Approved: 2-17-99
Date

MINUTES OF THE SENATE ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairman Senator Janice Hardenburger at 1:30 p.m. on February 9, 1999 in Room 529-S of the Capitol.

All members were present except: Senators Hardenburger and Steineger

Committee staff present: Dennis Hodgins, Legislative Research Department
Mike Heim, Legislative Research Department
Ken Wilke, Revisor of Statutes
Graceanna Wood, Committee Secretary

Conferees appearing before the committee: Senator Anthony Hensley
Gene Neely, President, Kansas National Education Assoc.
John Lewis, Publisher, Kansas Lawyer
Bruce Dimmitt, Lobbyist, Kansas for Life

Others attending: See attached list

Acting Chairman Becker opened hearing on **SB 23 concerning campaign finance** and introduced Senator Hensley to the Committee.

Senator Hensley presented testimony in favor of **SB 23**, a bill requiring disclosure of money raised and spent by independent groups to influence voters in Kansas elections. (Attachment #1)

Acting Chairman Becker introduced Gene Neely, President of the KNEA, who spoke in support of **SB 23.** Mr. Neely informed the Committee that KNEA participated in a number of independent campaigns last summer and did so in a legal manner. He said that KNEA had legally been involved in anonymous campaign advertising in the primary election, but has since rejected those actions. (Attachment #2)

Senator Huelskamp asked Mr. Neely why any organization would be afraid to put their name on literature, and Mr. Neely informed the Committee that there was no fear of this prior to the time their organization sent out information during the primary elections. He testified that the KNEA had contacted the Governmental Ethics office and received clearance on what we needed to do in order to comply with the letter of the law, and that is what was followed.

John Lewis, Publisher of the Kansas Lawyer informed the Committee of his opposition to **SB 23** and dispelled the notion that public disclosure is necessarily a virtue. The United States Supreme Court certainly doesn't think it is a virtue. The organizations that advocate privacy laws do not think public disclosure, necessarily in every case, is a virtue. The United States Supreme Court has said that the right to speak anonymously is a virtue. It is an entitled right of the citizens of this country. Mr. Lewis said Senator Hensley seems to initiate this idea that what are opponents of this afraid of, why fight it. We fight it as an advocate of the First Amendment. This is my sole agenda here as a newspaper publisher. My right and your right to speak anonymously is part of our heritage, that is what the founding fathers wanted, hence the First Amendment.

Mr. Lewis testified that this situation here is sadly analogist to what is going on in Washington. We have desperate politicians who cannot win according to the conditions of the United States Constitution, trying to bend words, slice meanings and place mandates with what are clearly understandable words. In Topeka, Kansas, the definition of express advocacy was stricken by the United States Supreme Court, as in *Buckley vs Valeo*. In fact, the Supreme Court overturned an attempt by the Federal Election Commission to do just that, saying the lower court of appeals was mistaken in thinking that this construction is an attempt to close a loophole. For the distinction between discussions and issues and candidates and advocacy of election or defeat of candidates may all been dissolved in practical application. Incumbents are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaign for themselves on issues of public interest.

Mr. Lewis continued that in *Thomas vs Collins* the US Supreme Court said "whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and effect. No speaker in such circumstances assumes that anything he might say upon the general subject would not be understood by some as an invitation".

The proponents of this law are troubled by a loophole just like that one, they can't close it. They have been trying for several years. When our freedom to speak is mildly eroded, it sets in motion falling dominos over the rest of our freedoms. The loophole under discussion here that is trying to be closed is no less than the First Amendment, and the US Supreme Court said in the *Buckley* opinion that it is a loophole that no one can close.

