

# *Michigan Retired Judges Association*

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September 23, 2013

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The Honorable Ruth Johnson,  
Secretary of State, Executive Office,  
Richard H Austin Building  
430 W Allegan Street  
Lansing, Michigan 48918

On September 19, 2013 at its annual meeting, the Michigan Retired Judges Association unanimously passed the following resolution:

The Michigan Retired Judges Association supports the efforts of the State Bar of Michigan described in a letter dated September 11, 2013, wherein the State Bar requested the Honorable Ruth Johnson, Michigan Secretary of State, for a declaratory ruling regarding the Michigan Campaign Finance Act, that would make Judicial campaign expenditures public by disclosing the source of election funding to the end that all sources of funds supporting or opposing judicial candidates be public.

William J Caprathe,

President MRJA

TO: THE HONORABLE RUTH JOHNSON  
SECRETARY OF STATE

FROM: GERALD H. ACKER  
PRESIDENT, MICHIGAN ASSOCIATION FOR JUSTICE

SUBJECT: SUPPORT FOR STATE BAR OF MICHIGAN'S ("SBM'S) REQUEST FOR  
DECLARATORY RULING UNDER THE MICHIGAN CAMPAIGN FINANCE  
ACT ("MCFA")

DATE: SEPTEMBER 23, 2013

CC: JANET K. WELCH  
EXECUTIVE DIRECTOR  
STATE BAR OF MICHIGAN

2013 SEP 23 10 01 AM

BUREAU OF ELECTIONS  
STATE OF MICHIGAN

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The Michigan Association for Justice ("MAJ"), founded in 1945, is a professional association of trial attorneys consisting of over 1,600 members. The members of MAJ represent individuals who have been personally injured or have experienced violations of their rights as a result of the wrongful conduct of others. MAJ is the leading trial attorney organization for plaintiffs' counsel. Its superior educational services and legislative and policy advocacy on behalf of our members and their clients is second to none in Michigan.

Our members frequently represent their clients in state and federal trial and appellate courts throughout the state of Michigan. Because resolution of legal claims through litigation is a basic service our members provide to their clients, we and our individual members are strongly committed to ensuring that the best possible individuals are elected or appointed to the judiciary.

We agree with the SBM assessment that the "issue ads" which are typically aired by special interest groups during judicial election campaigns should be declared by the Secretary of State to be the "functional equivalent" of express advocacy and therefore reportable as an "expenditure" under the MCFA.

Our members and their clients expect fair and impartial treatment from the judicial officers elected to decide their legal matters. Substantial unreported and undisclosed contributions by a party or their attorney to an elected judge hearing a contested legal matter violates the due process rights of the unsuspecting and non-contributing opponent. Disclosure of substantial campaign contributions will allow each litigant to make an informed decision as to whether a particular judge is fit to hear a contested legal matter.

Having a legal matter decided by a truly impartial judicial officer is a fundamental due process right. *Caperton v Massey*, \_\_\_ US \_\_\_, 129 S Ct 2252 (2009). Secret judicial election campaign contributions by a party's opponent to the judicial officer authorized to decide a contested legal matter prevents this informed decision from being made by a disadvantaged litigant and is anathema to the notion of fair play, ethics and decency.



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SEP 25 2013

RUTH JOHNSON  
SECRETARY OF STATE

September 25, 2013

The Honorable Ruth Johnson  
Secretary of State  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

Dear Secretary Johnson:

**Re: *Comments to the Request to Violate Freedom of Association Rights by the State Bar of Michigan***

By letter dated September 11, 2013, the State Bar of Michigan asked the Secretary of State for an affirmative response to the following question:

“In light of *Federal Election Commission v Wisconsin Right to Life* (2007), *Caperton v Massey Coal Company* (2009), and *Citizens United v FEC* (2010), must all payments for communications referring to judicial candidates be considered ‘expenditures’ for the purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functionable equivalent?”

The stated goal of the State Bar of Michigan, a public body corporate,<sup>1</sup> is to regulate non-express advocacy communications; however, the unstated result of the State Bar of Michigan request is to violate freedom of association rights of the Michigan Chamber of Commerce, and any other association that exercises its First Amendment rights to refer to candidates for public office. The State Bar of Michigan desires to compel the Michigan Chamber of Commerce, and any other association that exercises its First Amendment rights to refer to candidates for public office, to disclose a list of its members. In *NAACP v Alabama*,<sup>2</sup> the United States Supreme Court struck down an Alabama order directed at compelling the NAACP to disclose a list of its members. The order violated the NAACP’s freedom of association because:

<sup>1</sup> MCL 600.901.

<sup>2</sup> 357 U.S. 449, 462-463 (1958).

“[C]ompelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”

Similar to the arguments of the Segregationists in the Deep South, the arguments by the State Bar of Michigan that the “public has a right to know” should also be exposed as an unconstitutional attempt to violate the freedom to associate.

Membership was similarly at issue in *Tashjian v Republican Party of Connecticut*.<sup>3</sup> In that case, the United States Supreme Court struck down the Connecticut statute that restricted voting and party primaries to members of the respective parties. By limiting primary voting to party members, the statute regulated who the party could include in its primary voting activity, effectively limiting who could join together to participate in a group. Recognizing this infringement, the Court noted that, “the freedom to join together in furtherance of common political beliefs ‘necessarily presupposes the freedom to identify the people who constitute the association’”.<sup>4</sup>

The principles underlying these United States Supreme Court decisions is that the right of freedom of association is a right derived from the freedom of speech. In *Roberts v United States Jaycees*,<sup>5</sup> the United States Supreme Court stated:

“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort towards those ends were not also guaranteed.”

According to our own Michigan Supreme Court:

“The essential right protected under the freedom of association doctrine is the right to join together in a group of like-minded individuals and exercise free speech rights. Therefore, where a statute regulates the internal affairs of an organization, it violates the members' freedom of association if the compelled change in the internal affairs of the organization in turn affects

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<sup>3</sup> 479 U.S. 208 (1986).

<sup>4</sup> 479 U.S. at 214.

<sup>5</sup> 468 U.S. 609, 622 (1984).

the ability of the organization's members to come together and exercise free speech.”<sup>6</sup>

Not only does the State Bar’s request threaten significant rights of freedom of association, but the State Bar offers no standard when this government regulation would even apply. Currently, the Secretary of State utilizes the so-called “express advocacy” standard to determine when expenditures are subject to the Michigan Campaign Finance Act.<sup>7</sup> Under this clear standard, if the communication uses words such as “vote for”, “vote against”, “elect”, “defeat”, etc., then, and only then, does the Michigan Campaign Finance Act apply.<sup>8</sup>

However, the State Bar request seeks to subject “all payments for communications referring to judicial candidates” to government regulation, which is nothing more than a request to replace the bright line “express advocacy” standard with no standard whatsoever. Without any objective standard as to when the Michigan Campaign Finance Act applies, speakers are forced to guess when government regulation applies. The State Bar’s suggested approach represents nothing more than an unconstitutional attempt to chill speech:

“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’ The Government may not render a ban on political speech constitutional by carving out a limited exception through an amorphous regulatory interpretation.”<sup>9</sup> (Citations omitted)

Consequently:

“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”<sup>10</sup>

The State Bar of Michigan’s request threatens essential First Amendment rights. And for what reason? According to the State Bar of Michigan:

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<sup>6</sup> *Michigan State AFL-CIO v Employment Relations Commission*, 453 Mich 362, 371 (1996).

<sup>7</sup> See Interpretative Statement issued to Robert LaBrant dated April 20, 2004.

<sup>8</sup> See Interpretative Statement issued to Robert LaBrant dated April 20, 2004.

<sup>9</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 324 (2010).

<sup>10</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 349 (2010).

The Honorable Ruth Johnson  
September 25, 2013  
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“It is vital that the next cycle be one in which the public knows who is providing funding for judicial campaign advertising.”

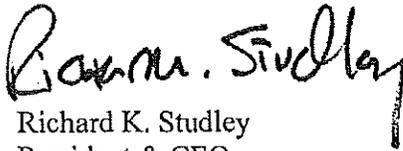
However, the public already knows “who is providing funding for judicial campaign advertising.” In every advertisement sponsored by the Michigan Chamber of Commerce, the following public notice appears:

“Paid for by the Michigan Chamber of Commerce.”

The sponsor of these ads is the Michigan Chamber of Commerce, not any single member of the Michigan Chamber of Commerce. The speaker who determined the content of these ads is the Michigan Chamber of Commerce, not any single member of the Michigan Chamber of Commerce. Therefore, the “transparency” requested by the State Bar of Michigan, already exists.

Accordingly, the State Bar of Michigan has offered no basis to allow the Secretary of State to adopt an interpretation of the Michigan Campaign Finance Act which violates freedom of association rights. As thoroughly and carefully analyzed in the April 20, 2004 Interpretative Statement issued to Robert LaBrant, the text of the Michigan Campaign Finance Act requires the use of the “express advocacy” standard. None of the cases cited by the State Bar require the Secretary of State to abandon the bright line “express advocacy” standard, and replace certainty with confusion.<sup>11</sup> Therefore, the Michigan Chamber of Commerce urges the Secretary of State to follow the law and reject the State Bar’s attempt to chill the freedom of speech.

Sincerely,



Richard K. Studley  
President & CEO

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<sup>11</sup> By its own terms, *Federal Election Commission v Wisconsin Right to Life, Inc.* cannot apply to a vague statute such as the Michigan Campaign Finance Act. 551 U.S. 449, 474 n 7 (2007). *Caperton v A.T. Massey Coal Company*, 556 U.S. 868 (2009) is a judicial disqualification/due process case which has nothing to do with the campaign finance laws. *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010) limited disclosure to the facts of that particular case, which concerned only express advocacy communications, not the non-express advocacy communications of which the State Bar seeks to regulate.

*Charles R. Toy*  
5023 River Ridge Drive  
Lansing, MI 48917

2013 SEP 24 PM 4:17

September 24, 2013

The Honorable Ruth Johnson  
Michigan Secretary of State  
Executive Office  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

Re: State Bar of Michigan's Request for Declaratory Ruling Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State

Dear Secretary Johnson,

Growing up I learned that in weighing words or deeds, I should always consider the source. Becoming more learned in literature (Shakespeare: Henry IV [Part I], Act II, Scene IV), Latin, and law, this saying was replaced with *ecce signum*, which means literally "behold the sign (or proof)" or "examine the evidence."

The 2004 Michigan Secretary of State interpretation of "issue advocacy advertisements" as not being "expenditures" under the Michigan Campaign Finance Act (MCFA) and consequently unreported, allows the vast majority of people and organizations funding advertising in judicial campaigns to remain anonymous.

Such an interpretation is the antithesis of promoting an informed electorate and insuring democratic accountability, both of which are purposes of the MCFA. I am unable to carefully and deliberatively examine or contemplate my judicial choices. I can not take into account any bias that the source may have, whether the source is credible, or the propensity of the source to distract by irrelevancies or obfuscations. Social scientists and our own experiences confirm the disinhibition, irresponsibility, and opportunism of anonymity. Michigan voters do not need these attributes added to judicial elections, which are already marked by a lack of information for voters to make meaningful choices.

Furthermore, uniqueness in judicial elections makes absolute transparency paramount. Polls cited in the Report and Recommendations of the Michigan Judicial Selection Task Force reveal that as a result of unreported, undisclosed spending, citizens and litigants alike lack a sound basis for confidence in the impartiality of their highest court. Michigan voters already believe that campaign spending has infected the decision-making of their judiciary. (See:

<http://www.lwvmi.org/documents/JSTFreport.pdf>.) As referenced in the State Bar of Michigan's Request, in *Caperton v. Massey Coal Company*, the U.S. Supreme Court recognized that "there is a serious risk of actual bias 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 judge's election campaign when the case was pending or imminent."

Second, in many instances judicial candidates are precluded from responding to "issue advocacy advertisements." The Michigan Code of Judicial Conduct, Canon 7 prescribes:

B. Campaign Conduct:

- (1) A candidate, including an incumbent judge, for a judicial office:
  - (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.

A judicial candidate can not state how he or she would decide an issue.

As a Past-President of the State Bar of Michigan, member of the Michigan Judicial Selection Task Force, Michigan attorney who believes in a fair, impartial, and independent judiciary, and Michigan citizen who takes my civic duty to vote seriously, I fully support the State Bar of Michigan's Request and conclusion that all payments for communications referring to judicial candidates must be considered "expenditures" for purposes of the MCFA, and thus reportable to the Michigan Secretary of State, regardless of whether such payments involve express advocacy or its functional equivalent. Only then will I be able to consider the source or examine the evidence.

Respectfully Submitted,



Charles R. Toy  
2009-2010 President, State Bar of Michigan



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September 26, 2013

The Honorable Ruth Johnson  
Secretary of State  
Executive Office  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

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

Dear Secretary Johnson:

As President of Michigan Defense Trial Counsel (MDTC), I am writing in order to comment upon, and support, the request by the State Bar of Michigan for a declaratory ruling as to the applicability of the Michigan Campaign Finance Act to judicial campaign expenditures. We submit the following comments pursuant to Section 15(1)(e) and 2 of the Michigan Campaign Finance Act (MCFA), MCL 169.201, et seq.

