



215 E Street, NE · Washington, DC 20002  
tel (202) 736-2200 · fax (202) 736-2222  
www.campaignlegalcenter.org

Paul S. Ryan  
Senior Counsel  
pryan@campaignlegalcenter.org

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Submitted Via Email to [elections@michigan.gov](mailto:elections@michigan.gov)

The Honorable Ruth Johnson  
Secretary of State  
c/o Michigan Bureau of Elections  
Richard H. Austin Building, 1st Floor  
430 W. Allegan Street  
Lansing, MI 48918

Re: State Bar of Michigan Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretative Statement by the Secretary of State in the Wake of Three U.S. Supreme Court Decisions—*FEC v. Wisconsin Right to Life*, *Caperton v. Massey Coal Company*, and *Citizens United v. FEC*.

Dear Secretary Johnson:

The Campaign Legal Center (CLC), a nonprofit, nonpartisan organization that represents the public interest in the regulation of campaign finance, voting rights and government ethics, submits these comments in support of the State Bar of Michigan’s request for a declaratory ruling as to the applicability of certain provisions of the Michigan Campaign Finance Act (MCFA) to spending related to judicial election candidates. Specifically, the CLC submits these comments to explain that multiple recent Supreme Court decisions clearly permit the application of MCFA disclosure requirements to all “expenditures” as defined in the MCFA, including payments for advertisements that the Department of State has previously characterized as “issue ads” due to the absence of “express advocacy” in the advertisement and, on that basis, incorrectly exempted from “expenditure” disclosure requirements.

## **I. Background and Summary of Law**

Michigan law defines “expenditure” to mean “a payment . . . of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate . . .” Mich. Comp. Laws Ann. § 169.206(1). The statute goes on to explain that “[e]xpenditure includes, but is not limited to . . . [a] contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate” but exempts from the definition of “expenditure” payment for “communication on a subject or issue if the communication does not

support or oppose a ballot question or candidate by name or clear inference.” *Id.* at § 169.206(1)(a) and (2)(b).

Payments for “expenditures” generally must be disclosed on a report filed with the Department of State or county clerk. *See, e.g., id.* at § 169.251 (non-committee independent expenditure reporting); *id.* at § 169.226 (expenditure reporting by committees other than political party committees).

In 2004, responding to a request filed by the Michigan Chamber of Commerce, the Department of State issued an interpretative statement opining that the statutory definition of “expenditure” does not encompass what the Department referred to as “issue ads,” which the Department identified as ads not containing “express advocacy.” Mich. Department of State, Interpretive Statement in Response to Request by the Mich. Chamber of Commerce, 5 (Apr. 20, 2004) (hereinafter “2004 Interpretive Statement”). The Department stated that the exemption in subsection (2)(b) of the statutory definition of “expenditure”—which excludes from the definition payment for a “communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference”—exempts “all non-express advocacy communications” from the definition of “expenditure.” *Id.* at 2 (citing Mich. Comp. Laws Ann. § 169.206(2)(b)).

The Department based its decision to interpret “does not support or oppose” to exempt from the definition of “expenditure” any communication that does not say “vote for,” “vote against,” “elect,” “defeat,” etc. (*i.e.*, any communication that does not “expressly advocate” the election or defeat of a candidate) on its reading of Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Department considered the possible implications of the Supreme Court’s 2003 decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), and concluded that the *McConnell* Court “unambiguously requires the express advocacy test for any statutory definition that employs vague, broad language.” 2004 Interpretive Statement at 4. “For that reason,” the Department stated, “we are compelled to apply the express advocacy test to all communications.” *Id.*

## II. Discussion

CLC respectfully submits that the Department’s 2004 conclusion that Supreme Court decisions in *Buckley* and *McConnell* compel the State to interpret the statutory phrase “support or oppose” narrowly to encompass only “express advocacy” was in error. This error has had significant detrimental effects in Michigan elections in general, and judicial elections in particular. Rapidly rising undisclosed political spending has left Michigan voters in the dark regarding those attempting to influence their vote and has deepened public concerns about the integrity of Michigan courts.<sup>1</sup>

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<sup>1</sup> Comments filed in response to this declaratory ruling request by the Michigan Campaign Finance Network and the Brennan Center for Justice detail this rise in spending in Michigan’s judicial elections. We limit our comments to constitutional law issues pertaining to the State’s definition of “expenditure” and corresponding disclosure requirements.