The proponents of this legislation don't know what they are doing. They do not understand what they are doing, they are not bad people, they just don't know what they are doing. They don't understand that they are trying to rub out their First Amendment Rights of free speech. You want to take on the United States Supreme Court, well, go right ahead. You are going to cause the good people who support the U. S. Constitution to spend lots of money that they shouldn't have to spend, that taxpayers in Nebraska, Idaho, Kentucky, Florida, New York aren't having to spend. Why is Kansas for this issue? Why does Kansas have to be the test case, what's going on here, why do we continue to ignore the United States Constitution and the United States Supreme Court? The taxpayers are going to be spending tens of thousands of dollars that belong to them and a feudal legal effort that will most certainly fail. There is a lawsuit, Kansas for Life vs State of Kansas. Some of you selfishly want to tear down this countries proud heritage of free speech so that you can set your own ground rules to get reelected without the ProLife people interfering. Of course, Governor Graves is joining with the Democrats on this; he is for it.

Bruce Dimmitt, lobbyist for Kansans for Life expressed his opposition to **SB 23** commenting on the language express advocacy and issue advocacy required by the U. S. Supreme Court which would require subjective interpretation and enforcement unfair to entities subject to regulations. (Attachment #3)

Acting Chairman Becker asked for approval of the minutes of February 4, 1999.

Senator Huelskamp moved that the minutes be approved as written, seconded by Senator Praeger. Motion carried.

Meeting was adjourned at 2:20 p.m. Next meeting scheduled for February 15, 1999.

ELECTIONS & LOCAL GOVERNMENT COMMITTEE
GUEST LIST

DATE: FEBRUARY 9, 1999

NAME	REPRESENTING
Bruce Dimmitt	Kansans for Life
Barb Soldier	Kansans for Life
MARK DESETTI	KNEA
Gene Neely	KNEA
Vera Gannaway	GEC
Carol Williams	GEC
Harriet Lange	KS Assn Broadcasters

State of Kansas
Senate Chamber

ANTHONY HENSLEY
STATE SENATOR, NINETEENTH DISTRICT
SHAWNEE, DOUGLAS & OSAGE COUNTIES

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VICE CHAIRMAN: CONFIRMATIONS OVERSIGHT
MEMBER: EDUCATION
HEALTH CARE REFORM OVERSIGHT COMMITTEE
INTERSTATE COOPERATION
LABOR EDUCATION CENTER ADVISORY COUNCIL
LEGIS. COORDINATING COUNCIL
LEGIS. POST AUDIT
STATE FINANCE COUNCIL
UTILITIES
WORKERS COMPENSATION FUND OVERSIGHT

Senate Elections and Local Government Committee

Senate Bill No. 23

February 9, 1999

Senator Hardenburger and Committee Members:

I testify today in support of Senate Bill No. 23, a bill that would require full disclosure of money raised and spent by independent groups to influence voters in Kansas elections. The bill would require independent groups spending more than $1,000 to "expressly advocate the nomination, election or defeat of a clearly identifiable candidate" to file a disclosure report containing the name and address of the person, group, or organization and any itemized contributions or expenditures in excess of $50.

As leader of the Senate Democrats, I am grateful to you, Senator Hardenburger, for how quickly you have acted to hold a hearing on this bill. We believe it is in the best interest of all Kansans to move as quickly as possible to pass this legislation.

Kansans have become skeptical of their elected officials because of a damaged campaign finance system. The controversy over independent expenditures is neither a Republican nor a Democratic issue, it is a voter "right to know" issue. The voters of Kansas have a right to know who is attempting to influence their elections.

It is no news that independent expenditures are a growing trend in campaigns throughout the country, and Kansas is not immune from this trend. The 1998 primary election gave us glaring examples of how independent expenditures in our elections continue to grow. Groups as politically diverse as the K-NEA, Kansas Taxpayers Network, Kansans for Life, and the Washington-based Foundation for Responsible Government were all exposed for their actions to influence different primary election races.

An August 7, 1998, article in the *Topeka Capital-Journal* explained one of the many problems that occurred during the 1998 primary election when they said:

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"Hensley cited a series of controversial mailings from the Kansas-National Education Association as an example of what he is attempting to stop. In the final days of the primary election campaign, the K-NEA, charged in two anonymous mailings that Representative Vince Cook failed to pay his child support and state income taxes on time."

