STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 20, 2004

Robert S. LaBrant
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

The Michigan Chamber of Commerce ("chamber"), a non-profit corporation, intends to use its treasury funds to finance issue advocacy advertisements that, for the purposes of this request, you define as "ads that discuss issues without expressly advocating the election or defeat of the candidate who is featured in that 'issue ad'." The chamber intends to hold meetings with the candidates and exercise exclusive direction, control, and decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, and frequency of placement of the ads. No candidate shall be allowed to organize, supervise, or create, review, accept, or modify any of the ads. The chamber may request photographs or other information from a candidate in order to produce an ad.

QUESTIONS PRESENTED

In light of the United States Supreme Court's *McConnell* decision, does the MCFA apply to any of the chamber's intended issue advocacy activities?

ANSWER

No. The MCFA governs "contributions" and "expenditures". Section 4 of the MCFA defines "contribution", in relevant part, as "[A] payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage or defeat of a ballot question."

Section 6 of the MCFA defines "expenditure" as "[A] payment, donation, loan, or promise of payment 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 … A contribution or 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." Section 6(2)(b) excludes from the definition of expenditure those communications that do not support a candidate or ballot question by name or clear inference.

The department has not interpreted the definitions of contribution and expenditure literally with regard to communications. In 1976, the United States Supreme Court interpreted several sections of the Federal Election Campaign Act (FECA) in *Buckley v Valeo*, 424 US 1 (1976). FECA defined "expenditure" as "the use of money or other assets for the purpose of influencing a federal election." The Supreme Court, finding the definition vague and overbroad, created the "express advocacy" test for determining which communications were considered expenditures under FECA and which were issue ads, exempt from FECA's reach. The court held that only those communications that contained words of express advocacy—"vote for", "vote against", "elect", "defeat", etc.—could be deemed expenditures under the FECA.

The MCFA's definition of expenditure was similar to FECA's overbroad and vague definition of expenditure. Moreover, unlike the latter definition, the MCFA's definition of expenditure did not (and still does not) require that a person intend to influence an election. In order to meet the constitutional concerns discussed in *Buckley*, the department interpreted section 6(2)(b)—which excluded from the definition of expenditure those communications that do not support or oppose a candidate or ballot question by name or clear inference—to apply to all non-express advocacy communications.

The department eventually attempted to address *Buckley's* constitutional barriers by promulgating an "issue ad" administrative rule in 1998. This rule (1999 AC, R 169.39b) prohibited section 54 entities (corporations, unions, and domestic dependent sovereigns) from running any advertisement that contained a candidate's name or likeness 45 days before an election. The rules were declared unconstitutional in *Right to Life of Michigan v Miller*, 23 F Supp 2d 766 (1998) and *Planned Parenthood of Michigan v Miller*, 21 F Supp 2d 740 (1998).

The department received a declaratory ruling request from a Mr. Norman Witte in August 2002. Mr. Witte asked the department for clarification regarding the regulation of issue ads. The department, believing itself constitutionally compelled by *Buckley*, *Right to Life*, and *Planned Parenthood*, officially adopted the express advocacy standard for all election-related communications.

MCCONNELL V FEC

The U.S. Supreme Court decided *McConnell v FEC (cite pending)*, in December 2003. *McConnell* upheld several provisions of the Bi-Partisan Campaign Reform Act of 2002 ("BCRA"), including the new restrictions on "electioneering communications." BCRA defines an electioneering communication as any broadcast, cable, or satellite communication that:

I. Refers to a clearly identified candidate for federal office;

II. Is made within—
(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

III. In the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C.A. §434(f)(3)(A)(i)

A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons in the district or state the candidate seeks to represent." 2 U.S.C.A. §434(f)(3)(c)

Congress adopted this new "electioneering communication" standard to prevent corporations and unions from influencing elections and avoiding disclosure by running issue ads in the weeks before an election. Congress created the electioneering communication standard to address the *Buckley* court's concern for vagueness and overbreadth. Specifically, by regulating only certain communications (broadcast, cable, and satellite), the content of the communications (those that refer to a clearly identified candidate for federal office), and the timing of the communications (30 days before a primary election, 60 days before a general election), Congress believed it had removed the ambiguity and uncertainty that necessitated the express advocacy test.

The Supreme Court upheld BCRA's definition of electioneering communication. Further, it held that the express advocacy test was not a constitutional requirement but rather an interpretation of a vague and overbroad statute. By removing the vagueness and overbreath in the definition of electioneering communication, Congress had dispensed with the need for the courts to apply the express advocacy test.

