Approved: 4-2-99

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 March 18, 1999, in Room 529-S of the Capitol.

All members were present except: Senator Praeger

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:

Others attending: See attached list

Chairman Hardenburger opened the meeting by introducing Mr. Eliehue Brunson, Assistant Attorney General, (who represented the Ethics Commission as one of the defending attorneys) to give an overview of the decision of the United States District Court Case #98-4192-RDR, *Kansans for Life vs. Diane Gaede* to the Committee. She also introduced M. J. Willoughby, Assistant Attorney General who accompanied Mr. Brunson to the Committee meeting.

Mr. Brunson stated that Judge Rogers, the presiding judge, gave both sides an opportunity to present the issues that were identified in this case. The case started in the Miller vs Graves primary election with a radio ad from the Kansans for Life organization. The ad apparently caught the interest of someone in the public, who called the Ethics Commission, suggesting that this ad should be required to disclose who made contributions in support of the ad. The Commission then called members of the Kansans for Life Committee and stated there had been an anonymous complaint, and further recommended that the Kansans for Life Committee request an opinion from the Commission whether or not this was an issue or an express advocacy. The Kansans for Life requested an opinion, and therein is where the framework of litigation occurred. The resultant opinion itself is what concerned the Kansans for Life. Once the opinion was issued, Kansans for Life filed a lawsuit, requesting a temporary restraining order against the application of the opinion. They asked for a judgment whereby the opinion should be rendered unconstitutional. They also requested an injunction to enjoin the Commission from applying that opinion in the future.

A temporary injunction was sought upon notification from the Commission that advised Kansans for Life to file a report disclosing the individuals who financed the ad, giving five days to comply. The notice carried not only financial penalty, but also a criminal penalty.

The Judge did not grant the temporary injunction, but instead allowed the defendants, the Governmental Ethics Commission, to file a brief. The defendants filed a brief setting out the state's procedural defenses. The case was thought to be about a single ad in which the opinion was based upon one advertising. An injunction was not necessary because only one situation was being challenged.

A week after the hearing, the Kansans for Life filed the report disclosing who had paid for the ad, and how much money was actually paid. The defendants, in our response, thought once they had filed a report, they did not deserve an injunction because that issue became a "moot" point. They were no longer in jeopardy of being penalized for not filing the disclosure report, and they were no longer in criminal jeopardy.

The state's attorneys procedurally argued that the matter was moot, the issue was not ripe for decision, and in the next election there would be a different ad. Obviously Governor Graves and Mr. Miller who were the subjects of this ad would no longer be running against one another. The state filed a motion; however, Kansans for Life responded, with a request for a preliminary injunction. They argued that they

were forced to file the report. Their argument was that their First Amendment right to run this particular ad was being infringed upon; that the Court still should intercede and grant them preliminary injunction. The Court set a trial date, and all of the issues that had been argued before were then presented to the Court. Ms. Williams, Executive Director, Kansas Governmental Ethics Commission, testified as to the particulars as to how the case was handled within the office. One of the Commissioners, Daniel Siefert, testified how the Commission determines how they are going to put together an opinion.

Plaintiffs argued that First Amendment and Fourteenth Amendment were applicable. The Judge was requested to grant them the preliminary relief that they had sought. That decision came down February 23rd, in which the Judge granted the Kansans for Life Organization an injunction. The temporary restraining order was authorized; the disclosure records in the Secretary of States Office were to be expunged. They also asked and were granted the ability to not have the opinion used in the future against similar ads. The Judge made it clear that the statute was still intact, but that the Governmental Ethics Commissions opinion itself was vague and overly broad in its application and ruled it unconstitutional.

The Judge ruled that the Commission's opinion was vague, and the public would not necessarily know whether or not they would be violating the law when putting together the ad. The leading case on which the Judge relied upon was the Supreme Court case of *Buckley v. Valeo*, which establishes a bright line test revolving around phrases in which if they are used in a particular advertisement, considered expressly advocating to vote for a particular candidate. If those phrases are not used as the Kansans for Life Organization claimed in putting their ad together, then those ads should be considered issue advocacy.

The Judge pointed out the I *Furgatch* case, which basically says that an ad can still be express advocacy and not have those 8 or 9 hrases in it. The *Furgatch* decision allows the Commission to look at these ads on a case by case basis, and not be in any way deterred from applying the statute when they think it is unmistakably exress advocacy. This case does not prevent the Ethics Commission from continuing to do its job. The case has not in any way inhibited them from applying the existing statute, and it would allow them to continue to apply the *Furgatch* approach.