While the K-NEA has a free speech right to make those charges which news reports say were corroborated by court documents, they should not have sent the mailings anonymously. The voting public had a right to know who was financing the mailings and where they came from.

The same *Topeka Capital-Journal* article went on to discuss similar problems in other races:

"During the primary, a Washington D.C.-organization called the Foundation for Responsible Government placed ads on Kansas television stations attacking Republican gubernatorial challenger David Miller.
Under current Kansas and federal law, the foundation doesn't have to disclose who funded the ads because they didn't directly advocate Miller's defeat - although that clearly was what they were designed to do."

Examples like this are the reason we need to require the disclosure of independent expenditures. This bill would expand the Campaign Finance Act to include a reporting requirement for persons or groups making independent expenditures for candidate elections. Their disclosure requirements will be identical to those now imposed on candidates, candidate committees, party committees, and political committees.

The Senate Democrats are joined in support on this issue by Governor Bill Graves. In a January 22, 1999, article in the *Lawrence Journal World*, the Governor told members of our state's ethics commission that, "the state should compel independent organizations to disclose financial involvement in political campaigns." Graves went on to say, "I support efforts to strengthen disclosure."

Senate Bill No. 23 follows the changes KU law professor Richard Levy suggested to the Special Committee on Local Government. Levy's suggestions were made at the request of the Special Committee concerning 1998 House Bill No. 2662, which last year became law. In his research of the current law, Levy found two basic problems that need our attention..

Professor Levy points out that according to *Buckley v Valeo*, there is a question about whether or not contribution limits can be applied to independent groups. 1998 House Bill No. 2662 creates questions because it may put limits on these contributions. Levy concludes that, "the expanded definition of contributions would not be problematic if only reporting and disclosure requirement were involved, because reporting and disclosure requirements may be applied to independent expenditures for express advocacy."

Senate Bill No. 23 does not put limits on contributions. Instead, it follows the law set forth in *Buckley v Valeo* by requiring disclosure of contributions and expenditures if more than a certain amount, in this case $1,000, has been spent to "expressly advocate the nomination, election, or defeat of a clearly identified candidate."

The second point that Levy stresses is the problem created by the definition of expenditures in 1998 House Bill No. 2662. *Buckley v Valeo* lists specific statements or "magic words" that constitute express advocacy. The magic words used in *Buckley v Valeo* include statements like: Vote for the Secretary of State, Re-elect your Senator, Smith for Senate, Bob Jones in 98, and many others. 1998 House Bill No. 2662 includes these "magic words", but also includes the wording "but not limited to." Levy believes the use of the statement "but not limited to" is too vague and explained it this way:

> "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."

In response to Professor Levy's concern, Senate Bill No. 23 changes the definition of "express advocacy" by adding the following language on page 4, lines 10-18:

> "(3) any communication, when taken as a whole and with limited reference to external events, such as the proximity to the election, only may be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because:
>
> (A) The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and
>
> (B) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action."

The addition of this wording eliminates any questions regarding how independent expenditures will be reviewed.

In his testimony (October 14, 1998) before the Special Committee, Professor Levy stated "The state may require reporting and disclosure of independent expenditures and 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."

Levy later said in a letter (November 30, 1998) to legislative research that, "as the Supreme Court made clear in *Buckley*, it is the message of an expenditure, viewed objectively, that determines whether it constitutes express advocacy." Senate Bill No. 23 provides the wording to ensure that all messages receive an objective review.

This bill is necessary to give the people of Kansas an opportunity to know who is providing information to them to influence their vote. A November 16, 1998, *Topeka Capitol Journal* editorial entitled, "Why fight disclosure?" explained it best:

> "Educated voters realize that when it comes to information, particularly in a politically charged environment, one must consider the source - and make decisions based in part on motivations and what self-interests are involved.
>
> "Besides, if your group is right, why fight it?"

