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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6895

April 8, 1996

ELECTIONS:

Distribution of anonymous campaign material

The disclosure requirement contained in section 47(1) of the Michigan Campaign Finance Act violates the First Amendment to the Constitution of the United States as applied to either a campaign "committee" or a person making an "independent expenditure" and is, accordingly, void and unenforceable in its entirety.

Honorable Candice S. Miller

Secretary of State

Treasury Building

Lansing, MI 48918

You have asked whether, in light of the recent decision of the United States Supreme Court in McIntyre v Ohio Elections Comm, ____ US ____; 115 S Ct 1511; 131 L Ed 2d 426 (1995), the disclosure requirement contained in section 47 (1) of the Michigan Campaign Finance Act (MCFA) [1] violates the First Amendment to the Constitution of the United States as applied to either a campaign "committee" or a person making an "independent expenditure" under the MCFA.

Section 47 (1) of the MCFA provides that:

> A billboard, placard, poster, pamphlet or other printed matter having reference to an election, a candidate, or ballot question, shall bear upon it the name and address of the person paying for the matter. [Emphasis added.]

A knowing violation of this section is a misdemeanor punishable by a fine or by imprisonment, or both, under section 47 (4) of the MCFA.

In section 3(4) of the MCFA the Legislature has defined the term "committee," for the purposes of that act, as "a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question," subject to certain monetary limits. The term "independent expenditure" is defined by section 9(2) of the MCFA as an expenditure made by a person without direction or control by another person when it is not made to a "committee." Finally, in section 11(1) the Legislature has defined the term "person" for purposes of MCFA to include both individuals and committees. Thus, both a "committee" and a person making an "independent expenditure" come within the intended sweep of section 47(1) of MCFA.

In McIntyre v Ohio Elections Comm, supra, the United States Supreme Court reviewed the constitutionality of a fine imposed by the Ohio Elections Commission upon Mrs. Margaret McIntyre, a private citizen, for anonymously

distributing leaflets opposing a school tax levy in violation of the Ohio Elections Code. There was no claim that the leaflets contained any false, misleading or libelous material. Rather, the sole complaint was that at least some of the leaflets failed to identify Mrs. McIntyre as the author of the material. The Ohio Elections Commission found this omission to be a violation of Ohio Rev Code Ann s 3599.09(A) (1988), which prohibited the publishing of information designed to promote or oppose an election candidate or ballot issue unless the writing identified the name and address of the person or organization responsible for the writing. This finding was ultimately upheld on appeal by the Ohio Supreme Court. The United States Supreme Court reversed, holding that the Ohio statute violated the constitutional right of free speech guaranteed by the First Amendment to the United States Constitution.

The Court began its analysis with the premise that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." 131 L Ed 2d at 436. The Ohio statute, therefore, by attempting to require the inclusion of the author's identity in campaign literature, did more than merely attempt to control the mechanics of the electoral process. The statute, the Court concluded, constituted "a direct regulation of the content of speech." 131 L Ed 2d at 439. Further, the Court observed, the category of speech regulated by the Ohio statute was political speech, the very category of speech that "occupies the core of the protection afforded by the First Amendment." Id. This, the Court concluded, requires application of an exceedingly strict standard of review:

> When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.

131 L Ed 2d at 440.

Attempting to meet this standard, Ohio advanced two state interests which it argued were sufficiently compelling to sustain the statute: (1) providing the electorate with relevant information and (2) preventing fraudulent and libelous statements. The Court quickly rejected the first of these interests, stating:

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.

Id. at 440.

While the Court found the state's interest in preventing fraud and libel to be more compelling, the Court ultimately found that interest to be insufficient as well. Initially, the Court acknowledged that "[t]he state interest in preventing fraud and libel stands on a different footing" and that "this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." Id. at 441. The Court concluded, however, that Ohio's prohibition of anonymous campaign literature was not the state's only nor even its principal weapon in combating fraud and libel and, more importantly, that this prohibition was both overly expansive and ineffective:

> As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the election code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here. [Footnotes omitted.]