The *McConnell* court addressed the *Buckley* court's reasoning regarding express advocacy:

> In *Buckley*, the Supreme Court considered FECA's definition of "expenditure" to include the use of money or other assets "for the purpose of...influencing" a federal election. Finding the ambiguous phrase to pose constitutional problems, the court attempted to interpret the statute in order to avoid an unconstitutionally vague interpretation. To do this, the court construed "expenditure".... to reach only funds used for communications that expressly advocated the election or defeat of a clearly identified candidate...In short, the concept of express advocacy [was] born of an effort to avoid constitutional infirmities...Our [decision] in *Buckley* [was] specific to the statutory language before us; [it] in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech. *(McConnell, p 84-85)*

APPLICATION TO MCFA

McConnell indicates that the "express advocacy" standard is not a constitutional requirement. Presumably, the Michigan legislature could enact FECA's "electioneering communication" standards. Yet, *McConnell* unambiguously requires the express advocacy test for any statutory definition of expenditure that employs vague, broad language. The vagueness and over-breadth discussed in *Buckley* and clarified in *McConnell* still lurk in the MCFA's definitions of contribution and expenditure. For that reason, we are compelled to apply the express advocacy test to all communications.

The 6th Circuit Court of Appeals in *Anderson v Spear, 356 F.3d 651 (2004)*, recently confirmed the constitutional requirement to apply the express advocacy test to vague and broad definitions of expenditures. *Anderson* concerned Kentucky's interpretation of its election statute, which prohibited "electioneering" within 500 feet of the entrance of a polling place. Kentucky interpreted "electioneering" to prohibit persons from providing instructions to voters regarding how to "write-in" a candidate's name on the ballot. Anderson, a candidate for governor whose name was not on the ballot, challenged Kentucky's interpretation of its statute.

The court, finding the Kentucky statute vague and overbroad, opined:

> In eschewing the express advocacy distinction, the Court also relied upon substantial evidence that the line between express and issue advocacy had become "functionally meaningless" as applied to the [FECA]. Accordingly, while the *McConnell* Court disavowed the theory that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy," it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest. And *McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest. *(Anderson, p 11)*

The department must take its guidance from *McConnell* and *Anderson*. The MCFA's definitions of contribution and expenditure, if interpreted literally, would criminalize even private correspondence. We also note that the definition of expenditure does not include an intent element. In the absence of more definite standards, we must administer the statute in such a way as to avoid the constitutional problems of vagueness and overbreadth. The department will continue to apply the express advocacy standard in determining which communications are regulated by the MCFA.

APPLICATION TO CONTRIBUTIONS AND EXPENDITURES

Both *Buckley* and *McConnell* dealt with the express advocacy test as it concerned expenditures; it did not require such a standard for contributions. The court believed that the possibility of corruption or the appearance of corruption was more likely to occur in a contribution to a

candidate than in an expenditure on behalf of the candidate. The court's distinction was premised on the FEC's ability to distinguish between contributions and expenditures.

The department, in its Witte interpretive statement, explained that it did not have the same tools, such as subpoena power or the ability to create a factual record, possessed and often deployed by the FEC. Without the ability to create a record, or even compel a person to testify, the department would have to speculate as to the degree of control exercised by a candidate over a communication produced on his or her behalf. Such speculation hardly accords with any concept of equal protection or due process. In order to avoid an arbitrary application of the law, the department must analyze a communication by its four corners to determine whether it can be regulated under the MCFA. If not, the department will not inquire further as to the circumstances behind the creation or production of the communication.

CONCLUSION

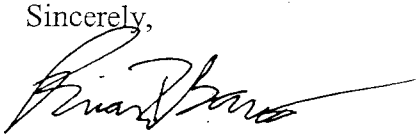
After a thorough review of the *McConnell* and *Anderson* cases, the department does not believe it has the authority to regulate issue ads. In determining which communications are subject to the MCFA, the department will continue to apply the express advocacy standard.

The only change from the Witte ruling is our rationale. In Witte, we premised our conclusion on the assumption that the express advocacy standard was a constitutional requirement. It is now clear that the express advocacy standard is required when the government relies on broad, ambiguous language to regulate election-related speech. Congress addressed that concern with its clear definitions of electioneering communications. In the absence of an amendment to the MCFA's definition of expenditure, the department must apply the express advocacy standard in order to avoid constitutional problems.

This in no way endorses some of the so-called issue ads, which are often more vicious than MCFA-regulated ads. Clearly, many if not most of these issue ads are campaign ads without words of express advocacy. Moreover, because they are not considered expenditures, relevant information, such as who paid for them, is often not disclosed.

Because your request does not include a statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,



Brian DeBano
Chief of Staff

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