1) whether the moving party has shown a strong or substantial likelihood of success on the merits;
> 2) whether the moving party has demonstrated that irreparable harm would result if injunctive relief is denied;
> 3) whether the issuance of the preliminary injunction would cause substantial harm to others; and
> 4) whether the public interest is served by the issuance of injunctive relief.

Superior Consulting Co., Inc. v. Walling, 851 F.Supp. 839, 846 (E.D.Mich.1994); Parker v. United States Dep't of Agriculture, 879 F.2d 1362, 1367 (6th Cir.1989); In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir.1985). The four factors are not prerequisites, but rather, they must be balanced. Superior Consulting, 851 F.Supp. at 847; In re Eagle-Picher Industries, Inc., 963 F.2d 855 (6th Cir.1992). The parties agreed to consolidate the hearing into a Motion for Permanent Injunction under Fed.R.Civ.P. 65(a)(2), and for the Court to consider the merits of the case. The same factors are to be applied to motions for permanent injunctions. McDonald & Company Securities, Inc., v. Bayer, 910 F.Supp. 348 (N.D.Ohio 1995); Fed.R.Civ.P. 65(a)(2).

IV. ANALYSIS

The Plaintiff's sole argument alleges that Rule 169.39(b) violates the First Amendment, on its face, because a state cannot prohibit or regulate expenditures for communications that merely use the name or likeness of a specific candidate within forty-five days before the election. PPAM claims that it has a protected First Amendment right to use the name or likeness of a specific candidate in their issue advocacy communications any time before the election. PPAM concedes that the state can prohibit or regulate communications made by a corporation or labor union that constitute express advocacy. Express advocacy is an expenditure that by its terms urges the voter to vote for or against a specific candidate.

M.C.L. 169.254 as noted above, prohibits corporations, including not for profit corporations like Planned Parenthood Affiliates from contributing to or making expenditures for political campaigns, except ballot questions. A violation of this section is punishable as a felony or by a fine. Rule 169.39(b) is intended to implement M.C.L. 169.206(2)(b) which provides that an "expenditure" under M.C.L. 169.254 does not include "an expenditure for

communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear reference."

*3 The Plaintiff asserts that Rule 169.39(b) violates the First Amendment because it is overbroad and impermissibly reaches protected speech in the form of issue advocacy. Issue advocacy expenditures include those expenditures made for or against issues of public importance, rather than for the defeat or election of a clearly identified candidate.

The Plaintiff cites Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) for the proposition that it is unconstitutional to impose limitations on the amount of money a candidate can spend in support of his own campaign. In Buckley, the Supreme Court found unconstitutional the provisions of the Federal Election Campaign Act of 1971, 18 U.S.C. §§ 608 et seq., that limited the amount of money that an individual could spend on his own campaign and the amount of money that an individual could spend independently in support of a candidate. The Buckley Court adopted the express advocacy requirement in order to avoid problems of overbreadth, and stated the purpose of the requirement was to "distinguish discussion of issues and candidates from the more pointed exhortations to vote for particular candidates." Massachusetts Citizens, 479 U.S. at 249, 107 S.Ct. 616.

The Plaintiff argues that the holding in Buckley applies with full force to efforts to limit independent political expenditures by corporations. Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The Supreme Court in Massachusetts Citizens applied the "express advocacy" requirement of Buckley to the provisions of the Federal Election Campaign Act, 2 U.S.C. § 441(b), which prohibits corporations from expending from their general funds on behalf of political candidates. The Court held that an expenditure must constitute express advocacy before it is subject to the prohibition of § 441(b). Noting that the express advocacy requirement of Buckley avoided the problem of overbreadth and distinguished between "pointed exhortations" to vote for certain candidates and "discussion of issues," the Court reasoned that a "similar construction of the more intrusive provision that directly regulates independent spending." was required. Massachusetts Citizens, 479 U.S. at 249, 107 S.Ct. 616.