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 W. 10TH STREET / TOPEKA, KANSAS 66612-1686

Gene Neely Testimony Before
Senate Elections and Local Government
Tuesday, February 9, 1999

Thank you Madame Chair. I am Gene Neely, president of the Kansas National Education Association and chair of the KNEA Political Action Committee. I am here today to speak in support of SB 23.

It may seem ironic that I speak in support of this bill in light of my organization's activities during the primary election last summer. As you are probably aware, KNEA participated in a number of independent campaigns and did so in a legal manner. Even so, it was clear from the reaction of our members to our campaign that our behavior should have been in accordance with what SB 23 promotes.

Anton Ahrens, a KNEA member who teaches at Topeka High, was fairly typical of our members when he wrote us last summer that "we should never be an anonymous organization. When we take a stand on an issue we should openly support and defend our position. Voters should never be in the position of wondering who may be influencing their votes." I agree with Anton.

It is extremely important that voters be as knowledgeable as possible and that includes knowing who is providing information to them about candidates and hence trying to influence their votes. When our members made it very clear that this is what they expect from KNEA, I believe they were representing the position of voters everywhere in Kansas.

During the general election, KNEA continued to participate in independent campaigns. However, we included the full name of our political action committee and my name was listed as chair on every piece of external mail we sent. Regardless of whether or not SB 23 is ultimately enacted into law, I will do what I can to see that my organization continues to provide such information to voters we are trying to influence. I believe it is a standard to which all political action committees should adhere.

Thank you for your consideration of our position.

Senate Elections & Local Government
Attachment: # 2-1
Date: 2-9-99

Telephone: (785) 232-8271 FAX: (785) 232-6012

STATEMENT BY BRUCE DIMMITT ON SB NO. 23 BEFORE SENATE COMMITTEE ON ELECTIONS AND LOCAL GOVERNMENT

February 9, 1999

Madam Chairman and members of the Committee:

I am registered as a voluntary lobbyist for Kansans for Life. I appreciate the opportunity to comment on SB 23.

My comments on the bill are as follows:

1. Lines 28, 29, 30 & 31 of subsection (h) on page 3 of the bill are flawed and subject to overbroad interpretation. This can be remedied by replacing those lines with the following:

> **"Expressly advocates" means any communication that in express or explicit words advocates the nomination, election or defeat of a clearly identified candidate, including, but not limited to the following examples:--- (See copy of a February 8, 1999 letter to me from James R. Mason, III, Esq., of Bopp, Coleson & Bostrom, Terre Haute, Indiana.**

2. Subsection (h) (3) is language from 11 C.F.R. 100.22 ruled to be unconstitutional by every Federal court to consider it to date. See:

- **Right to Life of Dutchess County v. FEC, 6 F.Supp. 2d (S.D.N.Y. 1998)**
- **Maine Right to Life Committee, Inc., v FEC, 914 F Supp 8 (D.Me. 1996) Aff'd per curiam, 98 F. 3d 1 (1st Cir. 1996)**
- **Iowa Right to Life Comm., Inc. v. William's, No. 4-98-CV-10399 (S.D. Iowa Oct. 23, 1998) See pertinent excerpt attached).**

The language tends to blur the required bright line between express advocacy and issue advocacy required by the U.S. Supreme Court and would require subjective interpretation and enforcement unfair to entities subject to regulation.

Thank you for your consideration of these comments. I will be happy to try to answer any questions you might have.

BRUCE DIMMITT
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February 8, 1999

VIA FACSIMILE
Bruce Dimmitt
Kansans for Life

Re: Proposed "expressly advocates" legislation

Dear Mr. Dimmitt:

The proposed legislative definition of "expressly advocates" that you read to me over the phone earlier today is based almost word for word on the FEC's regulation at 11 C.F.R. 100.22. Part (b) of that regulation has been ruled to be unconstitutional by every federal court to consider it to date. The cases are: *Right to Life of Dutchess County v. FEC*, 6 F.Supp. 2d (S.D.N.Y. 1998); *Maine Right to Life Committee, Inc., v. FEC*, 914 F. Supp 8 (D.Me. 1996) *aff'd per curiam*, 98 F. 3d 1 (1st Cir. 1996). In *Iowa Right To Life Comm., Inc. v. Williams*, No. 4-98-CV-10399 (S.D. Iowa Oct. 23, 1998), the federal district court preliminarily enjoined the State of Iowa from enforcing a state regulation that was based on the federal regulation. Iowa has appealed that court's decision to the Eighth Circuit Court of Appeals. The Kansas legislature would be well advised not to adopt part (b).