**A. The Supreme Court Made Clear In *McConnell* That The Statutory Phrase “Support Or Oppose” Is Constitutionally Valid And Does Not Require An “Express Advocacy” Narrowing Construction.**

Contrary to the Department’s conclusion in 2004 that the State’s definition of “expenditure”—and its use of the phrase “support or oppose”—is vague and must be narrowly construed to encompass “express advocacy,” the Supreme Court in *McConnell* explicitly established the constitutional validity of the phrase “support or oppose.” Indeed, the Supreme Court in *McConnell* upheld virtually identical language contained in Title I of the Bipartisan Campaign Reform Act (BCRA).

Reviewing one prong of the federal definition of “federal election activity,” the *McConnell* Court concluded that words like “‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ [PASO] . . . ‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’” 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)); *see also* 2 U.S.C. § 431(20)(A)(iii) (defining “federal election activity”).

Moreover, lower courts have followed *McConnell* to uphold “PASO” language in various contexts. The Seventh Circuit, for example, recently rejected a vagueness claim involving an Illinois statute containing analogous “support” and “oppose” language, and reiterated that “[t]his part of *McConnell* remains valid after *Citizens United*.” *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 486 (7th Cir. 2012), *petition for reh’g en banc denied* (7th Cir. Nov. 6, 2012). *See also Human Life of Wash. v. Brumsickle*, No. 08-cv-0590, 2009 WL 62144, at \*14-\*15 (W.D. Wash. Jan. 8, 2009) (citing *McConnell* to uphold state statute defining “political committee” as a group that receives contributions or makes expenditures “in support of, or opposition to, any candidate or any ballot proposition”), *aff’d*, 624 F.3d 990 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 62-64 (1st Cir. 2011) (rejecting vagueness challenge to Maine law containing the words “promoting,” “support,” and “opposition,” and noting that “*McConnell* remains the leading authority relevant to interpretation of the terms before us”), *cert. denied*, 132 S. Ct. 1635 (2012); *Nat’l Org. for Marriage v. Daluz*, 654 F.3d 115, 120 (1st Cir. 2011) (rejecting a vagueness challenge to Rhode Island law containing the phrase “to support or defeat a candidate”).

The “support or oppose” language in Michigan’s statutory definition of “expenditure” mirrors the language upheld in *McConnell* and in lower court decisions and is clearly constitutional. The Department is not “compelled to apply the express advocacy test to all communications.” 2004 Interpretive Statement at 4.

**B. The Supreme Court Has Made Clear That Disclosure Laws Are A “Cornerstone” To Effective Campaign Finance Regulation And Represent The “Least Restrictive” Means Of Preventing Corruption And Promoting Open And Effective Government.**

The State Bar of Michigan seeks a declaratory ruling that will result in effective disclosure of money spent to influence Michigan’s judicial elections. The Supreme Court has repeatedly

acknowledged that political disclosure laws both reflect and advance important First Amendment precepts. Indeed, disclosure has been called a “cornerstone” to campaign finance regulation. See *Buckley v. Am. Const. Law Found. (Buckley II)*, 525 U.S. 182, 222-23 (1999) (O’Connor, J., dissenting). As Justice Brandeis famously recognized nearly a century ago, “Sunlight is . . . the best . . . disinfectant,” and “electric light the most efficient policeman.” Louis Brandeis, *Other People’s Money* 62 (Nat’l Home Library Found. ed. 1933), *quoted in Buckley*, 424 U.S. at 67. Disclosure also secures broader access to the information that citizens need to make political choices, thereby enhancing the overall quality of public discourse.

When evaluating the constitutionality of campaign regulations, the Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed. Although disclosure laws can implicate the First Amendment rights to speak and associate freely, they also advance the public’s interest in preventing corruption and maintaining an informed electorate. Because disclosure is considered a “less restrictive alternative to more comprehensive regulations of speech” that advance these interests, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations. *Citizens United*, 558 U.S. 310, 368 (2010); *see also Buckley*, 424 U.S. at 68.<sup>2</sup> As the Court noted in *Citizens United*, disclosure requirements “do not prevent anyone from speaking.” 558 U.S. at 366 (internal citations omitted).

The Court in *Buckley* upheld disclosure provisions contained in the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, even as it invalidated the Act’s expenditure limitations, because disclosure represented the “least restrictive means of curbing the evils of campaign ignorance and corruption.” 424 U.S. at 68. Under *Buckley* and its progeny, disclosure obligations are subject only to “exacting scrutiny”—they are valid so long as there is “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United*, 558 U.S. 366-67 (quoting *Buckley*, 424 U.S. at 64, 66) (internal citations omitted).