Buckley and Massachusetts Citizens when read together establish a bright line between express advocacy and issue advocacy. The government can regulate express advocacy but issue advocacy cannot be prohibited or regulated. [FN3]

The Plaintiff also cites West Virginians for Life v. Smith, 960 F.Supp. 1036 (S.D.W.Va.1996), where the court held unconstitutional a law that provided that " a person, association, organization, corporation or other legal entity who publishes, distributes or disseminates any scorecard, voter guide or other written analysis of a candidate's position or votes on specific issues within sixty days of an election is presumed to be engaging in such activity for the purpose of advocating or opposing the nomination, election or defeat of any candidate." Id. at 1038. The Court held that the law was overbroad because the same requirements imposed on an organization engaging in issue advocacy were imposed on an organization engaging in express advocacy. Id. at 1039. The sixty day time frame set forth in the West Virginia law was also found to create an unconstitutional presumption that no matter the content, a communication analyzing a candidate's position published within sixty days of an election was express advocacy. Id. at 1040.

*4 In sum, the Plaintiff argues that the controlling authority requires this Court to find that Rule 169.39(b), on its face, violates the First Amendment. Rule 169.39(b) goes far beyond prohibiting expenditures for express advocacy, the rule prohibits corporate expenditures for a wide range of issue advocacy communications and chills constitutionally protected speech. The Plaintiff argues that it has met the criteria for granting injunction relief. According to the Plaintiff, Rule 169.39(b) violates the First Amendment on its face, and therefore the likelihood of prevailing on the merits is great. Plaintiff claims that this per se violation of the First Amendment if allowed to go on will cause irreparable injury to its First Amendment rights. The Supreme Court has held that minimal loss of First Amendment rights unquestionably constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). As for the third and fourth elements for granting a preliminary injunction, the Plaintiff claims that no harm will befall Defendant if she is enjoined from enforcing the provisions, and it is in the public interest to prevent the violation of a constitutional right. G & V Lounge v. Michigan Liquor Control Commission, 23 F.3d 1071, 1076

(6th Cir.1994).

Defendant argues that this Court cannot issue a preliminary injunction where there exist complex issues of law, the resolution of which are not free from doubt. First National Bank & Trust v. Federal Reserve Bank, 495 F.Supp. 154, 157 (W.D.Mich.1980). The Defendant argues that the Plaintiff mischaracterizes the scope and impact of the challenged rule. The rule merely prohibits affected organizations from using general treasury funds to pay for communications with the name or likeness of a candidate for the limited time period of forty-five days prior to the election. The Plaintiff is free to make such communications during the forty-five day time period, but must do so using funds contributed to and maintained in a separate segregated fund.

The Defendant claims in a footnote to her brief that the forty-five day time period is tied to the absentee voting time period. Defendant claims this is the critical period with respect to public interest in protecting the electoral process from "distorting and corrosive influences." However, Defendant presents no evidence to support that this period is "critical" with respect to voters or that "critical" legislative events that are a focus of issue advocacy do not occur during that time period as well.

Defendant argues that the Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) noted that the "application of the overbreadth doctrine ... is, manifestly, strong medicine," to be employed "sparingly and only as a last resort." The Supreme Court in Broadrick wrote:

> Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral non-censorial manner.
>
> * * *
>
> ***5** To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statutes plainly legitimate sweep. (citations omitted)

Defendant argues that Rule 169.39(b) does not regulate pure speech but instead places careful limits on the source of expenditures by a corporation for a specific type of communication. The rule is content-neutral, and like the statute in Broadrick, Rule 169.39(b) seeks to regulate political activity in an even-handed and neutral manner. In Broadrick, a class action was brought on behalf of certain Oklahoma state employees seeking a declaration that a state statute regulating political activity by state employees was invalid. The Court held that the statute was not impermissibly vague and was not unconstitutional on its face, stating that such statutes have in the past been subject to less exacting overbreadth scrutiny. Id. at 616, 93 S.Ct. 2908.