**Statement of Facts**

1. MDTC is a nonprofit corporation organized and existing to advance the knowledge and improve the skills of civil litigation attorneys, to support improvements in Michigan's civil litigation system, and to broadly address the interests of the legal community in Michigan. Membership in MDTC is limited to members who are in good standing with the State Bar of Michigan and who have as their primary focus the representation of parties in civil litigation.

2. The members of MDTC are interested parties whose course of action in upcoming judicial elections and in disqualification decisions

**MDTC**

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would be affected by a declaratory ruling as to the applicability of the MCFA to electioneering communications concerning judicial candidates.

3. The MCFA generally requires those making political "expenditures" to disclose the source of funding for such expenditures.

4. Based upon an April 2004 interpretive statement issued by the Department of State, expenditures for advertisements are not subject to disclosure under the Act, unless the ads expressly advocate the election or defeat of a candidate. This is often referred to as the express advocacy or "magic words" standard. Communications which do not satisfy this standard are considered to be "issue advocacy", and expenditures for such communications are not required to be reported to the Department of State's campaign finance reporting system.

5. The MCFA does not mention "express advocacy" or "issue advocacy", but does define "expenditure" as including "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. . ."<sup>1</sup> In pertinent part, the definition excludes any communication that "does not support or oppose a ballot question or candidate by name or clear inference."

6. Application of the express advocacy standard to judicial elections has come under increasing scrutiny and criticism over the last five years, culminating in the call for full and open disclosure of all judicial campaign spending as one of the recommendations of the Michigan Judicial Selection Task Force.<sup>2</sup> In the course of its report, the Task Force noted that "[o]ver the last decade, more than half of all spending on supreme court races in Michigan went unreported (and therefore the sources went undisclosed)."<sup>3</sup> The Task Force also described the harmful consequences of concealing judicial campaign expenditures from public view:

"Secret spending on campaigns is harmful in two ways: it can confuse voters about the messages they rely upon to assess the candidates, and it obscures financial contributions that might cause apparent conflicts of interest and require justices' recusal from cases involving those

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<sup>1</sup> MCL 169.206(1).

<sup>2</sup> <http://www.michbar.org/generalinfo/pdfs/4-27-13JSTF.pdf>

<sup>3</sup> Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4. Statistics regarding Michigan Supreme Court Campaign Finance are also available from the Michigan Campaign Finance Network at [http://www.mcfn.org/MSFC1984\\_2012.php](http://www.mcfn.org/MSFC1984_2012.php).

donors. Both problems undermine the public's respect for the courts and diminish democratic accountability."<sup>4</sup>

### Discussion

There are three main reasons why all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State.

First, the "magic words" test is outmoded. Although the test was initially adopted by the United States Supreme Court as a means of avoiding potential unconstitutionality,<sup>5</sup> the Court subsequently clarified that the magic words test is not a constitutional standard.<sup>6</sup> The Court also recognized that it is permissible to regulate not only communications containing the "magic words", but also communications that were "the functional equivalent" of express advocacy.<sup>7</sup> More recently, Chief Justice Roberts recognized that an ad qualifies as the functional equivalent of express advocacy "if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."<sup>8</sup>

Significantly, the Court has also stated that the magic words test was "functionally meaningless."<sup>9</sup> As the Court observed:

"Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election."<sup>10</sup>

Second, the attempted distinction between express and issue advocacy never had any relevance as applied to judicial elections. Typically, issue ads are distinguished from express candidacy ads on the basis that they promote the discussion of public policy issues, and seek to mobilize

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<sup>4</sup> Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4.

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

<sup>6</sup> *McConnell v. FEC*, 540 U.S. 93, 193, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

<sup>7</sup> *McConnell*, 540 U.S. at 206.

<sup>8</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-470, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).

<sup>9</sup> *McConnell*, 540 U.S. at 193.

<sup>10</sup> *Id.*

constituents, policy makers, or regulators in support of or in opposition to current or proposed public policies.<sup>11</sup> Judges, however, unlike other elected officers, are not supposed to be influenced by so-called "issue advocacy" outside the courtroom. As stated in the State Bar letter, "A judge's decisions must be driven solely by the facts of the case before the court and by the law as it applies to those facts." The argument for issue advertising is even more strained as applied to judicial candidates who are not current office holders, and therefore not in any position to make public policy. In other words, issue advocacy is often nothing more than thinly veiled candidate advocacy, but the veil is utterly transparent in the context of judicial elections.

Finally, whatever validity the distinction between express and issue advocacy might have in other aspects of election reform, it has no bearing upon the First Amendment implications of election finance disclosure requirements. Disclosure requirements "do not prevent anyone from speaking".<sup>12</sup> As Justice Kennedy wrote in *Citizens United v. FEC*,<sup>13</sup> "disclosure is a less restrictive alternative to more comprehensive regulations of speech."<sup>14</sup> On this basis, Justice Kennedy rejected the contention that disclosure requirements must be limited to speech that is the functional equivalent of express advocacy<sup>15</sup>, and further recognized that the transparency engendered by such disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>16</sup> Similarly, the United States Court of Appeals for the Seventh Circuit has stated:

"[M]andatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy and 'only pertain to a commercial transaction.' . . . Whatever the status of the express advocacy/issue discussion distinction may be in other areas of campaign finance law, *Citizens United* left no doubt that disclosure requirements need not hew to it to survive First Amendment scrutiny. With just one exception, every circuit that has reviewed First Amendment

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<sup>11</sup> See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 470.

<sup>12</sup> *McConnell*, 540 U.S. at 201.

<sup>13</sup> 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

<sup>14</sup> *Citizens United v. FEC*, 558 U.S. at 369.

<sup>15</sup> *Id.*

<sup>16</sup> *Citizens United v. FEC*, 558 U.S. at 371.

challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents, and in each case the court upheld the law."<sup>17</sup>

**Conclusion**

This is an issue of tremendous significance to the continued integrity of our judicial system. MDTC joins in the request by the State Bar of Michigan for a declaratory ruling that all payments for communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, regardless of whether such communications involve express advocacy or its functional equivalent. We thank you for your consideration of this statement in support of the State Bar request. If you have any questions, or would like further information, feel free to contact me at (248) 213-2013.

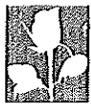
Sincerely,



Raymond W. Morganti

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<sup>17</sup> *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir., 2012).



# Right to Life of Michigan

peaceful, life-affirming solutions

www.RTL.org

September 26, 2013

The Honorable Ruth Johnson  
Secretary of State  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

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STATE CENTRAL  
2340 Porter Street, SW  
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Dear Secretary Johnson:

MID MICHIGAN  
233 N. Walnut  
Lansing, MI 48933  
tel: (517) 487-3376  
fax: (517) 487-6453

**Re: Effect of *Right to Life of Michigan v Miller* on the Declaratory Ruling Request submitted by the State Bar of Michigan, dated September 11, 2013.**

ANN ARBOR  
24 Frank Lloyd Wright Drive  
P.O. Box 493  
Ann Arbor, MI 48106  
tel: (734) 930-7474  
fax: (734) 930-7479

Right to Life of Michigan opposes any attempt, either by the Michigan Department of State, the Legislature, or now by the State Bar of Michigan, to infringe upon the freedom of speech. In 1998, the Michigan Department of State adopted Rule 169.39b, which provided in pertinent part as follows:

“Except as otherwise provided in this rule, an expenditure for a communication that uses the name or likeness of 1 or more specific candidates is subject to the prohibition on contributions and expenditures in section 54 of the act if the communication is broadcast or distributed within 45 calendar days before the date of an election in which the candidate’s name is eligible to appear on the ballot.”

MACOMB  
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tel: (586) 774-6050  
fax: (586) 774-5192

In order to protect its First Amendment rights, Right to Life of Michigan was forced to file the case known as *Right to Life of Michigan, Inc. v Miller*, 23 F.Supp 2d 766 (W.D. Mich. 1998). Right to Life of Michigan successfully obtained a permanent injunction against the Michigan Department of State barring enforcement of Rule 169.39b. This permanent injunction is still in place today.

WAYNE  
2010 Eureka Road  
Wyandotte, MI 48192  
tel: (734) 282-6100  
fax: (734) 282-6218

Recently, the State Bar of Michigan has requested a ruling from the Michigan Department of State on the following question:

“In light of *Federal Election Commission v Wisconsin Right to Life* (2007), *Caperton v Massey Coal Company* (2009), and *Citizens United v FEC* (2010), must all payments for communications referring to judicial candidates be considered ‘expenditures’ for the purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent?”

If the Michigan Department of State answers “yes” to this question in any manner, as advocated by the State Bar of Michigan, the Michigan Department of State would be in violation of the permanent injunction granted in *Right to Life of Michigan, Inc. v Miller*.

The request by the State Bar of Michigan is little more than a rehash of Rule 169.39b. The same First Amendment concerns that were present in the application of Rule 169.39b are present in the request to subject “all payments for communications referring to judicial candidates” to government regulation.

The request is particularly unsettling given the inclusion of the qualifying phrase “*regardless* of whether such payments entail express advocacy or its functional equivalent.” (emphasis added). The State Bar, in essence, is asking that the distinction between express advocacy for electoral purposes and issue advocacy protected as free speech be erased. There is a clear and deep body of legal precedent that would be contravened should an affirmative declaratory ruling be granted. Erasing that distinction would create a policy by which we could not passively abide.

Accordingly, it is our firm presumption in law that the Michigan Department of State remains bound by the terms of the permanent injunction granted in *Right to Life of Michigan, Inc. v Miller* as it takes the State Bar's request under consideration.

We appreciate the opportunity to provide you our thoughts in this matter.

Sincerely,



Barbara Listing  
President

# FOUNDATION FOR MICHIGAN FREEDOM

September 27, 2013

The Honorable Ruth Johnson  
Secretary of State  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

RECEIVED  
SEP 28 2013  
BUREAU OF ELECTIONS  
SECRETARY OF STATE

Dear Secretary Johnson:

**Re: *Request to Protect Freedom of Speech Under Attack By the State Bar of Michigan***

**“If the freedom of speech is taken away  
then dumb and silent we may be led, like sheep to the slaughter.”**

~ George Washington

The purpose of this letter is to urge the Secretary of State to protect the freedom of speech guaranteed by the First Amendment of the United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Article I, Section 5 of the Michigan Constitution similarly protects the freedom of speech and press:

"Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

These important rights are under attack by the State Bar of Michigan. In a September 11, 2013, the State Bar of Michigan asked the Secretary of State to say “yes” to the following:

“In light of *Federal Election Commission v Wisconsin Right to Life* (2007), *Caperton v Massey Coal Company* (2009), and *Citizens United v FEC* (2010), must all payments for communications referring to judicial candidates be considered ‘expenditures’ for the purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functionable equivalent?”

Without a clear, objective standard to determine when political speech is subject to government regulation, the State Bar's request to regulate "all payments for communications referring to judicial candidates" will necessarily prevent speech from entering the "open marketplace" of ideas protected by the First Amendment.<sup>1</sup> According to the United States Supreme Court:

"When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful."<sup>2</sup>

The United States Supreme Court has already defined the clear, objective standard to determine when political speech is subject to government regulation. In *Buckley v Valeo*,<sup>3</sup> the United States Supreme Court distinguished between "express advocacy" and "issue advocacy" communications. To this end, the United States Supreme Court addressed the constitutionality of contribution and expenditure limitations on individuals and groups under the Federal Election Campaign Act. The Court observed that the Federal Election Campaign Act's limitations operate in an area of the most fundamental First Amendment activities:<sup>4</sup>

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>5</sup>

Because of the vital importance in protecting such speech, the *Buckley* Court articulated what has come to be known as the "express advocacy" test. So-called "express advocacy" communications are communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office."<sup>5</sup> In more concrete terms, "express advocacy communications" are "communications containing express words of advocacy of election or defeat, such as "vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'elect.'"<sup>6</sup>

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<sup>1</sup> *New York State Bar of Elections v Lopez Torres*, 552 U.S. 196, 208 (2008).

<sup>2</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 356 (2010).

<sup>3</sup> 424 U.S. 1 (1976).

<sup>4</sup> *Buckley v Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v United States*, 354 U.S. 476, 484 (1957)).

<sup>5</sup> *Buckley v Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v United States*, 354 U.S. 476, 484 (1957)).

<sup>6</sup> *Buckley v Valeo*, 424 U.S. 1, 44 n. 52 (1976) (quoting *Roth v United States*, 354 U.S. 476, 484 (1957)).

The United States Supreme Court recognized the possibility that other communications, such as issue advocacy, might incidentally tend to influence the election or defeat of a candidate:<sup>7</sup>

“[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.”

“Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.”