Mr. Brunson said the Court ruling was well thought out and is an excellent guide for the Commission. The defense has taken the position that it did not ask for reconsideration in this particular case and are still debating as to whether or not the state will appeal this particular decision, recognizing, of course, repealing a decision from the District Court to the Tenth Circuit is, under the best of circumstances, a very difficult thing to do to get the decision reversed. Taking that into consideration and also the fact that this case entitles the prevailing party to attorney fees, going forward with the case would generate more legal fees on the part of the plaintiffs, assuming they would continue to prevail. Basically, the state's attorneys are reviewing whether an appeal will be considered.

The opinion offers the Ethics Commission a good guide in carrying out their responsibilities and, in no way, hinders its ability to apply the law in Kansas.

Senator Huelskamp asked if the Ethics Commission had rescinded its opinion. Mr. Brunson stated not to his knowledge. Senator Huelskamp asked if the Commission had any intentions of doing so, and what did the Court say exactly about that particular policy? Mr. Brunson stated the opinion was considered unconstitutional. The Court, in its deliberation, determined that the opinion to be unconstitutional, due to its vagueness.

Senator Huelskamp stated, that the Court declared the policy to be unconstitutional; however, after a couple of pages of the Court document, they never once referred to the opinion again, they referred to the policy. He asked Mr. Brunson, are you saying they can still operate under that policy? Mr. Brunson stated he thought what the Court determined was that the opinion became the official policy of the Ethics Commission, so when the Court says policy it is obviously talking about that particular opinion.

Senator Huelskamp asked, if they are still using that opinion as their method of operation, how could that still be within the guidelines outlined by the Judge? Mr. Brunson said based on the procedure, that particular opinion can no longer be applied to the factual situation applying to Kansans for Life. Senator Huelskamp, asked if Kansans for Life changed the facts situation, can the Ethics Commission apply that policy or opinion to another situation?

Mr. Brunson stated, if you change the fact situation, according to the workings of the Commission, then the Commission meets as a body to review the facts on a case -by -case basis and renders an opinion; therefore, the likelihood exists that this opinion could be the same word for word for another fact situation.

Senator Huelskamp said the Judge's opinion did mention the *Furgatch* case, and the problems with that, but he seemed to be very clear that the "buzz" words, as he called them, were the way to go. Mr. Brunson stated that the *Furgatch* case says you can still have express advocacy for candidate and not use the "buzz" words. Senator Huelskamp asked if he endorsed the *Furgatch* case? Mr. Brunson stated that *Furgatch* could be used to look at a particular ad and stll make a determination whether or not that ad is issue advocacy or express advocacy even though the "buzz" words were not used. The Supreme Court Case bases constitutionality issues on two main cases, the *Buckley* case and the *Furgatch* case. These two cases are the parameters by which the Commission clearly has to look within if they want to render opinions that are considered constitutional. The Court decision is an excellent guide for directing the Commission in the way that it should go.

Senator Huelskamp stated that the Court ruled that the advisory opinion was unconstitutionally vague. He asked, as long as you change the facts, can you still apply that standard? Mr. Brunson stated, that the decision that the Court has adopted forbids the Commission from applying that policy on the facts within that ad. The Court has forbid the Commission from applying that policy to future ads of this type and specifically against Kansans for Life; however, in the workings of the Commission, each factual situation, if there was a complaint in the next election about a particular set of statements in an ad, the Commission is duty bound to review the complaint, look at the ad, and if an opinion is requested or they feel an opinion is necessary, its responsibility is to issue an opinion. It may possibly come out in the same words on a different factual situation, but those same opinion words being used on this particular ad are considered unconstitutional. It is unlikely that opinion will ever be word for word as given for the Kansans for Life ad.

Senator Huelskamp said the opinion was ruled unconstitutionally vague, and is the Commission permitted to use that definition again in a different situation? Mr. Brunson said no. Obviously the candidates would be different, and that opinion for that day for that set of facts is unconstitutionally vague.

Staff asked how much were the attorney's fees and who pays it, does the Attorney General pay or does it come from the Ethics Commission. Mr. Brunson stated the bill was approximately $52,000. As to which fund it actually comes out of, it is not known. M. J. Willoughby, Assistant Attorney General furnished written letter advising Committee, any attorneys fees paid to the attorneys for plaintiff, Kansans for Life, Inc.; will be paid from the Kansas Tort Claims Fund, K.S.A. 75-6117. (Attachment #1)

Staff asked if the definition of express advocacy contained the following words: "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, will be deemed to expressly advocate the nomination, election or defeat of a clearly identified candidate." Staff thought the Commission could not use that definition as the statute is written. Mr. Brunson said that as the policy is written, and the Court has ruled it unconstitutional. There is a process that goes on as each facts situation is presented to the Commission. This policy as written would be a policy that in the future would continue to be unconstitutionally vague. (Attachment #2)

Meeting was adjourned at 2:20 p.m. Next meeting is scheduled for March 22, 1999.