As Professor Levy of the University of Kansas pointed out in his November 4, 1998 letter to the Legislative Research Department, the current statute lists examples of express advocacy, but does not clearly define the class of speech in which the examples fall. To remedy that problem and to bring the statute clearly within the constitutionally required "bright-line" rule required by the Supreme Court, I would recommend that the statute be written as follows:

> "Expressly advocates" means any communication that **in express or explicit words** advocates the nomination, election or defeat of a clearly identified candidate, including, but not limited to the following examples:
>
> (A) "vote for the secretary of state";
> (B) "re-elect your senator";

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(C) "cast your ballot for the republican challenger for governor";
(D) "Smith for senate";
(E) "Bob Jones in '98";
(F) "vote against Old Hickory";
(G) "defeat" accompanied by a picture of one or more candidates; or
(H) "Smith's the one."

Sincerely,

BOPP, COLESON & BOSTROM

James R. Mason, III

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IOWA RIGHT TO LIFE COMMITTEE, INC. and IOWA RIGHT TO LIFE STATE POLITICAL ACTION COMMITTEE,	
Plaintiffs,	
vs.	CIVIL NO. 4-98-CV-10399
KAY WILLIAMS, in her official capacity as Executive Director as Executive Director of the Iowa Ethics and Disclosure Board; BERNARD McKINLEY, JAMES ALBERT, GWEN BROOKS, MARIE THAYER, MICHAEL FORREST, in their official capacities as members of the Iowa Ethics and Disclosure Board; THOMAS MILLER, in his official capacity as Iowa Attorney General; and JOHN SARCONE, in his official capacity as County Attorney for Polk County, Iowa, and as a representative of the class of County Attorneys in the State of Iowa,	
Defendants.	

The Court has before it plaintiffs' motion for preliminary injunction, filed July 17, 1998. On August 14, 1998, the Court set a hearing on the motion for August 21, 1998. Defendant Miller, as well as the officials of the Iowa Ethics and Campaign Disclosure Board ("the state defendants") resisted the motion on August 17, 1998.

On August 19, 1998, plaintiffs filed a motion to continue the hearing to allow them an opportunity to amend their motion and complaint. The Court granted their motion, and continued the hearing indefinitely.

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> five hundred dollars in the aggregate, or incurs indebtedness in excess of five hundred dollars in the aggregate in a calendar year to cause the publication or broadcasting of material in which the public policy positions or voting record of an identifiable candidate is (sic) discussed and in which a reasonable person could find commentary favorable or unfavorable to those public policy positions or voting record.

Iowa Code § 56.2(16). In addition, IRLC challenges Iowa Code § 56.6, which requires permanent organizations that are organized primarily for other purposes to form a political committee if they spend more than $500.00 to support or oppose a candidate.

On July 9, 1998, the Iowa Ethics and Campaign Disclosure Board (the "Board") adopted 351 IAC 4.100(1). This regulation provides in relevant part:

> For the purposes of Iowa Code chapter 56 and this division, the following definitions apply.
>
> **4.100(1)** *Express advocacy.* "Express advocacy" means communication that either:
>
> *a.* Uses phrases such as "vote for the Governor," "re-elect your State Senator," "support the Democratic nominee," "cast your ballot for the Republican challenger for Iowa House seat 101," "Smith for County Auditor," "Jane Jones in '98," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote 'yes' for the cable franchise," "vote for the kids," "support the gambling referendum," "vote against Old Hickory," "vote 'no' on the local option tax," "defeat" accompanied by a picture of one or more candidates(s), "defeat the referendum," "reject the incumbent," "reject gambling," or communications of campaign slogan(s) or individual word(s) or symbol(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s) or a ballot issue such as posters, bumper stickers, or advertisements, which say "Branstad's the One," "Campbell '94," "Fitzgerald/Zimmerman," "Ray!," ✓ New City Library," "Float the Boat," or "ERA"; or
>
> *b.* When taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) or a ballot issue because:
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages action to elect or defeat one or more clearly identified candidate(s) or a ballot issue

or encourages some other kind of action.

351 IAC 4.100(1). Subsection (1)(b) is taken almost verbatim from the definition of "expressly advocating" found in 11 C.F.R. 100.22(b), which governs federal elections.[2]

IRLC does not challenge subsection (1)(a) of the above regulation, but contends that subsection (1)(b) is overbroad, and therefore, unconstitutional. According to plaintiffs, those charged with enforcing chapter 56 of the Iowa Code will apply subsection (1)(b) in determining whether money IRLC spends on its voter registration guides is "express advocacy." IRLC fears it will be subjected to enforcement actions for violating the ban on the use of corporate funds or for failing to organize as a political committee. Because it plans to publish a voter guide prior to the November 1998 election, IRLC filed the present action seeking to enjoin enforcement of the challenged statutes and regulations.

B. Challenges Made by IRLSPAC

Plaintiff IRLSPAC is a state political action committee ("PAC") affiliated with IRLC. IRLSPAC alleges it is not directly associated with any political candidate, campaign

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[2] As noted in plaintiffs' reply brief, the Federal Election Commission ("FEC") adopted 11 C.F.R. § 100.22(b) in reliance on the Ninth Circuit's holding in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), which is discussed in the body of this decision. 11 C.F.R. § 100.22(b) sets forth the following definition for "expressly advocating" as an alternative to the express or explicit words and phrases set forth in 11 C.F.R. § 100.22(a):

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonably person as containing advocacy of the election or defeat of one or more clearly identified candidates(s) because--
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992); *Tullos v. Parks*, 915 F.2d 1192, 1196 (8th Cir. 1990).

B. Plaintiffs' Probability of Success on the Merits

1. Whether 351 IAC 4.100(1)(b) is Unconstitutional

The first factor to be considered is the probability that plaintiffs will succeed on the merits. Both parties agree that the "heart" of this case rests on the distinction between "issue advocacy" and "express advocacy," under the language set forth in 351 IAC 4.100(1)(b). Defendants do not dispute they will rely in part on this subsection to determine whether a communication constitutes "issue advocacy" for purposes of Chapter 56. Communications viewed by defendants as "issue advocacy," would not subject IRLC to the chapter's reporting and disclosure requirements.[3]

Again, the parties do not dispute that the words and phrases in subsection (1)(a) of section 4.100 are consistent with the "magic words" set forth by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") to define "express advocacy." IRLC states in its Amended Memorandum that the voter guide it plans to publish later this month will not contain communications that would fall within the scope of subsection (1)(a). It does fear, however, that defendants may interpret some

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[3] In *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976) (*per curiam*), the United States Supreme Court held that the government may *not* regulate funds spent to publish communications that contain what is generally referred to as "issue advocacy." As explained by the Court:

> [d]iscussion 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."

Id. (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

of the language as meeting the definition of "express advocacy" contained in subsection (1)(b).

In arguing that subsection (1)(b) is constitutional, defendants rely largely on the Ninth Circuit Court of Appeals' decision in *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), which held that a communication need not contain "express words of advocacy" provided that the communication "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." Defendants further contend that as a policy issue, the Board has no intention "to force IRLC to report and disclose communications that to not rise to the level of 'express advocacy.'" Supplemental Brief in Support of Resistance to Preliminary Injunction by Miller and Williams *et al.*, ("Defendants' Supplemental Brief"), at 9.