Therefore, according to the United States Supreme Court: “*Buckley* adopted the ‘express advocacy’ requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.”<sup>8</sup>

In Michigan, the unavoidable by-product of an elected judiciary is that judicial candidates will necessarily be discussed in the public discussion of issues. Rather than regulate these discussions, as advocated by the State Bar of Michigan, the Secretary of State carefully reviewed this matter in an April 20, 2004 Interpretative Statement issued to Robert LaBrant. As recognized by the Secretary of State in this LaBrant ruling, since the Michigan Campaign Finance Act employs vague and broad language, the “express advocacy” standard is necessary to protect the freedom of speech.<sup>9</sup> According to the Secretary of State, the “express advocacy test is a clear, objective standard . . . .”<sup>10</sup> Consequently, if the Secretary of State adopts any portion of the request by the State Bar of Michigan, this “clear, objective standard” will be replaced by no standard whatsoever. The United States Supreme Court has already warned us of the consequences of non-existent standards to determine when government regulates speech:

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<sup>7</sup> *Buckley v Valeo*, 424 U.S. 1, 42 n. 50 (1976) (quoting *Buckley v Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975)).

<sup>8</sup> *Federal Election Commission v Massachusetts Citizens for Life, Inc.*, 479 U.S. 248, 249 (1986).

<sup>9</sup> Interpretative Statement issued to Robert LaBrant dated April 20, 2004. Because the regulation of non-express advocacy communications does not meet the “bright line requirements of [the Michigan Campaign Finance Act] in the first place,” the case of *Federal Election Commission v Wisconsin Right to Life, Inc.*, (relied upon by the State Bar) is inapplicable. See 551 U.S. 449, 474 at n. 7.

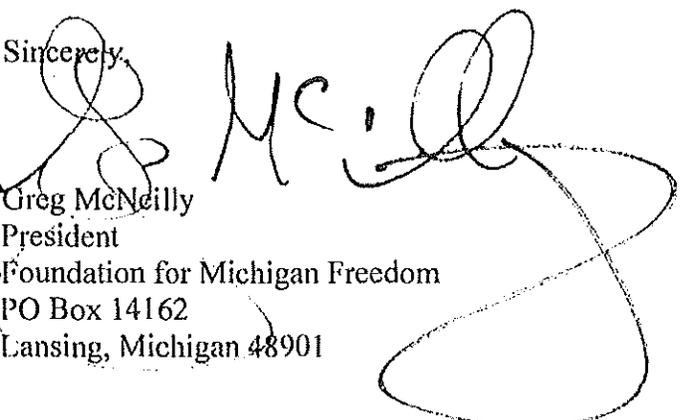
<sup>10</sup> Interpretative Statement issued to David Murley dated October 31, 2005.

The Honorable Ruth Johnson  
September 27, 2013  
Page 4

“If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the [Government] to issue an advisory opinion approving of the political speech in question. . . . This is an unprecedented governmental intervention into the realm of speech.”<sup>11</sup>

Accordingly, in the strongest terms possible, the Secretary of State is respectfully requested to reject this attempt to chill the freedom of speech submitted by the State Bar of Michigan.<sup>12</sup> Protecting speech is the correct legal thing to do and socially just.

Sincerely,

  
Greg McNeilly  
President  
Foundation for Michigan Freedom  
PO Box 14162  
Lansing, Michigan 48901

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<sup>11</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 336 (2010).

<sup>12</sup> The State Bar of Michigan was created by statute. MCL 600.901. As a result, it is understandable that a government entity with no First Amendment rights fails to appreciate how precious First Amendment rights are to those who possess them.



September 27, 2013

RECEIVED  
MICHIGAN DEPARTMENT OF STATE  
SEP 28 2013

**Board of Directors**  
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**Executive Director**  
Rich Robinson

The Honorable Ruth Johnson  
Secretary of State  
Richard H. Austin Building  
430 West Allegan Street  
Lansing, Michigan 48918

RE: Comment on the request by the State Bar of Michigan for a declaratory ruling on disclosure of spending in judicial election campaigns

Dear Secretary Johnson:

Following is the comment of the Michigan Campaign Finance Network in regard to the request of the State Bar of Michigan for a declaratory ruling on disclosure of spending in Michigan judicial election campaigns.

Introduction of Data

As executive director of the Michigan Campaign Finance Network I have compiled data from the Michigan Department of State's official campaign finance disclosure system since the 2000 election cycle. Over that same period of time I have collected data from Michigan's broadcasters and cable systems on political television advertisements that were not reported to the Department. I have included a summary of those results for Michigan Supreme Court election campaigns from 2000 through 2012 as Attachment A to this letter.

The summary in Attachment A shows that unreported candidate-focused electioneering television advertisements have been a significant portion of spending in every Michigan Supreme Court election campaign since 2000. Over the period from 2000 through 2012, undisclosed spending was at least 56.6 percent of all spending. It is not possible to document how much more was spent for undisclosed direct mail about the Supreme Court candidates and their suitability to hold office because the U.S. Postal Service, unlike Michigan broadcasters, does not have a public file from which spending records can be collected.

The Honorable Ruth Johnson  
September 27, 2013  
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A campaign finance summary of the 2012 Michigan Supreme Court campaign is included as Attachment B to this letter. It shows that only 26.8 percent of all spending was reported to the Department of State. It is notable that neither the Michigan Democratic State Central Committee nor the Michigan Republican Party reported any spending for television in the 2012 election cycle, even though the political parties each spent more than \$6 million for ads about the Supreme Court candidates' suitability to hold office. Indeed, the spending for unreported Supreme Court television advertising by each party was more than either political party reported for all its direct contributions and independent expenditures in all races in the 2012 cycle. Storyboards for the unreported Supreme Court television advertisements, including that of the Judicial Crisis Network, are included with Attachment B.

A campaign finance summary for the 2012 Oakland County Sixth Circuit Court campaign is included as Attachment C to this letter. The summary shows that two metropolitan Washington, DC-based nonprofit corporations spent a combined total of more than \$2 million for undisclosed television advertising about some of the candidates' suitability to hold office. At best, 26 percent of spending on the Sixth Circuit Court campaign was disclosed. Expenditures for unreported direct mail cannot be documented because the U.S. Postal Service does not have a public file for records of political advertising.

### Discussion

While undisclosed television advertisements characterizing judicial candidates' suitability to hold office predate the interpretive statement published by the Michigan Department of State on April 20, 2004, that interpretive statement provided the state's major political parties and nonprofit corporations with a green light to spend tens of millions of dollars in Michigan Supreme Court election campaigns without reporting that spending - or the contributions that paid for that spending - to the State. In its interpretive statement the Department said that it had to use the "express advocacy" standard to determine what advertising communications would be considered campaign expenditures subject to mandatory disclosure, and that has proved to be a standard that is easy to evade.

Since that interpretive statement was issued in 2004, U.S. Supreme Court campaign finance jurisprudence has changed the campaign finance legal landscape significantly. In particular, three cases point to a need to revisit the 2004 interpretive statement and reinterpret what constitutes a campaign expenditure subject to mandatory disclosure in a Michigan judicial election campaign.

*Federal Election Commission v. Wisconsin Right to Life (2007)* established that there is a functional equivalent of express advocacy. That is, the magic words of express advocacy from

The Honorable Ruth Johnson  
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Page 3 of 5

*Buckley v Vallejo* (1976) need not be present “if the advertisement is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>1</sup>

In *Federal Election Commission v. Wisconsin Right to Life*, the opinion of Chief Justice John Roberts discussed genuine issue advocacy. He said, “The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications or fitness for office.”<sup>2</sup>

In his Supreme Court brief, James Bopp, counsel for Wisconsin Right to Life, said that issue advocacy is “grassroots lobbying.”<sup>3</sup>

In view of the U.S. Supreme Court’s guidance on what genuine issue advocacy is, the argument that advertisements about Michigan Supreme Court candidates during an election campaign are issue advertisements is now completely without merit. Michigan judges are not lobbyable officials. The overriding issue in the advertisements, without exception, is the suitability, or unsuitability, of the candidates to hold office. The candidate-focused advertisements preceding Michigan judicial elections are the functional equivalent of express advocacy. Without question, they should be subject to mandatory disclosure

In *Caperton v. Massey Coal Company* (2009) the U.S. Supreme Court established that one litigant’s exercise of First Amendment rights does not trump another litigant’s due process right to an impartial court hearing. A litigant has a right to request recusal of the judge if the opposing litigant or counsel has been a major financial supporter of the judge’s election campaign. However, in Michigan, it is improbable that a litigant could assert that fundamental right because of the millions of dollars of unaccountable spending: nearly \$14 million in the 2012 Supreme Court campaign, alone; more than \$2 million in the 2012 Oakland County Sixth Circuit Court campaign.

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<sup>1</sup> Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 470 (2007)

<sup>2</sup> *Id.*

<sup>3</sup> Appellee’s brief, p.6

[http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_06\\_07\\_06\\_969\\_Respondent.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_06_07_06_969_Respondent.authcheckdam.pdf)

The Honorable Ruth Johnson  
September 27, 2013  
Page 4 of 5

A litigant can't know when a recusal motion is warranted if a campaign's financial supporters are anonymous. In order to assure the impartiality of the judiciary, major spenders in judicial campaigns must be identifiable. So far in 21<sup>st</sup> Century Michigan, they are not. That is because of the willful state of ignorance imposed by the Department's April 20, 2004 interpretive statement.

Finally, an 8-1 vote by the Supreme Court in Part IV of *Citizens United v. Federal Election Commission* (2010) established that it is constitutionally permissible to require disclosure of campaign spending, and the contributions that pay for that spending, even if the spender is a nonprofit corporation. This is not limited to disclosure of express advocacy, or its functional equivalent. The Opinion of the Court said, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>4</sup>

There is no question of the permissibility to require disclosure of all candidate-focused spending in Michigan judicial campaigns. The Michigan Campaign Finance Act says that campaign expenditures include communications where there is clear inference of support or opposition to a candidate. That should cover all communications about the candidates during a Michigan judicial election campaign, because the notion of judicial issue ads is a fatally flawed concept. Experience says that any mass communication that contains the name or image of a judicial candidate in the 90 days before an election should be considered a campaign expenditure and subject to full disclosure of the donors who paid for that communication.

Those who suggest that disclosure equals intimidation are likely aware that Justice Clarence Thomas raised that argument in casting the lone dissenting vote in Part IV of *Citizens United*. The other eight justices heard him but did not agree.

In fact, real intimidation occurred in the Sixth Circuit Court campaign in 2012. There, nonprofit corporations were used as vehicles to hide the source(s) of \$2 million of candidate-focused advertising. The source was widely assumed to be an angry litigant who wanted to take out a judge while leaving no fingerprints. That form of intimidation, enabled by anonymity, is a clear threat to impartial justice.

Those who suggest disclosure threatens freedom of association are twisting the tenets of *NAACP v. Alabama* (1958). There is no equivalence between the NAACP's need to protect its

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<sup>4</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 365 (2010)

The Honorable Ruth Johnson  
September 27, 2013  
Page 5 of 5

membership lists at a time when civil rights workers were being lynched and murdered and a political spender's fear of commercial or political backlash, or the disqualification of a judge he helped elect to hear his appeal. As Justice Antonin Scalia has said, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."<sup>5</sup>

In March 2009, just months after former Chief Justice Clifford Taylor was defeated in a campaign in which more than half of all spending was undisclosed, the Michigan Campaign Finance Network commissioned a statewide poll of Michigan voters. Ninety-six percent of respondents said that it is important that all sources of spending in judicial campaigns be publicly disclosed.

The public's desire for transparency and accountability is clear. The damaging gamesmanship surrounding faux issue advertising in judicial campaigns must end. It is clearly within the Department of State's authority to correct an interpretive statement from 2004, the rationale for which has been superseded by the seminal campaign finance jurisprudence of this century. For the sake of democracy and impartial justice, the Department should do so.