ELECTIONS & LOCAL GOVERNMENT COMMITTEE
GUEST LIST

DATE: MARCH 18, 1999

NAME	REPRESENTING
Emily Cole	Sen. Tyson
Bruce Dermitt	Kansans for Life
Melissa Wangemann	Sec. of State
[illegible]	City of Lenexa
Tom Schaefer	City of Lenexa
Martin Hawver	Hawver's Capitol Report
Carol Williams	GEC
MJ Willoughby, Assistant A.G.	Attorney General's Office
Vera Ganaway	GEC
Elaine Bensons	AG

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March 19, 1999

BY FAX: 296-3824

The Honorable Senator Janice Hardenburger
Chairperson of the Senate Committee on Elections and Local Government
Attn: Dennis Hodgins, Committee Staff
Legislative Research
State Capitol, Room 545N

Re: Kansans for Life, Inc. v. Gaede, et al., 98-4192-RDR

Dear Senator Hardenburger:

During the appearance of Eliehue Brunson, Assistant Attorney General, and myself before the Committee on March 18, 1999, a question was asked by the Committee regarding the source of funds used to pay any attorneys' fees in the above-referenced matter.

In response to the question, any attorneys fees paid to the attorneys for plaintiff, Kansans for Life, Inc., will be paid from the Kansas Tort Claims Fund, K.S.A. 75-6117.

If you need any further information, please do not hesitate to contact this Office.

Very truly yours,

OFFICE OF THE ATTORNEY GENERAL
CARLA J. STOVALL

M.J. Willoughby
Assistant Attorney General

Senate Elections & Local Government
Attachment: # 1-1
Date: 3-19-99

IN THE UNITED STAT

FOR THE DISTRI

KANSANS FOR LIFE, INC.,
Plaintiff,
vs.
DIANE GAEDE, in her official capacity as Chairwoman and Member of the Kansas Governmental Ethics Commission, et al.,
Defendants.

Case No. 98-4192-RDR

MEMORANDUM AND ORDER

This case is now before the court upon plaintiff's motion for preliminary injunction, defendant's motion to dismiss and plaintiff's motion to combine the hearing upon the preliminary injunction motion with the trial on the merits.

BACKGROUND

Plaintiff is a nonprofit Kansas corporation exempt from federal income tax. It promotes "pro-life" issues and attempts to educate the general public regarding such issues from a "pro-life" perspective. It is not associated with any political candidate or political party. Defendants are officers of the Kansas Governmental Ethics Commission. The Commission is charged with enforcing certain provisions of the Kansas Campaign Finance Act, K.S.A. 25-4142 et seq. The enforcement policy of the Commission is being challenged by plaintiff in this lawsuit. The defendants are being sued in their official capacities.

In July 1998, during the primary campaign to determine the Republican Party's candidate for Governor of Kansas, plaintiff ran a radio advertisement. The ad read as follows:

> Have you ever had someone try to trick you? You know, twist the truth to make you think one thing instead of another? Children are quite good at this. Unfortunately, Governor Bill Graves is trying to do the same thing, telling you he is pro-life when, in fact, he is a strong supporter of legal abortion in Kansas. During his last campaign, Gov. Bill Graves held a rally for his supporters — Dr. George Tiller, the infamous late-term abortionist was in attendance to support Bill Graves. We know Bill Graves props up the abortion industry because we are Kansans For Life — it's our job to know who is pro-life and who is pro-abortion. Yet there are political ads, which this radio station is required by law to run, by Bill Graves trying to deceive you. The truth is David Miller, who is challenging Bill Graves for Governor, is pro-life. David Miller has always been pro-life. David Miller will not change or try to fool you just because it is an election. Now you know the truth!
> Paid for by Kansans For Life.

The ad cost $750.00 which was covered in part from the general operating funds of plaintiff and from an in-kind contribution to it from a private individual. The Commission received an anonymous complaint that the ad should have been paid for by plaintiff's political action committee under the Kansas Campaign Finance Act because the ad expressly advocated the election or defeat of a clearly identified candidate. A staff member of the Commission informed plaintiff of the complaint and suggested that plaintiff seek an advisory opinion from the Commission on this matter. Plaintiff followed this advice. Consequently, the Commission reviewed the July ad and concluded in Advisory Opinion 1998-22 that the July advertisement constituted express advocacy of the election

or defeat of a candidate and, therefore, was subject to the disclosure requirements of the Kansas Campaign Finance Act.