Since *Buckley*, applying this “exacting scrutiny,” the Court has consistently upheld disclosure laws against constitutional challenge. Indeed, the Court has upheld challenged disclosure laws three times by 8 to 1 votes in the past decade alone.

In *McConnell*, the Court by an 8 to 1 vote upheld the BCRA “electioneering communication” reporting and disclosure requirements—disclosure requirements that apply to political advertisements not containing “express advocacy.” 540 U.S. at 194-99 (opinion of the Court); *id.* at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* 2 U.S.C. § 434(f)(2)(A), (B), and (D). All members of the Court except Justice Thomas found the

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<sup>2</sup> By comparison, campaign contribution and expenditure limitations are subject to more searching review because they are considered more “restrictive” of First Amendment rights. As the “most burdensome” campaign finance regulations, expenditure restrictions are subject to strict scrutiny and reviewed for whether they are “narrowly tailored” to “further a compelling interest.” *FEC v. Wisconsin Right To Life*, 551 U.S. 449, 476 (2007); *see also Buckley*, 424 U.S. at 44-45. Contribution limits are deemed less burdensome of speech, and are constitutionally “valid” if they “satisf[y] the lesser demand of being closely drawn to match a sufficiently important interest.” *McConnell*, 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Finally, disclosure requirements are the “least restrictive” campaign finance regulations and are subject only to “exacting scrutiny.” *Buckley*, 424 U.S. at 68.

BCRA disclosure requirements justified solely on the basis that they informed voters of the identity of those making electioneering communications. Quoting the district court, the Court held:

*BCRA's disclosure provisions require these [entities] to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.*

*Id.* at 196-97 (internal citations omitted and emphasis added). BCRA's disclosure requirements, the Court found, vindicated rather than violated the truly relevant First Amendment interest: that of "individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197.

In *Citizens United*, the Court again by an 8 to 1 vote upheld federal law disclosure requirements and reiterated the value of transparency in "[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371.

Importantly, with respect to this declaratory ruling request, the *Citizens United* Court explicitly rejected the argument that disclosure requirements must be confined to speech that is express candidate advocacy, noting, for example, that the "Court has upheld registration and disclosure requirements on lobbyists." *Id.* at 369 (citing *U.S. v. Harriss*, 347 U.S. 612, 625 (1954)).

The Supreme Court continued its strong support of disclosure laws most recently in *Doe v. Reed*, where the Court upheld by an 8 to 1 vote a Washington State law providing disclosure of ballot measure petition signatories, reasoning that "[p]ublic disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot." 130 S. Ct. 2811, 2820 (2010). Justice Scalia explained in concurrence:

There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns

anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

*Id.* at 2837 (Scalia, J., concurring).

### III. Conclusion

Clearly the State of Michigan has a compelling interest in providing voters with information regarding those spending money to influence voting decisions. This compelling state interest has its greatest force in the context of judicial elections. The Supreme Court held in *Caperton v. Massey*, 556 U.S. 868 (2009), that “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.” *Id.* at 884.

The Department’s 2004 Interpretative Statement narrowing the application of State disclosure laws to only those ads that contain “express advocacy” denies Michigan voters the ability to make informed decisions on election day. Furthermore, it denies Michigan residents their constitutional Due Process right to an impartial judiciary, as recognized in *Caperton*, by making it impossible for them to know “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case” by funding political advertisements supporting the judge’s election. *See* 556 U.S. at 884.

Contrary to the Department view expressed in its 2004 Interpretive Statement that it is “compelled to apply the express advocacy test to all communications,” the Supreme Court’s decision in *McConnell* makes clear that the statutory definition of “expenditure” and its use of the phrase “support or oppose” is perfectly constitutional and need not be narrowly construed to encompass only “express advocacy” communications. *See* 2004 Interpretive Statement at 4; *see also McConnell*, 540 U.S. at 170 n.64.

As explained by the State Bar of Michigan in its declaratory ruling request, there is no role for so-called “issue advocacy” or lobbying in the context of judicial elections or general operations of the courts. Advertisements naming judicial election candidates serve only one purpose—supporting or opposing those judicial candidates.

For these reasons, the Campaign Legal Center respectfully urges the Department of State to issue the declaratory ruling requested by the State Bar of Michigan, making clear that all payments for communications referring to judicial candidates are “expenditures” under State law, subject to Michigan’s campaign finance disclosure requirements.

We appreciate the opportunity to comment on this matter.

Sincerely,

*/s/ Paul S. Ryan*

Paul S. Ryan  
Senior Counsel  
The Campaign Legal Center