Sincerely,



Richard L. Robinson  
Executive Director

Attachments

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<sup>5</sup> Doe v. Reed, 561 U.S. \_\_\_ (2010), Scalia, J. concurring at p.10 of slip opinion

Attachment A. Michigan Supreme Court Campaign Finance Summary, 2000-2012

	2000	2002	2004	2006	2008	2010	2012	2000-2012
Candidate Committees	\$ 6,824,311	\$ 964,342	\$ 1,544,278	\$ 1,087,344	\$ 2,690,495	\$ 2,603,090	\$ 3,442,367	\$ 19,156,227
Reported Independent Expenditures	\$ 1,587,829	\$ 27,408	\$ 694,700	\$ 5,223	\$ 1,012,000	\$ 2,485,885	\$ 1,617,882	\$ 7,430,927
Unreported Electioneering TV Ads	\$ 7,500,000	\$ 1,020,000	\$ 1,377,000	\$ 844,500	\$ 3,804,000	\$ 6,295,000	\$ 13,850,000	\$ 34,690,500
Total Spending	\$ 15,912,140	\$ 2,011,750	\$ 3,615,978	\$ 1,937,067	\$ 7,506,495	\$ 11,383,975	\$ 18,910,249	\$ 61,277,654
Number of Seats	3	2	2	2	1	2	3	15
Spending per Seat	\$ 5,304,047	\$ 1,005,875	\$ 1,807,989	\$ 968,534	\$ 7,506,495	\$ 5,691,988	\$ 6,303,416	\$ 4,085,177
Percentage Disclosed	52.9%	49.3%	61.9%	56.4%	49.3%	44.7%	26.8%	43.4%

Sources:

Candidate Committees and Independent Expenditures: Michigan Department of State campaign finance records

Electioneering TV Ads: MCFN TV study/Public files of Michigan broadcasters and cable systems

**Attachment B. Michigan Supreme Court Campaign Finance Summary, 2012**

<b>Eight-year Term <i>two seats</i></b>	<b>Nomination</b>	<b>Contributions</b>	<b>In-kind Contrib.</b>	<b>Expenditures</b>	<b>Balance</b>	<b>Debt</b>	<b>Votes</b>
Dern Doug	Natural Law	waiver					219,128
Kelley, Connie M.	Democratic	\$ 310,052	\$ 6,582	\$ 310,054	\$ -	\$ -	1,400,308
<b>Markman, Stephen J. <i>incumb</i></b>	Republican	\$ 778,577	\$ 4,772	\$ 778,577	\$ -	\$ -	1,496,198
<b>McCormack, Bridget Mary</b>	Democratic	\$ 636,327	\$ 25,523	\$ 636,327	\$ -	\$ -	1,528,200
Morgan, Kerry L	Libertarian	waiver					264,121
O'Brien, Colleen A.	Republican	\$ 563,251	\$ 13,981	\$ 563,252	\$ -	\$ -	1,387,590
Roddis, Robert	Libertarian	waiver					181,238
<b>Totals</b>		<b>\$ 2,288,207</b>	<b>\$ 50,859</b>	<b>\$ 2,288,210</b>	<b>\$ -</b>	<b>\$ -</b>	<b>6,476,783</b>

**Two-year Term *one seat***

Barry, Mindy		waiver					307,781
Johnson, Shelia R.	Democratic	\$ 230,013	1250	\$ 230,013	\$ -	\$ -	1,470,000
<b>Zahra, Brian K. <i>incumbent</i></b>	Republican	\$ 863,827	\$ 8,211	\$ 863,827	\$ -	\$ -	1,745,105
<b>Totals</b>		<b>\$ 1,093,840</b>	<b>\$ 9,461</b>	<b>\$ 1,093,840</b>	<b>\$ -</b>	<b>\$ -</b>	<b>3,522,886</b>

<b>Grand Totals</b>		<b>\$ 3,382,048</b>	<b>\$ 60,319</b>	<b>\$ 3,382,050</b>	<b>\$ -</b>	<b>\$ -</b>	<b>9,999,669</b>
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Source: MI Bureau of Elections

**Winners in bold type**

**Reported Supreme Court Independent Expenditures, 2012**

MI Republican Party	\$ 325,474
MI Right to Life	\$ 127,747
MI Assn of Realtors (SuperPAC)	\$ 402,864
Republican County/Congress Dist Parties	\$ 6,771
Retake Our Government - MI	\$ 639
<b>Total</b>	<b>\$ 863,495</b>

MI Democratic State Central Cmte	\$ 623,044
Democratic County/Local Parties	\$ 578
America Votes Action Fund	\$ 101,034
Conservation Voters of MI	\$ 16,210
Working America (SuperPAC)	\$ 13,523
<b>Total</b>	<b>\$ 754,389</b>
<b>Grand Total</b>	<b>\$ 1,617,884</b>

Source: MI Bureau of Elections

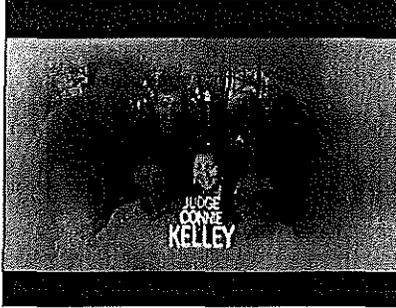
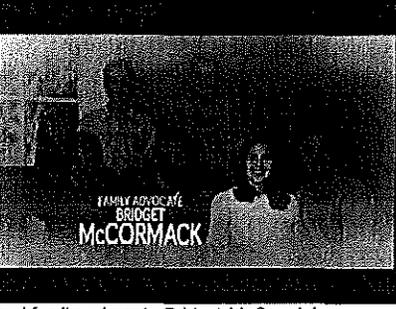
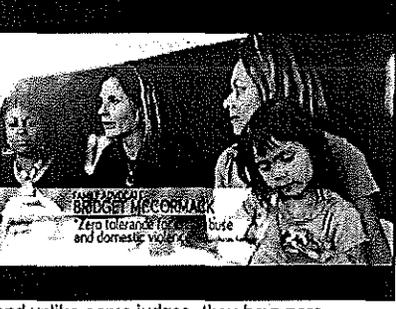
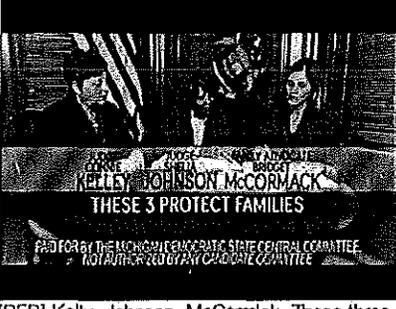
**Unreported Supreme Court Television Issue Advertising, 2012**

MI Dem State Central Cmte	\$6.2M
MI Republican Party	\$6.7M
Judicial Crisis Network	\$1.0M
<b>Total</b>	<b>\$13.85M</b>

Source: Public files of MI broadcasters and cable systems

# STSUPCT\_MI\_MIDSCC\_THESE\_THREE

Brand: Democratic State Central Committee - (B339)  
 Parent: PARENT UNKNOWN  
 Aired: 9/6/2012 4:25:43 PM  
 Creative Id: 11518421

 <p>Because they can't run for judge, we need our judges to stand up for them.</p>	 <p>Judge Connie Kelly,</p>	 <p>Judge Sheila Johnson,</p>
 <p>and family advocate Bridget McCormick,</p>	 <p>are three candidates for Michigan Supreme Court,</p>	 <p>who have spent their careers protecting families and victims of crime.</p>
 <p>From getting criminals off our streets, to keeping kids out of gangs,</p>	 <p>and unlike some judges, they have zero tolerance for violence against women and klds.</p>	 <p>[PFB] Kelly, Johnson, McCormick. These three protect families.</p>

www.PoliticsOnTV.com

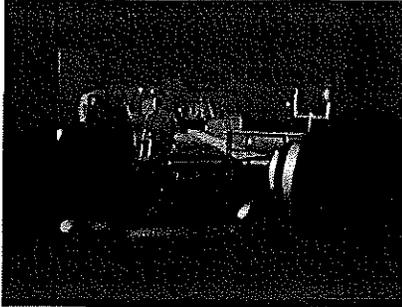
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# STSUPCT\_MI\_MIDSCC\_MICHIGAN\_INSURANCE\_COURT

Brand: Democratic State Central Committee - (B339)  
 Parent: PARENT UNKNOWN  
 Aired: 10/1/2012 2:32:03 AM  
 Creative Id: 11601808



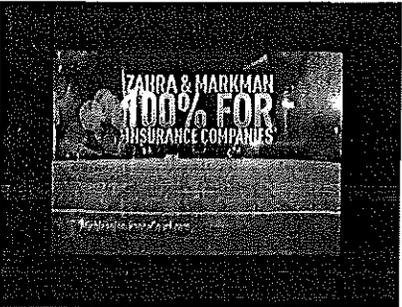
Well folks, the streak is alive



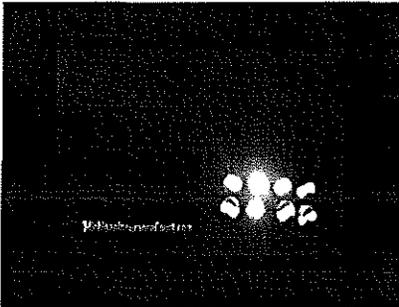
For four years running, Supreme Court Justices Steven Markman and Brian Zahra



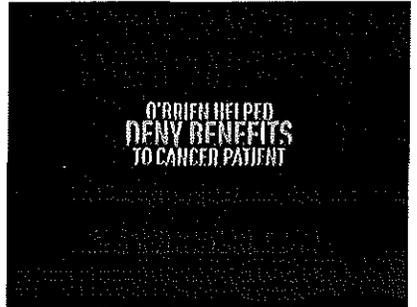
have sided with insurance companies over patients and providers in every opinion under the no-fault law



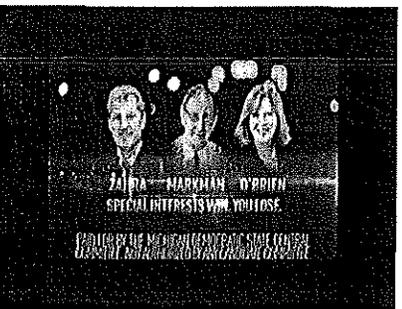
one hundred percent of the time



now they want to bring in former insurance lawyer Colleen O'Brien



she worked to deny benefits to a cancer patient



[PFB] Zahra, Markman, O'Brien- when special interests win, you lose.

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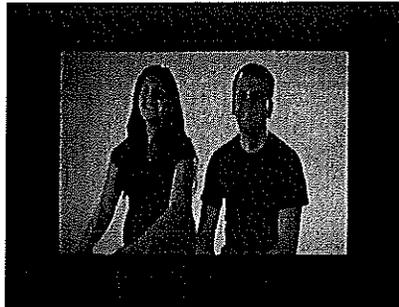


# STSUPCT\_MI\_MIDSCC\_THREE\_REASONS

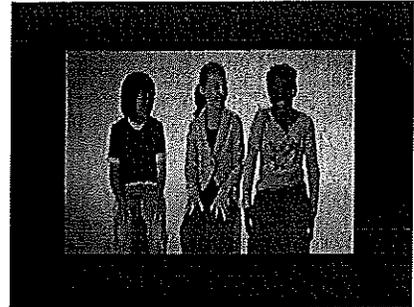
Brand: Democratic State Central Committee - (B339)  
Parent: PARENT UNKNOWN  
Aired: 10/19/2012 1:28:12 PM  
Creative Id: 11679736



Three reasons to remember three candidates for Supreme Court



One, middle class families



Two, Michigan kids



Three, women



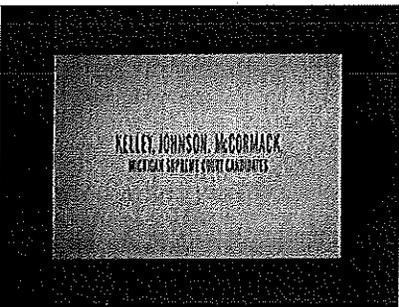
Connie Kelley



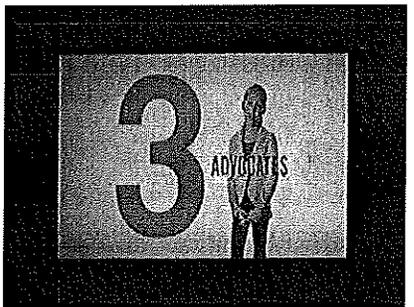
Sheila Johnson



Bridget McCormack



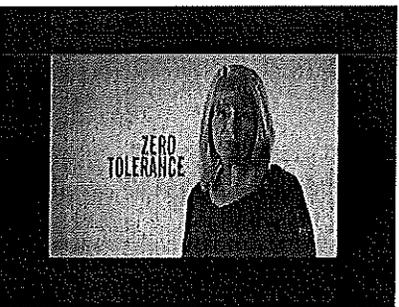
Kelley, Johnson, McCormack



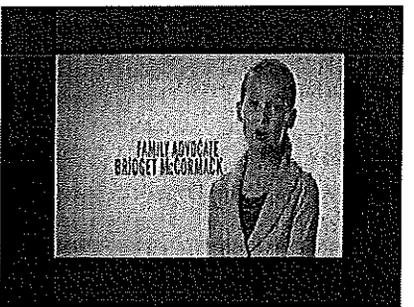
Three proven advocates



Kelley, Johnson, McCormack



Zero tolerance for violence against women and kids



Connie Kelley, Sheila Johnson, Bridget McCormack



[PFB] Kelsey, Johnson, McCormack, these three protect families

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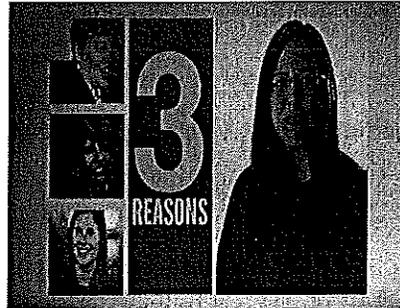


# STSUPCT\_MI\_MIDSCC\_REMEMBER\_THREE\_CANDIDATES

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Aired: 10/20/2012 10:11:18 AM  
Creative Id: 11681095