On November 4, 1998, plaintiff filed this case and asked for a temporary restraining order against the application of the Kansas Campaign Finance Act, as construed by the advisory opinion, against the July ad and future "issue advocacy" political advertisements by plaintiff. On November 6, 1998, the Commission mailed a notice of failure to file a receipts and expenditures report required by the Kansas Campaign Finance Act. The notice stated:

> A review of the files in the Secretary of State's Office indicates that you have failed to file the October 26, 1998 Receipts and Expenditures Report For A Person Other Than A Candidate, Party Committee or Political Committee as required by law. Such report, a blank copy of which is enclosed for your use, must be completed and filed within five (5) days from the date of receipt of this notice.
>
> As provided by K.S.A. 25-4181, the Commission may assess a civil fine against Kansans For Life in an amount not to exceed $5,000 for the first violation, $10,000 for the second violation and $15,000 for the third violation.
>
> File the required report within five (5) days with the Secretary of State.

As stated, the notice gave plaintiff five days to file the report. The report lists who made an expenditure on behalf of a political candidate. In this instance, the report required the disclosure of what individual and organization paid for the July 1998 radio ad. On November 10, 1998, the court conducted a hearing upon plaintiff's motion for a temporary restraining order. The focus of the TRO hearing was the deadline for filing the receipts and expenditures report. Ultimately, however, the court did not rule

upon the motion and allowed defendants additional time to respond to it. On November 12, 1998, plaintiff filed the receipts and expenditures report. A few days later an amended report was filed.

If the report had not been filed, then a staff member of defendant would have filed a complaint. The Commission would have reviewed the complaint for sufficiency. There would have been an investigation and a determination of probable cause and then a public hearing. The Commission would have made findings which may have led to a fine or even criminal prosecution by the Attorney General.

Plaintiff's filing of the report arguably eliminated some of the urgency for injunctive relief. But, the time for Wichita city elections is approaching. Plaintiff intends to run political advertisements for that election. Now, plaintiff argues that injunctive relief is necessary in this case to prevent its rights from being violated both as to the July 1998 advertisement (because the report is still on file and open to the public) and as to future advertisements. Defendants have filed a motion to dismiss.

OPERATION OF THE STATUTE

The Kansas Campaign Finance Act requires a receipts and expenditures report by persons other than a candidate or candidate committee, or party or political committee, regarding the funding of political advertisements when the advertisements are considered "contributions" for a certain candidate. K.S.A. 25-4150. If the advertisement "expressly advocates the nomination, election or defeat of a clearly identified candidate," then it is a

"contribution" under K.S.A. 25-4143(e)(1)(B). The report must contain the name and address of each person from whom a contribution or in-kind contribution in excess of $50 was made. K.S.A. 24-4148(b)(2)&(8).

The statute further provides at 25-4143(h) that "expressly advocate" means:

> "any communication which uses phrases including, but not limited to: (A) 'Vote for secretary of state'; (B) 're-elect your senator'; (C) 'support the democratic nominee'; (D) 'cast your ballot for the republican challenger for governor'; (E) 'Smith for senate'; (F) 'Bob Jones in '98'; (G) 'vote against Old Hickory'; (H) 'defeat' accompanied by a picture of one or more candidates; or (I) 'Smith's the one.'"

THE ADVISORY OPINION

The July ad contained none of the "buzz" words specified in the statute as express advocacy. But, the advisory opinion from the Commission (Advisory Opinion 1998-22) found that it constituted express advocacy which triggered the reporting requirement because if read "on the whole" by an ordinary person it would lead that person to believe he or she was being urged to vote for a particular candidate. Specifically, the advisory opinion applied the following definition of express advocacy to the July ad:

> 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, will be deemed to expressly advocate the nomination, election or defeat of a clearly identified candidate.

PLAINTIFF'S COMPLAINT

The complaint in this case has two claims. The first claim ("Count One") involves relief directed toward the July

advertisement. The second claim ("Count Two") involves relief directed toward future advertisements.

Plaintiff asks that the court issue a declaratory judgment that the July ad was "issue advocacy" protected under the First Amendment from regulation; that the enforcement policy enunciated in Advisory Opinion 1998-22 be declared unconstitutional; that the Commission expunge the report filed by plaintiff regarding the July ad; and that defendants be enjoined from enforcing the alleged unconstitutional policy stated in the advisory opinion against future advertisements.