Under Broadrick there must be a showing that the overbreadth is real and substantial when judged in light of the statute's legitimate sweep. Broadrick, 413 U.S. at 616, 93 S.Ct. 2908. The Defendant argues that the state has the authority to regulate campaign finance and to act to protect the election process. As such, the State of Michigan has a long standing public policy against allowing corporations to directly support candidates through expenditures from the general treasury fund. The espoused premise behind governmental regulation of corporate contributions in political campaigns is that corporations should not be able to use amassed corporate wealth to unfairly influence elections. Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). In Austin the Court upheld a provision of the Michigan Campaign Finance Act which provides that corporations could make expenditures in support of a candidate from a separately segregated fund, created under § 54 of the Act. The Court reasoned that because corporations are able to amass great sums of money and enjoy special advantage conferred by state law, the state had a compelling interest in regulating "political speech" of corporations. Evaluated against this legitimate purpose, it is clear that any perceived overbreadth would not be sufficiently real or substantial to support facial invalidation. In light of Austin, Defendant suggests that Rule 169.39(b) may regulate corporate express advocacy by requiring it to be funded by a separate segregated funds.

The Defendant claims that because Rule 169.39(b) is content neutral and regulates conduct the potential impact of this rule on protected conduct must be dealt with on a case by case basis. New York v. Ferber, 458 U.S. 747, 773-74, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). At the same time the rule does

not impede the Plaintiff's ability to advocate for the passage or defeat of certain legislation. The Defendant further claims that enjoining the enforcement of Rule 169.39(b) is contrary to public interest, as the rule seeks to minimize the "distorting influence" of unregulated corporate expenditures for express advocacy disguised as issue advocacy. This rule further limits the impact of these expenditures by "providing the public with access to greater information about the sponsorship of the communications."

***6** This Court must first determine whether the prohibition of Rule 169.39(b) burdens political speech and if so, whether such a burden is justified by a compelling state interest. Buckley, 424 U.S. at 44-4, 96 S.Ct. 612. The Defendant minimizes the impact of the legislation upon PPAM's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose. However, PPAM is not free to use its general funds for campaign advocacy purposes. While that is not an absolute restriction on speech it is a substantial one. because to speak

cont'd on next page.

the election process by corporations and labor unions. Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982). The regulation of corporate political activity has been concerned not only with the use of the corporate form per se, but also about the potential for the unfair deployment of wealth for political purposes. A group like PPAM does not pose such threat. The PPAM was formed to disseminate political ideas, not to amass capital. The resources it has available are not derived from its success in the marketplace, but from its popularity with the public. The rationale for the regulation is not compelling with respect to PPAM because individuals who contribute to PPAM are aware of its political purpose and goals, and contribute because they support those purposes and goals. A contributor may not be aware of exactly how his or her contribution will be used, however, with the contribution is an implied delegation of authority to use the funds in a manner that best achieves the goals of the organization. PPAM is not the type of corporation which poses the threat perceived by the Defendant. Therefore, the compelling state interest espoused by Defendant does not justify an

IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction, considered by the Court as Motion for Permanent Injunction and Declaratory Judgment (Docket No. 2), is GRANTED.

IT IS FURTHER ORDERED that Defendant is permanently enjoined from enforcing Rule 169.39(b) because it is unconstitutionally overbroad.

FN1. Under the rule, corporations include: corporations, domestic dependent sovereigns, joint stock companies and labor unions.

FN2. Judge Robert Holmes Bell declared the Rule unconstitutional on September 16, 1998 in Right to Life of Michigan, Inc., v. Candice Miller, Case No. 1:98-CV-567, 1998 WL 743712, --- F.Supp.2d ---- (W.D.Mich.1998).