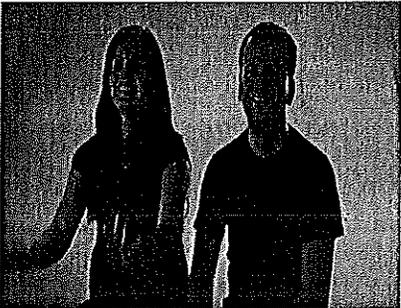
Kelley, Johnson, McCormack



Three reasons to remember



three candidates for supreme court



One, middle class families



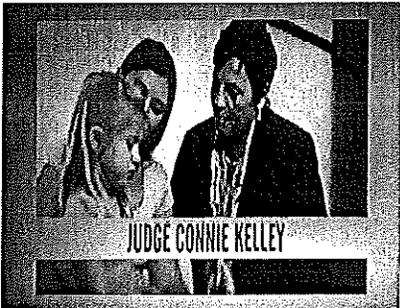
Two



Michigan kids



Three, women



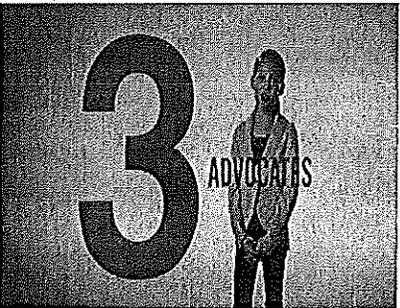
Connie Kelley



Sheila Johnson



Bridget McCormack



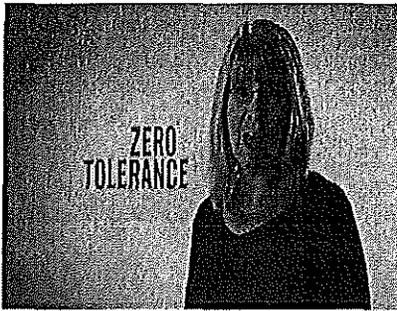
Three proven advocates



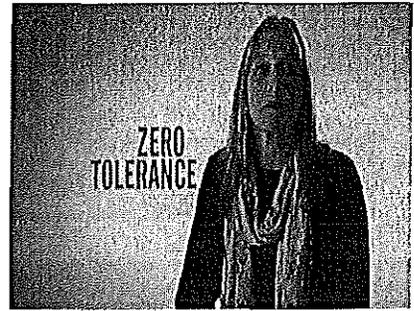
Kelley, Johnson, McCormack



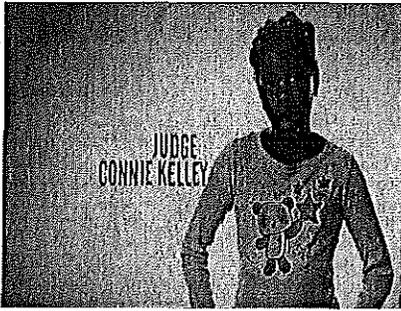
Zero tolerance



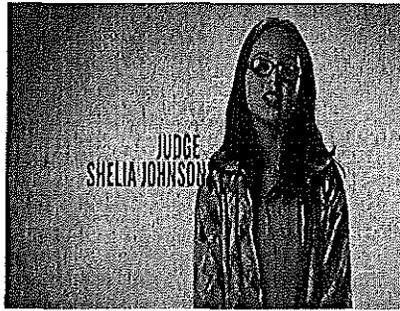
for violence



against women and kids



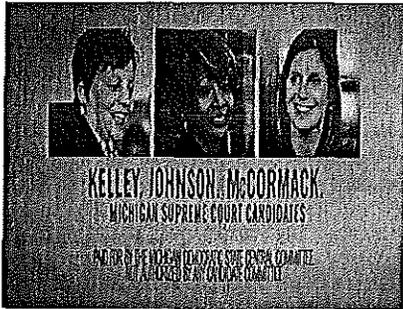
Connie Kelley



Sheila Johnson



Bridget McCormack



[PFB] Kelley, Johnson, McCormack. These three protect families.

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# STSUPCT\_MI\_MIDSCC\_THREE\_PROTECT\_FAMILIES

Brand: Democratic State Central Committee - (B339)

Parent: PARENT UNKNOWN

Alred: 11/1/2012 8:53:29 AM

Creative Id: 11721616



Three candidates for Michigan's Supreme Court who protect families



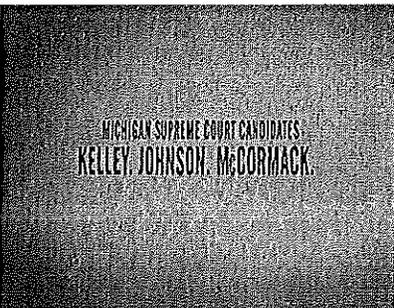
Connie Kelley



Sheila Johnson



Bridget McCormack



Kelley, Johnson, McCormack



Kelley, Johnson, McCormack



Kelley, Johnson, McCormack



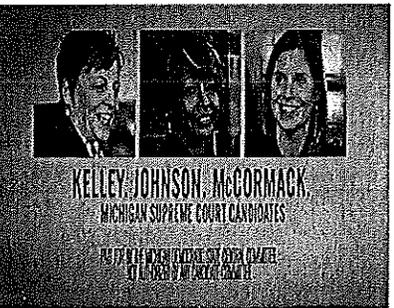
Connie Kelley



Sheila Johnson



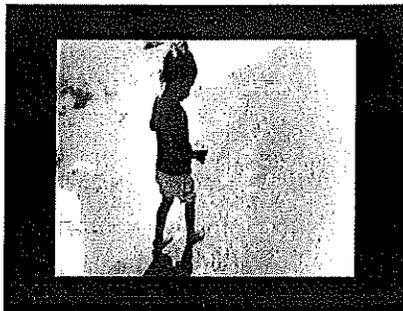
Bridget McCormack



[PFB] Kelley, Johnson, McCormack. These three protect families

# STSUPCT\_MI\_MIDSCC\_PROTECTING\_CHILDREN\_REV

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Parent: PARENT UNKNOWN  
Aired: 11/2/2012 1:08:36 PM  
Creative Id: 11725555



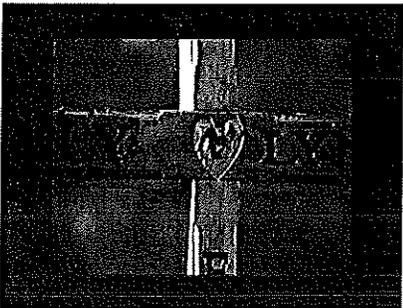
After my daughter Lily was killed at the hands of a child abuser



I vowed to spend my life protecting children



I know how important it is to have judges



who protect them too



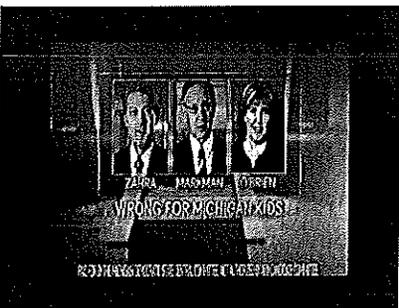
But Supreme Court Justice Brian Zahra, Justice Steven Markman and Colleen O'Brien have protected criminals, not kids



Overturing convictions of child pornographers



sentencing a child rapist to just one year in jail



[PFB] Zahra, Markman, O'Brien, wrong for Michigan's kids

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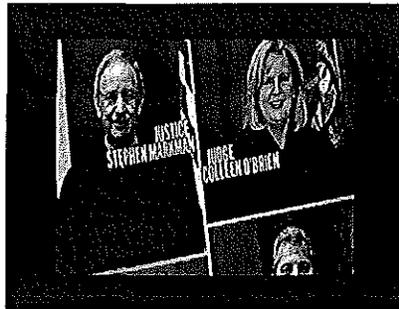
**KANTAR MEDIA** / CMAG

# STSUPCT\_MI\_MIRP\_AS\_MICHIGAN\_REBUILDS

Brand: Republican State Committee - (B333)  
 Parent: REPUBLICAN STATE COMMITTEE  
 Aired: 10/10/2012 10:29:33 AM  
 Creative Id: 11644506



While Michigan rebuilds, our judges stay vigilant, defending against efforts to derail our recovery.



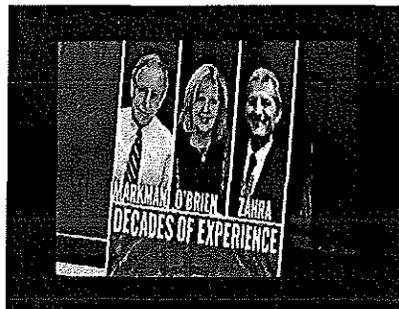
Judges Stephen Markman, Colleen O'Brien and Brian Zahra



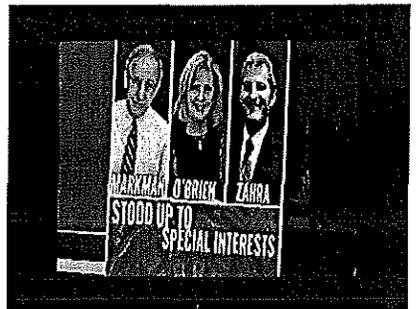
honesty and integrity on the bench



holding government and special interests accountable



Markman, O'Brien, and Zahra- decades of experience



They stood up to the special interests



protecting children



helping seniors



defending our jobs



Tell Markman, O'Brien and Zahra



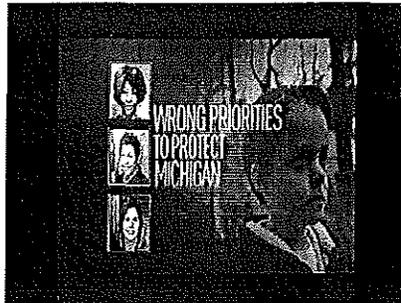
[PFB] Keep fighting for Michigan, keep fighting for our jobs

# STSUPCT\_MI\_MIRP\_HARDLY\_TOUGH\_ON\_CRIME

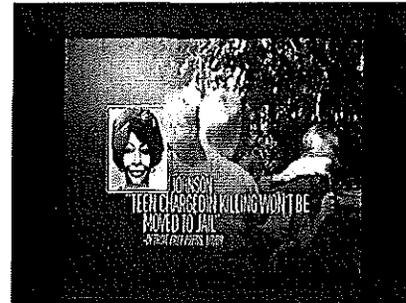
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 Aired: 10/21/2012 3:42:13 AM  
 Creative Id: 11680932



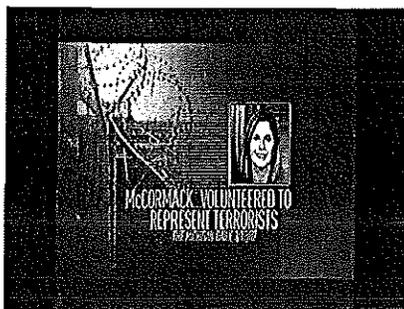
Johnson, Kelley, McCormick, tough on crime?  
 Hardly



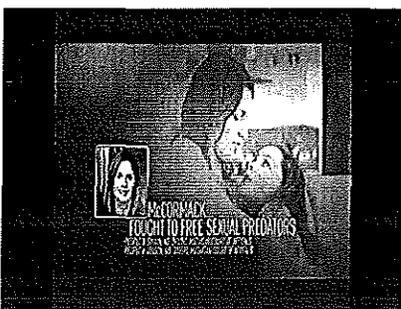
Johnson, Kelley, McCormick have the wrong  
 priorities to protect Michigan families



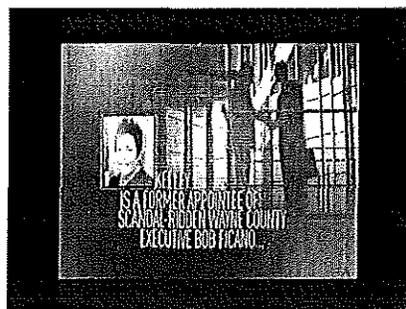
Johnson has a record of questionable judgment,  
 putting communities at risk



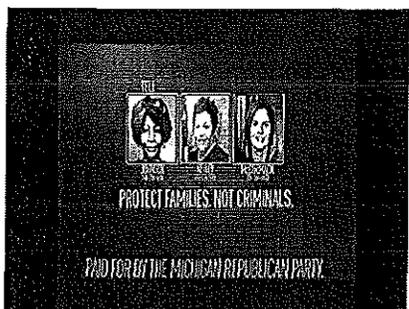
McCormick volunteered to represent terrorists at  
 Guantanamo Bay



and fought to protect sexual predators



and Kelley is a former appointee of scandal-  
 ridden Wayne County executive Bob Ficano



[PFB] Tell Johnson, Kelley and McCormick that  
 Michigan families need judges to protect them,  
 not criminals

STSUPCT\_MI\_MIRP\_ZAHRA\_PRAISED

Brand: Republican State Committee - (B333)  
 Parent: REPUBLICAN STATE COMMITTEE  
 Aired: 10/26/2012 9:24:54 AM  
 Creative Id: 11701439