DEFENDANTS' POSITION

Defendants' motion to dismiss contends: 1) that there is no case and controversy because plaintiff's filing of the report has made any controversy regarding the July 1998 ad moot; 2) that there is no case and controversy regarding future political ads because any issue regarding those ads is not ripe for decision; and 3) that the court should abstain from deciding plaintiff's claims in this matter. Defendants also contend that the July ad is not issue advocacy and that the enforcement policy stated in Advisory Opinion 1998-22 is constitutional.

DISCUSSION

Consolidation of hearing with trial on the merits

Plaintiff moved to consolidate the trial on the merits in this case with the hearing upon the preliminary injunction motion. Defense counsel at first opposed this idea. However, when the issue was raised again at the close of the hearing upon the instant

motions, defense counsel appeared to approve consolidation. The court believes consolidation would be logical and efficient. Therefore, the court shall grant the motion for consolidation and consider this order to be the final order on the merits in this case.

Mootness

Defendants assert that there is no case and controversy regarding Count One of plaintiff's complaint (the July ad) because: plaintiff filed the report; any information contained in the report is now a matter of public record; and no further proceedings will be taken against plaintiff with regard to the July ad. Defendants make reference to Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994). There, the Tenth Circuit stated:

> The touchstone of the mootness inquiry is whether the controversy continues to "touch[] the legal relations of parties having adverse legal interests" in the outcome of the case. DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) . . . This "legal interest" must be more than simply the satisfaction of a declaration that a person was wronged. Ashcroft v. Mattis, 431 U.S. 171, 172-72 (1977).

43 F.3d at 1348.

The court believes a legal interest is still at stake with regard to Count One and the July ad. Plaintiff has asked for expungement of the report which is on file with the public. Case law recognizes that a legal request for expungement may create a sufficient controversy to avoid dismissal for alleged mootness. See Kerr v. Farrey, 95 F.3d 472, 476 (7th Cir. 1996) (request for expungement of misconduct references from prison records is not made moot by prisoner's parole); Paton v. LaPrade, 524 F.2d 862,

868 (3rd Cir. 1975) (plaintiff may ask for expungement of information gathered by FBI in violation of plaintiff's First Amendment rights, although file and investigation are closed); Black v. Warden, 467 F.2d 202, 204 (10th Cir. 1972) (case may not be dismissed as moot until plaintiff's disciplinary records are expunged).

Case law also states that the mootness doctrine is not applied strictly to First Amendment cases, particularly when it is difficult to fully consider a promptly-filed case prior to the event (such as an election) which arguably renders the case moot and when the issue is capable of repetition. See New Hampshire Right to Life v. Gardner, 99 F.3d 8, 18 (1st Cir. 1996). In this instance, the letter from the Commission which ordered plaintiff to file the report at issue gave plaintiff five days to do so. That is not much time to litigate whether the order is legal prior to the Commission filing a complaint which could lead to a civil fine or criminal penalty. Furthermore, it is evident that this is an issue which is capable of repetition.

To summarize, the court finds that plaintiff has asserted a real and substantial controversy with regard to Count One. Plaintiff contends that it was unconstitutionally forced to file a report revealing the source of money for issue advocacy protected from regulation by the First Amendment and that the information continues on file for public inspection. Plaintiff further alleges an interest in withholding the information and expunging the report. Accordingly, we reject defendants' mootness argument.

Ripeness

Defendants contend that any claim regarding future ads is not ripe for decision because there is no indication: that plaintiff will do ads; that the ads will be considered express advocacy; or that defendant will direct that a receipt and expenditures report be filed with regard to the ads. In other words, defendants insist that any issue regarding future ads (Count II of this case) is anchored on future events that may not happen and therefore is not ripe for decision.

The Tenth Circuit discussed the standards relating to ripeness in a First Amendment case in New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499-1500 (10th Cir. 1995):

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. "[R]ipeness is peculiarly a question of timing," Regional Rail Reorganization Act Cases, 419 U.S. 102, 140, 95 S.Ct. 335, 357, 42 L.Ed.2d 320 (1975), intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in "'clean-cut and concrete form.'" Renne, 501 U.S. at 322, 111 S.Ct. at 2339 (quoting Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 584, 67 S.Ct. 1409, 1427, 91 L.Ed. 1666 (1947)).
>
> As a general rule, determinations of ripeness are guided by a two-factor test, "'requiring us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.'" Sierra Club v. Yeutter, 911 F.2d 1405, 1415 (10th Cir. 1990) (quoting Abbott Labs., 387 U.S. at 149, 87 S.Ct. at 1515). In determining whether an issue is fit for judicial review, the central focus is on "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A Wright, Miller & Cooper, Federal Practice & Procedure, § 3532 at 112. To this end, courts

frequently focus on whether a challenged government action is final and whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed. See Sierra Club, 911 F.2d at 1415; El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 495 (1st Cir. 1992). In assessing the hardship to the parties of withholding judicial resolution, our inquiry "'typically turns upon whether the challenged action creates a "direct and immediate" dilemma for the parties.'" El Dia, 963 F.2d at 495 (quoting W.R. Grace & Co. v. United States EPA, 959 F.2d 360, 364 (1st Cir. 1992)).