This Court cannot agree with defendants' position. The First and Fourth Circuit Courts of Appeals recently have rejected *Furgatch's* "read as a whole" language--which would allow defendants to consider external factors such as the timing of the communications--in favor of the "bright-line rule" requiring explicit or express words of advocacy set forth by the Supreme Court in *Buckley* and *MCFL*. *See FEC v. Christian Action Network, Inc.* 110 F.3d 1049 (4th Cir. 1997) ("CAN II"); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 11 (D. Me.), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert denied*, 118 S.Ct. 52 (1997) ("MRLC"). *See also Right to Life of Duchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (1998) (following *CAN II* and *MRLC*). Similar to the present case, in *MLRC* the Maine Right to Life Committee, Inc. brought a pre-enforcement action to challenge the constitutionality of 11 C.F.R. § 100.22(b), which was to go into effect on October 5, 1995, approximately one month before general elections. As explained by the district court in *MRLC*, the Supreme Court's decision in *Buckley* clarified that:

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> FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. 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. The Court seems to have been quite serious in limiting FEC enforcement to express advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language.

MRLC, 914 F. Supp. at 12. The *MRLC* court later noted, "what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches." *Id.* at 13.

As discussed above, defendants in the present case do not dispute they would apply 351 IAC 4.100(b) to determine whether a particular communication is subject to regulation under Iowa Code §§ 56.2(16) and 56.15. Like the plaintiffs in *MRLC*, therefore, as of July 1998, IRLC must re-evaluate all of its intended communications in light of subsection 4.100(b). Based on the well-reasoned opinion of the district court in *MRLC*, as well as the Fourth Circuit's decision in *CAN II*, the Court finds plaintiffs would likely succeed on the merits that the regulation is unconstitutionally overbroad, and acts to "chill" their First Amendment rights to inform the public of various candidates' positions on certain issues.

Defendants' "policy of nonenforcement" does not alter the Court's decision. As argued by plaintiffs in their reply brief, the fact the Board adopted not only 351 IAC 4.100(1)(a) but also subsection (1)(b)–and did so after the decisions in both *MRLC* and *Duchess County*–strongly suggests its interpretation of "express advocacy" is more closely akin to that set forth in *Furgatch* than *Buckley* or *MCFL*. The Court therefore finds IRLC is likely to succeed on the merits with

regard to 351 IAC 4.100(b).

2. Whether Iowa Code § 56.15 is Readily Susceptible to a Narrowing Construction

Plaintiffs next challenge the express language set forth in Iowa Code § 56.15. Subsection (1) prohibits corporations in general from using corporate funds "for the purpose of influencing the vote of an elector." Plaintiffs contend this subsection is overbroad on its face, and should be struck down. With regard to nonprofit corporations such as IRLC, subsection (4) provides:

> The restrictions imposed by this section relative to making, soliciting or receiving contributions shall not apply to a nonprofit corporation or organization which uses those contributions to encourage registration of voters and participation in the political process, or publicizes public issues, or both, but does not use any part of those contributions to *endorse or oppose* any candidate for public office

Iowa Code § 56.15(4) (emphasis added). Plaintiffs note that the words "endorse or oppose" in this subsection are not defined in the act or regulation, and under their ordinary meaning, could potentially be used to encompass IRLC's voter guide.

Additionally, plaintiffs challenge 351 IAC 4.82, which was adopted to implement section 56.15. This regulation provides:

> These rules do not prevent a corporate entity from providing or publicizing voter registration procedures, election day information, voting procedures or other voter education information, so long as the information provided is not *designed to influence the vote of the elector*.

351 IAC 4.82 (emphasis added). Plaintiffs contend that the phrase "designed to influence the vote of the elector" creates a third standard by which defendants may determine whether an entity has improperly used corporate funds, and request that this Court strike down the regulation.

In *Buckley*, the Supreme Court evaluated the phrase "for the purpose of influencing" as

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