Michigan Supreme Court Justice Brian Zahra



Praised by the Detroit Free Press for rising above partisanship



The Detroit News called Zahra a respected jurist



Integrity, independence, experience, that's Zahra



But Sheila Johnson



Johnson's a judicial activist with little experience



and a favorite of special interests, the same special interests that tried to hijack our constitution



[PFB] Judicial activist, special interest favorite. Tell Sheila Johnson Michigan's not for sale

# STSUPCT\_MI\_JUDICIALCRISIS\_MCCORMACK\_FREED\_TERRORIST

Brand: Judicial Crisis Network Organization - Organization (B329.2)  
Parent: PARENT UNKNOWN  
Aired: 10/31/2012 9:55:57 AM  
Creative Id: 11713670

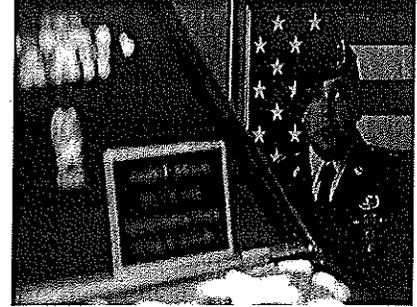


June 16, 2010, the day our life was shattered



Teri Johnson

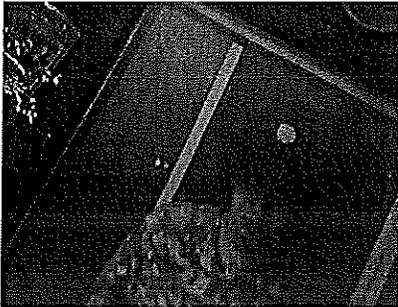
My son Joe was taken from me. Killed when his unit was attacked by terrorists in Afghanistan



My son selflessly gave his life for this country



So when I heard Bridget McCormack volunteered to represent and help free suspected terrorists, I couldn't believe it



My son's a hero, and fought to protect us



PHOTO BY KANTAR MEDIA/CROSS-ROADS WITH A POLITICAL ROOM  
NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE'S COMMITTEE

[PFB] Bridget McCormack volunteered to help free a terrorist. How could you?

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**Attachment C. Oakland County 6th Circuit Court Campaign Finance Summary, 2012**

	Contributions	In-kind	Expenditures	Balance
Bowman, Leo	\$ 116,338	\$ 13,240	\$ 116,846	\$ -
Carley, Deborah	\$ 36,875	\$ 37,851	\$ 32,609	\$ 4,086
McMillen, Phyllis C.	\$ 110,713	\$ 12,030	\$ 110,713	\$ -
Morris, Denise Langford	\$ 107,313	\$ 11,950	\$ 107,313	\$ -
Potts, Wendy L.	\$ 102,413	\$ 11,950	\$ 102,413	\$ -
Rollstin, William	\$ 11,180	\$ 34,642	\$ 9,955	\$ 1,225
Warren, Michael	\$ 106,988	\$ 11,950	\$ 106,988	\$ -
<b>Total</b>	<b>\$ 591,820</b>	<b>\$ 133,615</b>	<b>\$ 586,836</b>	<b>\$ 5,311</b>

Source: MI Bureau of Elections

**6th Circuit Court Reported Independent Expenditures, 2012**

MI Dem State Central Cmte	\$ 7,376	Support Leo Bowman
Right to Life MI State PAC	\$ 419	Support Deborah Carley
Right to Life MI State PAC	\$ 419	Support William Rollstin
Right to Life MI State PAC	\$ 455	Support Michael Warren
<b>Total</b>	<b>\$ 8,669</b>	

Source: MI Bureau of Elections

**6th Circuit Court Unreported TV Issue Advertising, 2012**

Americans for Job Security	\$ 1,130,951
Judicial Crisis Network	\$ 957,663
<b>Total</b>	<b>\$ 2,088,614</b>

Source: Public files of MI broadcasters and cable systems



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

September 27, 2013

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



RECEIVED

SEP 26 2013

LEGAL AND REGULATORY  
SERVICES ADMINISTRATION

September 24, 2013

The Honorable Ruth Johnson  
Secretary of State  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

Dear Secretary Johnson:

**Re: *Comments on the Declaratory Ruling Request (the "Request") of the State Bar of Michigan dated September 11, 2013***

### INTRODUCTION

The Request demands an interpretation of the Michigan Campaign Finance Act ("MCFA") such that:

"[A]ll payments for communications referring to judicial candidates be considered 'expenditures' for purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent."

Therefore, not only does the Request seek to regulate issue advocacy advertisements,<sup>1</sup> but local bar judicial candidate evaluations, announcements by charitable organizations referring to a judicial candidate as an event guest, or any other communication referring to a judicial candidate. Such a novel interpretation of the MCFA is contrary to the text of the MCFA, decades of interpretation of the text of the MCFA by the Michigan Department of State, and relevant case law.

In an April 20, 2004 Interpretative Statement issued to Robert LaBrant (the "LaBrant Ruling"), the Michigan Department of State carefully analyzed the text of the MCFA and relevant case law, and held that the "express advocacy" standard must be applied to communications to determine whether speech would be subject to government regulation. Under this standard, if speech does not contain words of express advocacy, it is not subject to government regulation under the MCFA. Such a bright line standard promotes freedom of speech, since speakers know where the line is drawn between free speech and government regulation. The State Bar Request, however, offers no bright line standard (or any standard whatsoever) in order to subject "all payments for

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<sup>1</sup> As referenced in the Interpretative Statement issued to Robert LaBrant dated April 20, 2004, issue advocacy advertisements are "ads that discuss issues without expressly advocating the election of the candidate who is featured in that issue ad."

### **Relentlessly Committed to Success**

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communications referring to judicial candidates” to government regulation. By forcing speakers to guess as to the scope of government regulation, and then subjecting speakers to criminal penalties for making the wrong guess, proposals like the State Bar’s Request have been unequivocally rejected by the United States Supreme Court:

“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’ The Government may not render a ban on political speech constitutional by carving out a limited exception through an amorphous regulatory interpretation.”<sup>1</sup> (Citations omitted)

We respectfully ask the Michigan Department of State to decline the Request’s invitation to transform the current bright line standard into a quagmire of regulation whose only purpose is to suppress free speech.

**THE MCFA ONLY APPLIES TO “CONTRIBUTIONS” AND  
“EXPENDITURES” AS THOSE TERMS ARE DEFINED IN THE MCFA**

At the root of the Request is whether the MCFA applies to a particular activity or disbursement thereby allowing for government regulation of speech. In making this determination whether government can regulate speech, it is imperative to “give the benefit of the doubt to speech, not censorship.”<sup>2</sup> Further, the United States Supreme Court has warned government not to utilize ambiguous tests to regulate speech:

“First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal. Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.”<sup>3</sup> (Citations omitted)

Accordingly, the Michigan Department of State has consistently made the determination that government regulation under the MCFA applies only where an activity or disbursement falls

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<sup>1</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 324 (2010).

<sup>2</sup> *Federal Election Commission v Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007).

<sup>3</sup> *Citizens United v Federal Election Commission*, 558 U.S. 310, 336 (2010).

within the definition of a “contribution” or “expenditure” set forth in the MCFA.<sup>4</sup> Therefore, in order to regulate a disbursement, the disbursement must constitute a “payment...in assistance of, or in opposition to, the nomination or election of candidate....”<sup>5</sup>

What is considered to be “in assistance of, or an opposition to, the nomination or election of a candidate” is not capable of a precise definition. Nonetheless, the impropriety of the Request can be demonstrated even with such an imprecise definition. Significantly, the Request seeks to regulate “all payments for communications referring to judicial candidates”, which is far broader than the statutory definition of “payment . . . in assistance of, or in opposition to, the nominating or election of a candidate ...”. Therefore, such a demand that all payments referring to judicial candidates be regulated, (not merely payments which assist or oppose the nomination or election of a candidate) - - compared to the imprecise statutory definition of “expenditure”, must be rejected.

**THE INTERPRETATIVE STATEMENT ISSUED TO ROBERT LABRANT ON APRIL 20, 2004 IS  
THE MOST RECENT MICHIGAN DEPARTMENT OF STATE RULING ON ISSUE ADVOCACY  
ADVERTISEMENTS, AND IS STILL VALID TODAY.**

In 2004, the Michigan Department of State was asked whether the MCFA would allow government to regulate issue advocacy advertisements, which were defined as “ads that discuss issues without expressly advocating the election or defeat of the candidate who was featured in that issue ad.”<sup>6</sup> The core analysis set forth in this LaBrant Ruling is worth repeating in its entirety:

**“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.

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<sup>4</sup> Interpretative Statement issued to Phillip Van Dam dated April 12, 1982; Interpretative Statement issued to John Engler dated October 7, 1986; Interpretative Statement issued to Sandra Cotter dated July 15, 1992; Interpretative Statement issued to Greg James dated May 25, 1995; Interpretative Statement issued to John Pirich dated November 4, 1997; Interpretative Statement issued to Michael Hanley dated October 29, 1999; Interpretative Statement issued to Kathleen Boyle dated June 15, 2001; Interpretative Statement issued to Eric Doster dated May 30, 2003; Interpretative Statement issued to Robert LaBrant dated April 20, 2004; Interpretative Statement issued to Eric Doster dated March 26, 2010; Interpretative Statement issued to Eric Doster issued November 1, 2011.

<sup>5</sup> MCL 169.206(1).

<sup>6</sup> Interpretative Statement issued to Robert LaBrant dated April 20, 2004.

The 6<sup>th</sup> Circuit Court of Appeals in *Anderson v. Spear*, 356 F.3d (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."

The above-referenced analysis set forth in the LaBrant Ruling is as accurate today as it was in 2004.

Nonetheless, the Request seeks to disturb the LaBrant Ruling based on three United States Supreme Court rulings,<sup>7</sup> none of which addressed the issue of what test should be utilized to interpret a statute that employs vague, broad language, such as the MCFA. As carefully analyzed in the LaBrant Ruling, *McConnell v FEC*<sup>8</sup> did address this pivotal issue, and determined that the express advocacy test was required in order to subject government regulation to any communications for any statutory definition of expenditure that employs vague, broad language.

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<sup>7</sup> *Federal Election Commission v Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Caperton v A.T. Massey Coal Company*, 556 U.S. 868 (2009); *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010).

<sup>8</sup> 540 U.S. 93 (2003).

Therefore, the only subsequent development that could alter the analysis set forth in the LaBrant Ruling would be a change to the definition of “expenditure” in the MCFA to remedy vagueness concerns. However, such a change in the MCFA did not occur. Consequently, the analysis of the LaBrant Ruling is as accurate today as it was in 2004.

**THE MICHIGAN DEPARTMENT OF STATE IS CURRENTLY ENJOINED  
FROM REGULATING NON-EXPRESS ADVOCACY COMMUNICATIONS.**

*Right to Life of Michigan v Miller*<sup>9</sup> and *Planned Parenthood Affiliates v Miller*<sup>10</sup> enjoined the Michigan Department of State from enforcing Administrative Rule 169.39b. The Request seeks the same government regulation of speech as proposed by Administrative Rule 169.39b:

“The purpose of the Rule is to address the problem of unregulated expenditures by corporations for candidate communications that are made under the guides of issue advocacy but which in fact in effect are express advocacy communications. Based upon the Supreme Court’s recognition of the potential evils associated with the infusion of corporate funds into the election process, the State would have this Court ignore the express advocacy distinction set forth in *Buckley* and adopt a less stringent rule that would allow state regulation of *all* corporate speech in the 45 days prior to an election that names or depicts a candidate, *regardless* of the content of the message, on the basis that it might constitute indirect advocacy on behalf of or against the candidate.”<sup>11</sup> (Emphasis in original)

In the present case, the Request demands that “all payments for communications referring to judicial candidates” be regulated, thereby subjecting to government regulation a far broader range of communication than the now-enjoined Rule 169.39b (which only regulated communications made within 45 days prior to an election, that contained the name or likeness of a candidate). Consequently, if the Michigan Department of State has been permanently enjoined from enforcing Rule 169.39b, it definitely could not regulate the scope of communications demanded in the Request. Significantly, the Michigan Department of State is still subject to the permanent injunctions set forth in the *Planned Parenthood Affiliates v Miller* and *Right to Life of Michigan v Miller*. Therefore, granting the Request would subject the Michigan Department of State to civil and criminal contempt for a willful violation of these permanent injunctions.<sup>12</sup>

**THE THREE UNITED STATES SUPREME COURT CASES REFERENCED IN THE REQUEST ARE  
COMPLETELY IRRELEVANT TO A DISCUSSION OF REGULATING NON-EXPRESS ADVOCACY  
COMMUNICATIONS UNDER THE MCFA.**

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<sup>9</sup> 23 F.Supp 2d 766 (W.D. Mich, 1998).

<sup>10</sup> 21 F.Supp 2d 740 (E.D. Mich, 1998).

<sup>11</sup> 23 F.Supp 2d at 770.

<sup>12</sup> 18 U.S.C. §401.