The customary ripeness analysis outlined above is, however, relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought. E.g., ACORN, 835 F.2d at 739; Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 380 (D.C.Cir.), cert. denied, 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 218 (1980). Thus, while it is true that "the mere existence of a statute . . . is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms," National Student Ass'n v. Hershey, 412 F.2d 1103, 1110 (D.C.Cir. 1969), in the context of a First Amendment facial challenge, "[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim," Martin Tractor, 627 F.2d at 380. See also Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 1500, 289, 298-99, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979). The primary reasons for relaxing the ripeness analysis in this context is the chilling effect that potentially unconstitutional burdens on free speech may occasion:

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.

13A Wright, Miller & Cooper, Federal Practice and Procedure § 3532.3 at 159, see also ACORN, 835 F.2d at 740.

In this case, defendants have not disavowed the policy enunciated in Advisory Opinion 1998-22. Quite the contrary, defense counsel have affirmed that the advisory opinion represents

the defendants' official enforcement policy. Furthermore, in contrast to Wisconsin Right to Life v. Paradise, 138 F.3d 1183 (7th Cir. 1998), defendants have recently applied the policy to plaintiff. Plaintiff has also stated in its verified complaint that it wants to continue making political advertisements in the nature of "issue advocacy" but fears the application of the allegedly ambiguous enforcement policy to such ads. ¶¶ 41, 46 Amended Verified Complaint. The court believes it would be a hardship to require plaintiff to produce the advertisements it intends to make for the inspection of a court or the Commission prior to this court finding that there was a case and controversy ripe for the court's decision. After considering the hardship upon plaintiff and defendants, the alleged chilling effect under the current enforcement policy and the fitness of this matter for review, the court shall reject defendants' ripeness challenge. See Vermont Right to Life Committee, Inc. v. Sorrell, 19 F.Supp.2d 204, 210-11 (D.Vt. 1998).

Abstention

Defendants assert that this court should abstain from exercising jurisdiction in this case. The Supreme Court has stated that "Abstention is . . . the exception and not the rule, and we are particularly reluctant to abstain in cases involving facial challenges based on the First Amendment." Houston v. Hill, 482 U.S. 451, 467 (1987). This case is not a facial challenge to a statute; it's a challenge to how a statute has been applied in the past and may be applied in the future. Nevertheless, we take some

instruction from these comments.

At the hearing upon plaintiff's application for a temporary restraining order, the court suggested that Younger abstention deserved consideration in this case. But, at that time, there was arguably a state administrative enforcement proceeding being initiated against plaintiff. The court may have interfered with it if an injunction had issued. There is no such administrative proceeding at the present time. Therefore, Younger abstention is not an issue. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (ongoing state proceedings are a necessary premise for Younger abstention).

Nor will this court apply the Burford and Pullman abstention doctrines to these facts.

> Burford abstention arises when a federal district court faces issues that involve complicated state regulatory schemes. Under Pullman abstention, a district court should abstain if three conditions are satisfied: (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies.

Lehman v. City of Louisville, 967 F.2d 1474, 1478 (10th Cir. 1992). This case does not involve state law issues which are connected to complicated state regulatory schemes. It presents a straightforward First Amendment question. Therefore, Burford abstention is not appropriate. Pullman abstention is a closer question. However, in this case where plaintiff is exercising its right to bring a claim under 42 U.S.C. § 1983 in federal court and

the delay from abstention would perpetuate the alleged chilling effect on First Amendment rights, the court does not believe Pullman abstention should be invoked. See Bad Frog Brewery v. New York State Liquor Authority, 134 F.3d 87, 93-94 (2nd Cir. 1998); Clajon Production Corp. v. Petera, 70 F.3d 1566, 1576 (10th Cir. 1995).

For these reasons, the court rejects abstention.