131 L Ed 2d at 442-443

Finally, the Court rejected Ohio's argument that its statute requiring disclosure of identity was essentially similar to the campaign finance disclosures previously approved by the Court in First National Bank of Boston v Bellotti, 435 US 765; 98 S Ct 1407; 55 L Ed 2d 707 (1978) and Buckley v Valeo, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976), stating that, "[r]equired disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case." 131 L Ed 2d at 445. The Court went on to state:

> Not only is the Ohio statute's infringement on speech more intrusive than the Buckley disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in Buckley regulates only candidate elections, not referenda or other issue-based ballot measures .... In candidate elections, the government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individual will spend money to support a candidate as a quid pro quo for special treatment after the candidate is in office. [Citation omitted.]

131 L Ed 2d at 445

In light of this analysis, the Court concluded that the Ohio statute was unconstitutional. Describing the statute as a "blunderbuss approach," the Court observed:

> The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse .... The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. [Citation omitted.]

Id. at 446

In Louisiana v Moses, 655 So 2d 779, 785 (La Ct App, 1995), the Louisiana Court of Appeals reached a similar result, invalidating a Louisiana statute which prohibited all anonymous campaign literature regardless of whether the information contained in the literature was true or false. Like the Ohio statute invalidated in McIntyre, the Louisiana statute applied to both individuals and committees and governed literature affecting ballot propositions as well as candidate elections. Citing McIntyre, the Louisiana Court held that "the right to distribute anonymous campaign literature is clearly protected by the First Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court and by article 1, Section 5 and 7 of the Louisiana Constitution" and that the statute, accordingly, was unconstitutional.

It is true that the Supreme Court in McIntyre was careful to leave open at least the possibility that a state's interest in protecting the integrity of its elections "might justify a more limited identification requirement" than that presented by the Ohio statute. 131 L Ed 2d at 443. [2] See also, concurring opinion of Ginsburg, J, 131 L Ed 2d at 447. It is also true that the courts will, when possible, construe a statute to avoid unconstitutionality, or pare away the unconstitutional portions of the statute to leave the remaining constitutional parts intact. See Los Angeles Bd of Airport Commrs v Jews for Jesus, 482 US 569, 575; 107 S Ct 2568; 96 L Ed 2d 500 (1987). Unfortunately, the language of the MCFA, section 47(1), is not susceptible to a saving construction nor can its unconstitutional elements be effectively excised; the language used by the Legislature in that section of the MCFA is both sweeping and explicit and, moreover, is functionally indistinguishable from both the Ohio statute invalidated in McIntyre and the Louisiana statute invalidated in Moses.

It is my opinion, therefore, that the disclosure requirement contained in section 47(1) of the Michigan Campaign Finance Act violates the First Amendment to the Constitution of the United States as applied to either a campaign "committee" or a person making an "independent expenditure" and is, accordingly, void and unenforceable in its entirety.

Frank J. Kelley

Attorney General

[1] 1976 PA 388, MCL 169.201 et seq; MSA 4.1703(1) et seq.

[2]The language utilized by the Court at 131 L Ed 2d 442-443 seems to suggest at least three factors that may affect the validity of a narrowly drawn statute: (1) whether it is limited to the activities of "candidates and their organized supporters" as opposed to individual electors; (2) whether it is limited to candidate elections and not ballot issues; and (3) whether it is limited to "leaflets distributed on the eve of an election, when the opportunity for reply is limited" as opposed to "those distributed months in advance." [Footnote omitted.] The Court's opinion, however, provides virtually no guidance as to precisely how these factors might be applied and with what result.

STATE OF MICHIGAN

1-96-CI

CANDICE S. MILLER, Secretary of State

MICHIGAN DEPARTMENT OF STATE

MUTUAL BUILDING, LANSING, MICHIGAN 48918

September 3, 1996

Senator Dianne Byrum
State Senator 25th District
State Capitol
Lansing, Michigan 48913

Representative Laura Baird
State Representative 70th District
State Capitol
Lansing, Michigan 48913

Dear Senator Byrum and Representative Baird:

The following discussion is a response to your letter on behalf of HOM-TV, the community broadcasting service of the Charter Township of Meridian. You are requesting an opinion under the Campaign Finance Act, 1976 PA 388, as amended (the Act). The issue presented is whether section 57 of the Act (MCL 169.257) prohibits the township from using its staff and broadcast facilities for conducting interviews of candidates for public office and advocates for and against ballot questions.