The Request refers to three United States Supreme Court rulings as the sole basis to demand an interpretation of the MCFA that “all payments for communications referring to judicial candidates be considered ‘expenditures’ for purposes of the MCFA.” These decisions are *Federal Election Commission v Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Caperton v A.T. Massey Coal Company*, 556 U.S. 868 (2009) and *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010). Unlike the United States Supreme Court decision in *McConnell v Federal Election Commission* (relied upon in the LaBrant Ruling), none of these cases address the issue of what test should be utilized to interpret a statute that employs vague, broad language such as the MCFA. Again, the focus of whether non-express advocacy communications can be regulated begins and ends with the text of the MCFA. Since the definition of “expenditure” in the MCFA employs vague and broad language, the prerequisite for government regulation is the express advocacy test. Therefore, rather than citing irrelevant United States Supreme Court cases, the Request should attempt to amend the MCFA. Even a cursory review of these three cases cited by the State Bar illustrates any reliance upon these three cases to chill free speech, is misplaced.

*Federal Election Commission v Wisconsin Right to Life, Inc.* considered the application of an unambiguous statute, Section 203 of the Bipartisan Campaign Reform Act of 2002, which made it a federal crime for a corporation to finance clearly defined “electioneering communications.” Footnote 7 of this decision (conveniently not referenced in the Request), makes it abundantly clear that *Federal Election Commission v Wisconsin Right to Life, Inc.* has no application to the MCFA:

“[O]ur test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting free speech. And keep in mind this test is only triggered if the speech meets the bright line requirements of [the statute] in the first place.”<sup>13</sup> (Emphasis added)

Accordingly, any standard adopted in *Federal Election Commission v Wisconsin Right to Life, Inc.* is “only triggered if the speech meets the bright line requirements [of the statute] in the first place.” As no one can reasonably deny, the MCFA contains no “bright line requirements” to regulate non-express advocacy communications. Therefore, *Federal Election Commission v Wisconsin Right to Life, Inc.* is inapplicable here.

Any reliance upon *Caperton v A.T. Massey Coal Company* is even more far-fetched than *Federal Election Commission v Wisconsin Right to Life, Inc.* At least *Federal Election Commission v Wisconsin*

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<sup>13</sup> 551 U.S. at 474.

*Right to Life, Inc.* is a campaign finance case. In *Caperton*, the United States Supreme Court held that the Due Process Clause is violated where a judge did not recuse himself when he knowingly received substantial political contributions from a party who was litigating a matter before his court. By referring to *Caperton*, the Due Process Clause and Michigan Court Rule 2.003, the State Bar is asking the Michigan Department of State to analyze matters other than the MCFA, which the Michigan Department of State has consistently determined is improper:

1. The Michigan Department of State does not provide answers to general legal questions which are outside the framework of the MCFA.<sup>14</sup>
2. "As your question concerns a matter that exceeds the reach of the MCFA or this Department's regulation, the Department declines to render a declaratory ruling or interpretative statement on this issue...."<sup>15</sup>
3. Where the subject is outside the purview of the MCFA and the expertise of the Michigan Department of State, it is not appropriate for the Michigan Department of State to respond to such questions.<sup>16</sup>
4. A declaratory ruling is not appropriate where the inquiry concerns the applicability of another statute to the MCFA.<sup>17</sup>
5. The Michigan Department of State has no authority to issue a declaratory ruling regarding the Michigan Insurance Code.<sup>18</sup>

Moreover, one must question the sincerity of the State Bar for relying on *Caperton*. As admitted in the Request, "no one knows" who financed an issue advocacy communication - - not even the judge. Consequently, if the justice in *Caperton* did not know who supported his campaign, then no Due Process Clause violation could have possibly occurred. Therefore, to avoid the Due Process Clause violations in *Caperton*, one would assume that the State Bar should defend non-disclosure, rather than attack it.

In *Citizens United v Federal Election Commission*, the United States Supreme Court did not categorically state that the First Amendment always permits disclosure of non-express advocacy communications. To the contrary, according to the United States Supreme Court in *Citizens United*, disclosure requirements "would be unconstitutional as applied to an organization if there were a

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<sup>14</sup> Interpretative Statement issued to Euella Thomas dated May 30, 1979.

<sup>15</sup> Declaratory Ruling issued to Kevin Harty dated November 1, 2006.

<sup>16</sup> Interpretative Statement issued to David Hohendorf dated December 3, 1980.

<sup>17</sup> Interpretative Statement issued to James Kjilleen dated July 26, 1977.

<sup>18</sup> Interpretative Statement issued to Joseph Gelb dated August 21, 1979.

reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed."<sup>19</sup> Thereafter, the Court observed:

"Citizens United, however, has offered no evidence that its members may face similar threats or reprisals."<sup>20</sup>

Therefore, based on the limited facts of *Citizens United v Federal Election Commission*, the Court concluded:

"And there has been no showing that, as applied in this case, these [disclosure] requirements would impose a chill on speech or expression."<sup>21</sup>

Instead of citing *Citizens United v Federal Election Commission* for a holding that was limited to the facts of that particular case, because *Citizens United*, in reality, stands for freedom of speech and freedom from government regulation, we suggest the following quote from *Citizens United* is more relevant to the disposition of the Request:

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The right of citizens to inquire, to hear, to speak and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office . . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence."<sup>22</sup> (Citations omitted)

Accordingly, the three United States Supreme Court cases referenced in the Request are completely irrelevant to a discussion of regulating non-express advocacy communications under the MCFA.

**THERE IS NO AUTHORITY UNDER THE MCFA TO ALLOW THE  
MICHIGAN DEPARTMENT OF STATE TO DISTINGUISH JUDICIAL  
CANDIDATES DIFFERENTLY THAN OTHER CANDIDATES.**

The Request asks the Michigan Department of State to make a distinction between communications relating to judicial candidates, and communications relating to non-judicial candidates. There is absolutely no provision in the MCFA to allow the Michigan Department of State to make such a distinction. Under the MCFA, the term "candidate" encompasses both judicial

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<sup>19</sup> 558 U.S. at 370.

<sup>20</sup> 558 U.S. at 370.

<sup>21</sup> 558 U.S. at 371.

<sup>22</sup> 558 U.S. at 339.

and non-judicial elective offices.<sup>23</sup> The only distinction provided for a judicial candidate in the MCFA relates to the exemption afforded a candidate committee for a judicial incumbent from filing an annual campaign finance statement.<sup>24</sup> No other distinctions between judicial and non-judicial candidates are permitted under the MCFA. Since such distinction is not permitted under the MCFA, the Request is asking the Michigan Department of State to state or create a general rule of law, rather than an interpretation of the MCFA. On this point, the MCFA clearly provides:

“A declaratory ruling or interpretative statement issued under this section shall not state a general rule of law, other than that which is stated in this act...”<sup>25</sup>

Therefore, the MCFA prevents the Michigan Department of State from amending the MCFA, and prevents the Michigan Department of State from granting the interpretation demanded by the Request.

**BY ASKING THAT “ALL” COMMUNICATIONS REFERRING TO JUDICIAL CANDIDATES BE SUBJECT TO GOVERNMENT REGULATION, THE REQUEST CONSTITUTES AN UNCONSTITUTIONAL SUPPRESSION OF FREE SPEECH**

As indicated repeatedly in these comments, if the State Bar intends to obtain government suppression of free speech, the method is not by a novel interpretation of the MCFA as demanded by the Request. Rather, the method would be to petition the Legislature to amend the MCFA. However, since the Request seeks government regulation for “all payments for communications referring to judicial candidates,” such an overly broad regulation of speech could never be considered constitutional. According to the United States Supreme Court:

“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest’.”<sup>26</sup> (Citations omitted)

Consequently, what compelling interest can the State Bar invent to regulate all communications referring to judicial candidates? What justification is there to regulate a communication that indicates that a judicial candidate is speaking at a charitable event, a law school symposium, or at a high school graduation ceremony? The list of possibilities of communications referring to a judicial candidate, and the corresponding governmental regulation, is endless. Therefore, not only

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<sup>23</sup> MCL 169.203(1).

<sup>24</sup> MCL 169.235(1).

<sup>25</sup> MCL 169.215(2).

<sup>26</sup> *Citizens United v Federal Election Commission*, 558 U.S. at 340.

does the MCFA prevent the Michigan Department of State from granting the Request, but the First Amendment prohibits the Legislature from amending the MCFA to grant the Request.

\* \* \*

For the foregoing reasons, we respectfully request the Michigan Department of State to uphold the principles of free speech and uphold the constitutionally-driven analysis set forth in the Interpretative Statement issued to Robert LaBrant dated April 20, 2004.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Robert LaBrant". The signature is written in black ink and is positioned above the typed name.

Robert LaBrant  
Senior Counsel



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September 27, 2013

Caleb P. Burns  
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The Honorable Ruth Johnson  
Secretary of State  
Executive Office  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

Re: Comments on the declaratory-ruling request of the State Bar of Michigan dated September 11, 2013.

Dear Secretary Johnson:

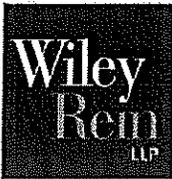
The Center for Individual Freedom (“CFIF”) offers these comments in response to the request for a declaratory ruling submitted by the State Bar of Michigan (“State Bar”) on September 11, 2013. *See Mich. Comp. Laws § 169.215(2); Mich. Admin. Code r. 169.6(1)*. CFIF respectfully requests that the Department of State decline the State Bar’s invitation to reinterpret the Michigan Campaign Finance Act (“MCFA”).

#### **I. The Center for Individual Freedom.**

CFIF is a non-profit 501(c)(4) organization whose mission is to protect and defend individual rights guaranteed by the U.S. Constitution. It seeks to focus public, legislative, and judicial attention on the rule of law as embodied in the federal and state constitutions. It also seeks to foster public discourse and to promote education that reaffirms the imperatives of the U.S. Constitution and principles of economic liberty as they relate to contemporary conflicts. Its goals, principles, and activities are more fully described on its Internet website at <http://www.cfif.org>.

CFIF often speaks publicly during the months leading up to elections, focusing citizens’ attention on important issues of public policy at a time when they are most attuned to those issues. Its ability to do so, in Michigan and elsewhere, requires laws that reasonably and clearly define the bounds of regulated speech. To that end, CFIF has a long history of seeking to clarify and defend its free-speech rights, both by requesting advisory opinions, *see Ga. State Ethics Comm’n, Adv. Op. 2010-05 (Apr. 5, 2011)*,<sup>1</sup> and by successfully pursuing civil-rights litigation, *see, e.g., Ctr.*

<sup>1</sup> The Georgia advisory opinion addressed a question similar to the one presented here and ruled that “the express advocacy standard remains . . . the standard under which independent



The Honorable Ruth Johnson  
September 27, 2013  
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*for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); Order Awarding Attorney's Fees and Expenses, *Ctr. for Individual Freedom v. Tennant*, No. 1:08-cv-00190 (S.D. W. Va. June 10, 2013). CFIF welcomes the opportunity to comment in this matter.

## II. Comments.

The State Bar of Michigan asks this Department to reinterpret the MCFA to reach all speech that "refers to" candidates for state judicial office. This remarkable view of executive power rests on two grounds, both flawed. Foremost, the State Bar says that any speech that "refers to" or "relates to" judicial candidates is automatically electoral speech and ripe for regulation under the MCFA. But this theory is openly unsupported. Equally troubling, it would give rise to the same vagueness concerns that justify the interpretation of the MCFA now in force. Second, the State Bar suggests that the Department's interpretation must be revisited in light of more recent U.S. Supreme Court decisions. This is wrong as a doctrinal matter; the Supreme Court authority cited in no way speaks to the issue raised by the State Bar.

### A. The Department Has Long Held that Only Express Advocacy Can Be Regulated as an "Expenditure" Under the MCFA.

By way of background, Michigan campaign finance law regulates "expenditures," defined loosely to include any payment made "in assistance of, or in opposition to" a candidate. Mich. Comp. Laws § 169.206(1). Anyone making more than \$100 in expenditures in a year must file reports with the state; upon making \$500 in expenditures, corporations and other groups must also register and report as committees. *See id.* §§ 169.203(4), 224(1), 169.251; *see generally* Mich. Dep't of State, *Independent Expenditures by Corporations, Unions and Domestic Dependent Sovereigns*, [http://www.michigan.gov/sos/0,1607,7-127-1633\\_8723\\_15274-230880--,00.html](http://www.michigan.gov/sos/0,1607,7-127-1633_8723_15274-230880--,00.html). Failure to comply with these provisions can give rise to civil fines and even criminal charges. Mich. Comp. Laws §§ 169.215(15), 169.224(1), 169.233(8). Hence, whether speech is labeled an "expenditure" has profound consequences for the speaker.

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(Continued . . .)

expenditures are regulated . . ." The record of that advisory-opinion request is available at <http://media.ethics.ga.gov/commission/opinions/2010-05.pdf>.