Count One

Plaintiff asserts that the requirement to file the receipts and expenditures report disclosing the source of money for the July advertisement violated the right to free speech and association guaranteed by the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S.CONST. Amend. I. The Fourteenth Amendment protects these rights against infringement by the State government. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n. 1 (1995). The protections of the First Amendment have been construed broadly "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Buckley v. Valeo, 424 U.S. 1, 14 (1976) quoting, Roth v. United States, 354 U.S. 476, 484 (1957). "'[D]ebate on public issues should be uninhibited, robust, and wide-open.'" Id., quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The right of association is connected to the right of speech protected by the First Amendment. Buckley, 424 U.S. at 75. In

Buckley, where the Supreme Court reviewed the constitutionality of a federal campaign finance statute which required the disclosure of contributors under certain circumstances, the Court stated:

> "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." [citing five Supreme Court cases].
>
> . . . .
>
> [G]roup association is protected because it enhances '[e]ffective advocacy.' NAACP v. Alabama, supra, [357 U.S.] at 460. The right to join together 'for the advancement of beliefs and ideas,' ibid., is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.' Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)."

424 U.S. at 64-66. The Court acknowledged that disclosure requirements served legitimate governmental interests in informing the public of the source of financial support for political discourse, deterring corruption and maintaining records necessary to detect violations of contribution limits. 424 U.S. at 67-68. But, the Court further found that disclosure "will deter some individuals who otherwise might contribute" and "in some instances . . . may even expose contributors to harassment or retaliation." 424 U.S. at 68. Finding that "[t]hese are not insignificant burdens of individual rights," the Court narrowly limited the type of expression subject to disclosure requirements. Hence, the disclosure requirements were limited to funds paid "for communications that expressly advocate the election or defeat of a

clearly identified candidate." 424 U.S. at 80. The Court listed examples of such "express advocacy" as communications using words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n.52.

Ten years after Buckley, in Federal Election Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) ("MCFL"), the Court generally reaffirmed Buckley. The Court made clear that Buckley contemplated that not only a discussion of issues but also a discussion of candidates could qualify as "issue advocacy"; the line was drawn at "more pointed exhortations to vote for particular persons." 479 U.S. at 249. In MCFL, the Court found this line was crossed by a voting guide which contained the exhortation "VOTE PRO-LIFE" and listed candidates who had pro-life voting records. That constituted express advocacy.

To reiterate, the July ad at issue in this case contains none of the "buzz" words or phrases which the Supreme Court or the Kansas Legislature have listed as trademarks of "express advocacy." It does not expressly exhort the listener to vote for, elect or support one candidate or another. A reasonable and ordinary person would imply from the ad that plaintiff favors one candidate over the other. But, the ad does not expressly advocate the election or defeat of a candidate or direct the public to take action for or against an identified candidate. The ad contrasts the positions of two candidates on the issue of abortion and asserts that one candidate is honestly stating his position on the issue while the

other candidate is not. Thus, the ad discusses an issue while disparaging one candidate and commending his opponent. However, the question of whether a candidate's ads are truthful and whether a candidate is candidly stating his positions during a campaign are very common "issues" in an election season. Those issues are the subjects of the message. Because the ad addresses those issues without expressly advocating the election or defeat of a candidate, the court finds that it was unconstitutional for defendants to regulate this speech by directing that a report be filed which discloses who paid for the communication.[1]

As discussed earlier, the court does not believe this matter is moot. Maintaining the report on file perpetuates the potentially chilling disclosure which the Court in Buckley found can infringe on the privacy of association and belief guaranteed by

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[1]A similar conclusion was reached by the Tenth Circuit in Federal Election Commission v. Colorado Republican Federal Campaign Committee, 59 F.3d 1015, 1023 n.10 (10th Cir. 1995) vacated on other grounds, 518 U.S. 604 (1996). There, the court held that, "although it comes close" the following advertisement was not express advocacy within the "narrow definition" of Buckley and MCFL:

> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapons system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

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the First Amendment. 424 U.S. at 64. The court is aware of no government interest which in this instance would justify maintaining the disclosure of information collected in violation of the First Amendment. Accordingly, the court shall direct defendants to ask the Kansas Secretary of State to expunge the report filed by plaintiff from the public records. See Doe v. U.S. Air Force, 812 F.2d 738, 741 (D.C. Cir. 1987) (federal court has power to order expungement where necessary to vindicate Constitutional rights even if files are closed and scheduled for destruction).

Count Two

In Count Two of the complaint, plaintiff asks for an injunction against application of the enforcement policy stated in Advisory Opinion 1998-22 and a declaration that the policy is unconstitutional. The court shall grant the requested relief.