FN3. In Buckley, the Court went so far as to suggest language that would constitute express advocacy, such as the words, "vote for," "elect," "cast your vote for," "vote against," words that are clearly persuasions of election or defeat. Buckley, 424 U.S. at 44, n. 52, 96 S.Ct. 612. In Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir.1987), the 9th Circuit held that the words suggested in Buckley need not be used to constitute express advocacy, but that the language have no other interpretation "but as an exhortation to vote for a specific candidate." The Supreme Court rejected the use of the Buckley specific words and phrases in Massachusetts Citizens, 479 U.S. at 249, 107 S.Ct. 616, in favor of a contextual analysis of a "unambiguous message" or "essential nature" standard.

END OF DOCUMENT

substantial one, because to speak through a segregated fund PPAM must make very significant efforts to raise monies for each and every specific issue it desires to address to the public.

Rule 169.39(b) is overbroad in its prohibitions. The rule prohibits expenditures made from the general fund that use the name or likeliness of a candidate within forty five days of an election. This rule does not limit its reach to those expenditures that urge voters to vote for or against a specific candidate, or "attack ads" which attack a candidate by name without specifically urging the voter to vote for or against the candidate. The Rule as drafted infringes on protected speech by prohibiting expenditures for issue advocacy. Interpreting the language of the statute, it is easy to envision that protected speech, in the form of issue advocacy, would be stifled by a fear of violating this rule, and the possible ramifications of such a violation. Similar to the law at issue in West Virginia for Life, supra, this rule imposes the same restrictions on an organization engaging in issue advocacy as it does on those engaging in express advocacy. Id. at 1039.

The Defendant has expressed a desire to protect the integrity of the electoral process with the implementation of Rule 169.39(b). The Defendant argues that it has a compelling interest in protecting against the real or perceived corrupting influence on the election process by corporations and labor unions. Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982). The regulation of corporate political activity has been concerned not only with the use of the corporate form per se, but also about the potential for the unfair deployment of wealth for political purposes. A group like PPAM does not pose such threat. The PPAM was formed to disseminate political ideas, not to amass capital. The resources it has available are not derived from its success in the marketplace, but from its popularity with the public. The rationale for the regulation is not compelling with respect to PPAM because individuals who contribute to PPAM are aware of its political purpose and goals, and contribute because they support those purposes and goals. A contributor may not be aware of exactly how his or her contribution will be used, however, with the contribution is an implied delegation of authority to use the funds in a manner that best achieves the goals of the organization. PPAM is not the type of corporation which poses the threat perceived by the Defendant. Therefore, the compelling state interest espoused by Defendant does not justify an infringement on PPAM's First Amendment rights. To the contrary, Rule 169.39(b) directly infringes o the right of PPAM to engage in issue advocacy for periods the legislature is in session directly prior to an election, often a critical period for voting on important and pending legislation of our day. The rule also reaches non advocacy and speech which is merely informational in nature.

*7 Having reviewed the arguments of the parties this Court is satisfied that Rule 169.39(b) is overbroad and will chill the exercise of constitutionally protected "issue advocacy." There is no support for further intrusion on issue advocacy by the enforcement of this Rule. The Defendant has not shown that the prohibition of the use of corporate treasury funds containing the name or likeness of a candidate, forty-five days before the election is as compelling an interest that it overcomes the potential for the Rule to compromise constitutionally protected speech which cannot be interpreted as supporting or opposing the election of a specific candidate. Massachusetts Citizens, 479 U.S. at 249, 107 S.Ct. 616.

Balancing the factors to be considered in a Motion for Permanent Injunction, the Court finds in favor of the Plaintiff. The Court having ruled on the merits in favor of the Plaintiff and finding that enforcing Rule 169.39(b) would chill and irreparably harm Plaintiff's First Amendment rights, a permanent injunction should issue against Defendant prohibiting the enforcement of Rule 169.39(b).

CONCLUSION

The Court finds that Rule 169.39b is unconstitutionally overbroad and infringes on the Plaintiff's First Amendment rights. Plaintiff's request for a Permanent Injunction and Declaratory Judgment is granted.

Accordingly,