DISCUSSION

The programming is described in attachments to your letter, which were supplied to you by the staff of HOM-TV. The programming is shown on HOM-TV, which is channel 21 on the local cable system available throughout the township. HOM-TV is governed by a set of operating policies which have been approved by both the township board and the township's cable communications commission.

One of the areas of coverage to be offered by HOM-TV identified in the Operating Policies is "Township Election Coverage." Section Three of the Operating Policies provides:

> "SECTION THREE: TOWNSHIP ELECTION COVERAGE
>
> I. HOM-TV shall present television programming pertaining to all elections held in Meridian Township. The scope and format of such coverage shall be determined by the HOM-TV Manager. The minimum acceptable coverage shall be graphic material summarizing election results, initially presented sometime on election night, and carried on HOM-TV at least until the normal program schedule begins

the next day. The HOM-TV Manager shall cooperate with the Township Clerk and Election Commission to provide graphic material and/or other material announcing pre-election administration information.

II. Special efforts shall be made to produce programming in 'even year' elections, with a maximum emphasis on elections held to fill positions on the Board of Trustees and/or the Park Commission. All registered candidates shall be afforded an equal opportunity to be included in this coverage. The scope and format of such election year programming shall be determined by the HOM-TV Manager, but it should include the following components:

A. An interview program for candidates, including standardized questions and follow-up questions.

B. An opportunity for candidates to make open (sic) statements on their candidacy.

C. A debate-style program for candidates, organized by party affiliation and/or desired office.

D. A call-in show to allow residents to ask questions of the candidates.

III. The HOM-TV Manager shall ensure that all programming featuring registered candidates be fairly balanced with programming featuring their opponents. In cases where balance is not possible due to the lack of participation of one or more candidates, the participating candidates will receive balanced coverage in comparison to the entire field of participating candidates.

IV. Candidates for elected office shall not be included in HOM-TV programming during the time period ninety (90) days before an election, with the exception of official Township meeting coverage, HOM-TV produced special election coverage and coverage of incumbents performing official duties which warrant cablecasting. The HOM-TV Manager shall decide if equal time for opposing candidates

> is necessary when evaluating the coverage of incumbent candidate's performance of official duties."

These policies emphasize that the programming shall provide candidates with an "equal opportunity" to be included. The manager of the cablecasting service is required to ensure that the programming is "fairly balanced." Among the programs to be produced are interviews with all candidates, including standardized questions, a debate style program for candidates and a call-in show to allow residents to ask the candidates questions.

It is clear that the intent is to provide all candidates with an opportunity to participate in the programs. The materials supplied indicate that these pre-election programs have been used in elections since 1988. In both 1988 and 1992 the election programming received awards from cable industry associations.

Since it was enacted twenty years ago, the Act has included provisions which except certain activities from the Act's coverage. Many of these exceptions are included in the definition of the term "expenditure" in section 6 of the Act (169.206). The listing of the types of spending that are not included as expenditures is found in section 6 which provides:

> "Sec. 6. (1) 'Expenditure' means a payment, donation, loan, or promise of 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, or the qualification, passage, or defeat of a ballot question. Expenditure includes but is not limited to any of the following:
>
> (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.
>
> (b) Except as otherwise provided in subsection (2)(f) or (g), an expenditure for voter registration or get-out-the-vote activities made by a person who sponsors or finances the activity or who is identified by name with the activity.
>
> (c) Except as otherwise provided in subsection (2)(f) or (g), an expenditure made for poll watchers, challengers, distribution of election day literature, canvassing of voters to get out the vote, or transporting voters to the polls.
>
> (2) Expenditure does not include any of the following:

(a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under section 55.

(b) An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference.

(c) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.