Counsel for defendants have acknowledged that Advisory Opinion 1998-22 represents the official enforcement policy of the Commission. To repeat, "express advocacy" is defined in the Advisory Opinion as:

> 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 . . .

This is an unconstitutionally vague standard.

Under this standard, if reasonable people could disagree whether the communication urges a vote for or against a particular candidate, then the message is subject to the regulatory disclosure

requirements applicable to express advocacy. This is contrary to the Buckley Court's constitutionally mandated narrow, unambiguous and explicit definition of the term for the purposes of the federal campaign finance statute. It is also contrary to how Buckley has been construed by other courts and the Federal Election Commission (FEC).

One approach to defining "express advocacy" has focused on use of the "buzz" words or "magic" words listed in the Buckley opinion. E.g., Faucher v. Federal Election Commission, 928 F.2d 468, 470 (1st Cir.) cert. denied, 502 U.S. 820 (1991). Another arguably broader definition was employed by the Ninth Circuit in Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir.) cert. denied, 484 U.S. 850 (1987). There, the court permitted consideration of contextual factors:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

To the Ninth Circuit this meant that: the language had to be "unmistakable and unambiguous, suggestive of only one plausible meaning"; it must present a "clear plea for action"; and "it must be clear what action is advocated." Id. The regulations of the FEC attempt to follow the Ninth Circuit approach. 11 C.F.R. § 100.22. However, these regulations have been attacked successfully in other circuits as unconstitutionally vague. Right to Life of Dutchess County, Inc. v. Federal Election Commission, 6 F.Supp.2d

248 (S.D.N.Y. 1998); Maine Right to Life Committee, Inc. v. Federal Election Commission, 914 F.Supp. 8 (D.Maine) aff'd per curiam, 98 F.3d 1 (1st Cir. 1996) cert. denied, 118 S.Ct. 52 (1997); Federal Election Commission v. Christian Action Network, 894 F.Supp. 946 (W.D.Va. 1995), aff'd per curiam, 92 F.3d 1178, 1996 WL 431996 (4th Cir. 1996).

The enforcement policy described in the advisory opinion at issue does not conform with any of the approaches described above. It does not restrict regulation to advertisements which use certain "buzz" words. Nor does it restrict regulation to advertisements which can only be reasonably interpreted as advocating the election or defeat of a candidate; which contain a clear plea to action; and which are unmistakable and unambiguous.

In summary, plaintiff has established a realistic danger that defendants will apply an unconstitutionally vague and overbroad enforcement policy against issue advocacy by plaintiff that is protected by the First Amendment. Therefore, the court shall enjoin defendants from applying that enforcement policy against plaintiff in the future and declare that the policy is unconstitutional.[2]

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[2]As noted, there is a split among courts as to what definition of express advocacy satisfies constitutional muster. Because the enforcement policy of defendants violates any definition approved by other courts, the court does not believe it is necessary in this opinion to endorse one definition or another. Rather than engage in such dicta and unnecessarily interpret state law, the court shall leave the task of developing a different definition of express advocacy to the agents of the State.

Injunction Standards

In order for the court to grant a permanent injunction, plaintiff must satisfy the standards for a preliminary injunction, except for a permanent injunction plaintiff must show actual success on the merits. Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 546 n. 12 (1987). Here, plaintiff has sufficiently proven a chilling effect upon its First Amendment rights. This constitutes irreparable harm. Elam Construction, Inc. v. Regional Transportation District, 129 F.3d 1343, 1347 (10th Cir. 1997). The public interest favors the assertion of First Amendment rights and we believe this outweighs the interests served by regulating the kind of speech at issue in this case. Id. Finally, for the reasons previously stated, the court finds that plaintiff has demonstrated actual success on the law and the facts of this case. Consequently, the court shall enter a permanent injunction in this case.

CONCLUSION

Plaintiff's motion for consolidation of the hearing on the motion for a preliminary injunction and the trial on the merits is granted. Defendants' motion to dismiss is denied. The court hereby declares that plaintiff's July 1998 radio advertisement constituted issue advocacy protected from regulation by the State of Kansas under the First and Fourteenth Amendments to the Constitution. The court hereby directs defendants to request that the receipts and expenditures reports filed by plaintiff at defendants' behest with regard to the July 1998 radio advertisement

be expunged from the public records of the Secretary of State. The court further declares that the enforcement policy based upon the definition of express advocacy contained in defendants' Advisory Opinion 1998-22 is unconstitutionally vague and enjoins defendants from applying that policy against plaintiff in the future.

IT IS SO ORDERED.

Dated this 23rd day of February, 1999 at Topeka, Kansas.

Richard D. Rogers
United States District Judge

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