(d) An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for a news story, commentary, or editorial in support of or opposition to an candidate for elective office or a ballot question in the regular coarse of publication or broadcasting.

(e) An offer or tender of an expenditure if expressly and unconditionally rejected or returned.

(f) An expenditure for nonpartisan voter registration or non partisan get-out-the-vote activities made by an organization that is exempt from federal income tax pursuant to section 501(c)(3) of the internal revenue code of 1986, 26 U.S.C. 501, or any successor statute.

(g) An expenditure for nonpartisan voter registration or nonpartisan get-out-the-vote activities performed pursuant to section s 491 to 524 of the Michigan election law, Act No. 116 of the Public Acts of 1954, being sections 168.491 to 168.524 of the Michigan Compiled Laws, by the secretary of state and other registration officials who are identified by name with the activity."

APPLICATION

Most relevant to the issues presented in your letter is the language of section 6(2)(b) which limits the coverage of the Act to communications which support or oppose a candidate or ballot question. The election coverage outlined in HOM-TV's policies is specifically required to be balanced, without providing support or opposition to any candidate or issue. The programming, taken as a whole, is provided for the purpose of allowing the viewers to see and hear all the candidates and ballot question proponents and opponents.

Since the inception of the Act, the Department of State has concluded that election forums conducted in a way that provided equal access for each of the candidates in a particular election contest are excepted from the definition of the term "expenditure." One of the early declaratory rulings issued pursuant to the Act analyzed the Act's application to election forums sponsored by the League of Women Voters. It concluded that such forums

did not constitute expenditures if they were conducted in a way which provided equal access for each candidate in a particular election contest.

The series of programs to be produced by HOM-TV differs in only two major respects from the election forums that have been previously considered by the Department in the declaratory ruling mentioned above and two more recent informational letters sent by the Department.

The first difference is that the HOM-TV programs are not sponsored or produced by a nonpartisan nonprofit organization like the League of Women Voters. They are instead produced by an arm of township government. This does not appear to affect the exception found in section 6(2)(b). The materials supplied with your request make it clear that the programs are produced in an effort to provide the township's voters with the opportunity to assess candidates and ballot questions, not as an effort to support or oppose particular candidates or sides of an issue.

The second difference is that the HOM-TV programs do not necessarily feature the candidates or ballot questions on the same program as is the usual procedure in an election forum. Instead the programs are taped and shown at various times before the election is held. The procedures spell out that the presentation of the programs is done in a way that insures that no candidate is provided with an advantage by times at which their interview is presented. This difference does not appear to convert the program presentation to a communication which supports or opposes a candidate or a ballot question. In effect, the HOM-TV programs are an election forum that is spread through the pre-election period. It thus provides a wider number of voters with opportunities to compare the candidates than a more traditional format.

In recent informational letters to Abigail Elias, the City Attorney of Ann Arbor, and State Representative Curtis Hertel, the Department has examined the impact of section 57. These letters have concluded that section 57 does not restrict the constitutionally protected right to associate or to engage in political speech. It is intended to prevent those who control public resources from using those resources to influence the outcome of an election. It does not prohibit community organizations or local governments from making the views of candidates or those supporting or opposing ballot questions available, provided that government resources are not used to influence the outcome of the election.

CONCLUSION

Section 57 first became effective on March 28, 1996. Since that time numerous questions have been raised about the meaning and application of its provisions. The inclusion of felony penalties in section 57 has created a high level of apprehension among public officials all over the state. In addition, lack of clarity has contributed to confusion as to which agencies and officials are covered by the prohibition on taxpayers funds being used in election campaigns. Amending the Act to clear up these ambiguities appears to be a necessity. It will assure that the Act's prohibition on the use of public money in elections will withstand judicial scrutiny. It will also provide citizens and public officials with an understandable law that does not create a chilling effect on legitimate campaigning and the discussion of issues.

The foregoing response is an interpretive statement and does not constitute a declaratory ruling since such a ruling was not requested.

Sincerely,

Robert T. Sacco

ROBERT T. SACCO
Deputy Secretary of State

RTS:wb
cc: Secretary Candice Miller
A. Edwin Dore
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