The Honorable Ruth Johnson  
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Recognizing that the MCFA's definition of "expenditure" has potentially limitless breadth, the Department has long held that reading the term aggressively would raise vagueness concerns. If the MCFA were to be applied "literally," the Department has voiced concern that the law "would criminalize even private correspondence." Mich. Dep't of State, Interpretive Statement at 4 (Apr. 20, 2004) (hereinafter "2004 Interpretive Statement"). Indeed, a limiting construction is constitutionally compelled by the U.S. Supreme Court's reasoning in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). Like the MCFA, federal campaign finance law defines "expenditure" as payments made "for the purpose of influencing" a federal election—language that the Supreme Court held impermissibly vague. *Id.* at 77-80. Candidates, the Court reasoned, are "intimately tied to public issues," and "campaigns themselves generate issues of public interest." *Id.* at 42, 80 & n.108. So indefinite terms like "for the purpose of influencing" could be read to extend regulation to an unlimited field of public discourse. *Id.* at 43, 78-79. Even narrowing the federal law to govern only speech "advocating the election or defeat of a candidate"—the lower court's solution—would not suffice. *Id.* at 42. "For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* So to avoid the danger of "arbitrary and discriminatory" enforcement, the Court in *Buckley* steered clear of constitutional vagueness concerns by reading the law to apply only to "explicit words" of "express advocacy." *Id.* at 41 n.48, 43, 44 & n.52; see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).<sup>2</sup>

These principles apply with equal force regardless of whether the law restricts expenditure amounts or imposes disclosure obligations. To quote *Buckley*, "compelled disclosure, in itself, can seriously infringe on . . . the First Amendment." 424 U.S. at 64; see also *Davis v. FEC*, 554 U.S. 724, 744 (2008). There, the Court first limited vague provisions that directly capped expenditures, *Buckley*, 424 U.S. at 40-41, and then applied those same principles to federal disclosure laws, *id.* at 78. To avoid "serious problems of vagueness," the Court "construe[d] 'expenditure' for purposes of [the disclosure provision] in the same way . . . to reach only funds used for communications that expressly advocate . . ." *Id.* at 76, 80 & n.108; see also *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (applying same vagueness analysis to state disclosure laws).

<sup>2</sup> Express words of advocacy are those such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam); Mich. Dep't of State, Interpretive Statement at 2 (Apr. 20, 2004).



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In 2004, the Department read a similar limiting construction into the MCFA. Mich. Dep't of State, 2004 Interpretive Statement. Remarking that, if anything, the MCFA's definition of "expenditure" was even less precise than its federal counterpart, *id.* at 2, the Department salvaged the "broad, ambiguous language" by applying the law only to express advocacy, *id.* at 5.

Of course—and as the Department acknowledged—the express advocacy standard is not a constitutional requirement *per se*. *Id.* at 4. In the Supreme Court's words, the bright line between express and issue advocacy is "born of an effort to avoid [the] constitutional infirmities" of otherwise-vague laws. *McConnell v. FEC*, 540 U.S. 93, 192 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *see also* Mich. Dep't of State, 2004 Interpretive Statement at 3. Thus, Congress has enacted an "electioneering communication" law that regulates a precise set of speech beyond just express advocacy used in federal elections. 2 U.S.C. § 434(f)(3)(A). And as the Department observed in its 2004 ruling, "the Michigan legislature could enact [these same] 'electioneering communication' standards." Mich. Dep't of State, 2004 Interpretive Statement at 4.<sup>3</sup> Other state legislatures have done so. *E.g.*, Ala. Code §§ 17-5-2(a)(5), 17-5-8(h). But absent legislative action in Michigan, the Department is charged with continuing to administer the existing law "in such a way as to avoid the constitutional problems of vagueness and overbreadth." Mich. Dep't of State, 2004 Interpretive Statement at 4.

**B. The State Bar's Theory Is Openly Unsupported and Would Visit Profound Burdens on Public Discourse.**

The State Bar freely admits that the Department's 2004 Interpretive Statement has governed state campaign finance practices for almost a decade. Yet it proposes a new system: one that summons different definitions of a single term, "expenditure," depending on the type of election involved; one that invites the Department to rework legislation in the face of legislative silence; and one that empowers government officials to oversee speech on an inexhaustible range of public issues.

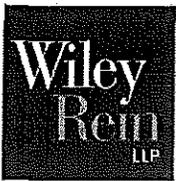
<sup>3</sup> Like Congress, Michigan's lawmakers would need to base their judgments on "reasonable factual findings supported by evidence that is substantial for a legislative determination." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224 (1997); *see also id.* at 196; *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003).



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The proposal rests on an extraordinary premise—that judicial campaigns are so different from executive- or legislative-branch campaigns that speech “related to judicial candidates . . . can *never* constitute issue advocacy . . .” State Bar Letter at 3 (emphasis added). But the three branches are not so different. While a “complete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature,” that “is not a true picture of the American system.” *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002). “Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.” *Id.* For these reasons, “operations of the courts and the judicial conduct of judges are matters of utmost public concern” separate and apart from elections. *See Landmark Comm’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

This is particularly true in Michigan. Commentators have characterized judicial interpretive methodologies in Michigan as especially “normative” and “intertwined with politics.” Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1808 (2010). On the Michigan Supreme Court, “methodological wars have carried over into . . . political wars,” with incumbents and candidates “actively campaign[ing]” on theories of statutory interpretation. *Id.* at 1808-09. Justices have long publicized their interpretive views in competing law review articles. *See* Robert P. Young, Jr., *A Judicial Traditionalist Confronts Unique Questions of State Constitutional Law Adjudication*, 76 Alb. L. Rev. 1947 (2013); Marilyn Kelly & John Postulka, *The Fatal Weakness in the Michigan Supreme Court Majority’s Textualist Approach to Statutory Construction*, 10 T.M. Cooley J. Prac. & Clinical L. 287 (2008); Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. Cooley L. Rev. 199 (2005); Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 Tex. Rev. L. & Pol’y 261, 265 (2004); Maura D. Corrigan & J. Michael Thomas, “Dice Loading” Rules of Statutory Interpretation, 59 N.Y.U. Ann. Surv. Am. L. 231 (2003); Clifford Taylor, *Who Is in Charge Here? Some Thoughts on Judicial Review*, 77 Mich. B.J. 32 (1998); Clifford W. Taylor, *Who’s in Charge: A Traditional View of Separation of Powers*, 1997 Det. C.L. Rev. 769; *see generally* Gluck, *supra*, at 1809 n.221. Most recently, former-Justice Elizabeth Weaver even co-authored a book castigating some of her former colleagues, not in an effort to harm their reelection prospects but, she writes, “to convey the need for reform in the way we select



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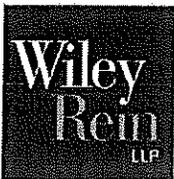
justices.” See Elizabeth A. Weaver & David B. Schock, *Judicial Deceit: Tyranny & Unnecessary Secrecy at the Michigan Supreme Court* 753 (2012).

No matter, the State Bar says. When it comes to the judicial branch, all payments for speech “related to” candidates must be treated as campaign finance expenditures—with all the registration and reporting burdens that follow from that label. See State Bar Letter at 3. Yet even the State Bar itself cannot describe the speech it seeks to regulate with anything close to precision. In the span of five pages, it refers to “advertisements,” *id.* at 2, “issue advocacy,” *id.* at 3, “ads,” *id.*, and “communications,” *id.* at 5, all without distinction. Turning to the types of speech that would trigger the MCFA, the State Bar variously proposes regulating communications “referring to” judicial candidates, *id.* at 5, advertisements “concerning” judicial candidates, *id.* at 2, ads “identifying” judicial candidates, *id.*, and advertising “related to” judicial candidates, *id.* at 3.<sup>4</sup> That a body speaking for Michigan’s legal community cannot define the bounds of its proposed standard is itself cause for concern. See *id.* at 1 ¶ 1.

The upshot of such indefinite terms, of course, is vagueness, overbreadth, and all the constitutional ills those defects entail. See *Buckley*, 424 U.S. at 41 n.48 (vague laws “trap the innocent by not providing fair warning,” foster “arbitrary and discriminatory application,” and “induc[e] citizens to steer far wider of the [regulated] zone . . . than if the boundaries . . . were clearly marked” (quotation marks omitted)). Facing the State Bar’s assortment of standards, “[n]o speaker . . . safely could assume that anything he might say upon . . . general subject[s] would not be [regulated].” See *id.* at 43. What types of speech could qualify as expenditures under the State Bar’s MCFA? Would a 2008 article by Justice Kelly, which argued that an interpretive practice used by four of her colleagues “is flawed and . . . has often led to misguided decision making”? See Kelly & Postulka, *supra*, at 287. (The article was published in 2008, a year when one of the targets of its criticism, Chief Justice Taylor, was running for reelection.) What about former-Justice Weaver’s recent book, if a new edition happens to be published at the same time one of her former colleagues is campaigning for reelection? And what about payments associated with a speech she gave in October

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<sup>4</sup> Strikingly, a minor variant on one of the State Bar’s proposed standards—“related to”—was actually scrutinized and narrowed in *Buckley*. See 424 U.S. at 41 (“The use of so indefinite a phrase as ‘relative to’ a candidate fails to clearly mark the boundary between permissible and impermissible speech.”).



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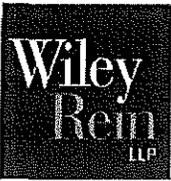
2012, which included a passing swipe at then-incumbent-candidate Stephen Markman?<sup>5</sup> Would the answer to this last question be different if her address had been given in Kansas City—instead of Kalamazoo—where the audience members would likely be ineligible to vote for or against Justice Markman? Would payments associated with this very comment be expenditures if one of the justices “referred to” above were campaigning for reelection this fall?

The interpretation advanced by the State Bar raises all these questions and more, but without offering any solutions. And it is no answer to dispel vagueness by saying that *all* the examples above should be regulated simply by virtue of their “referring to” judicial candidates. That would be a bright line to be sure—and it may well be what the State Bar seeks—but it would also be a grossly overbroad exercise of state power. Disclosure laws are subject to “exacting scrutiny,” calling for “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66). Exposing the universe of speakers—anywhere at any time—to the prospect of MCFA regulation is not even arguably tailored to the state’s interest in “provid[ing] the [Michigan] electorate with information about the sources of election-related spending.” *See id.* at 367 (quotation marks and citation omitted); *see also Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 & n.6, 348 (1995).

Constitutional shortcomings aside, the State Bar’s proposal also cannot be squared with the text of the MCFA itself. Again, the law regulates payments made “in assistance of, or in opposition to” a candidate—language the Department has rightly termed “broad” and “ambiguous.” *See Mich. Dep’t of State, 2004 Interpretive Statement* at 5. Yet, remarkably, the State Bar urges the Department to take the MCFA’s breadth and ambiguity to new heights beyond what the text could conceivably allow. Whatever “in assistance of, or in opposition to” may mean, broadening it to embrace every utterance referring to, related to, or identifying a candidate cannot but “conflict with the plain meaning of the statute.” *See In re Complaint of Rovas Against SBC Mich.*, 754 N.W.2d 259, 270 (Mich. 2008).

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<sup>5</sup> *See* Elizabeth A. Weaver, Address to Kalamazoo Trial Lawyers Ass’n, *Need for Reforms for and Transparency at the Michigan Supreme Court* at 1 (Oct. 12, 2012), at <http://www.justiceweaver.com/pdfs/kalamazoofall2012.pdf>.



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**C. Doctrinally, Nothing Has Changed Since the Department's 2004 Analysis.**

The State Bar also enlists three Supreme Court decisions to suggest that the Department's 2004 Interpretive Statement is now unsound. But the State Bar misreads this authority. The law dictating the 2004 analysis remains in full force, and, if anything, the cases cited by the State Bar actually favor the Department's objective, express advocacy standard. Two of the decisions speak exclusively to Congress's power to serve the voting public's informational needs by regulating "electioneering communication"—precisely the type of law the Department invited the Michigan Legislature to pass in 2004 but that remains unenacted almost a decade later. *See supra* 4; *see also* Mich. Dep't of State, 2004 Interpretive Statement at 4, 5. The third addresses the due-process problems that might arise when an interested party has "a significant and disproportionate influence" on a judge's campaign. But whether the state interests are framed as generic "informational" interests or in due-process terms, none of these cases disturbs the bedrock principle that any law governing speech must "clearly mark the boundary" between regulated and unregulated discourse. *See Buckley*, 424 U.S. at 41.

1. The State Bar rests primarily on *FEC v. Wisconsin Right to Life, Inc. (WRTL)*, a decision dating back to 2007. 551 U.S. 449 (2007). According to the State Bar, *WRTL* "clarified the legal line between express advocacy and issue advocacy." State Bar Letter at 3. In the wake of that decision, the State Bar says, "a political ad is considered express advocacy or its 'functional equivalent' if it is 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.'" *Id.* In short, the State Bar suggests that *WRTL* somehow loosened the express advocacy standard that governs vague campaign finance laws.

This reading does not withstand close inspection. Again, *WRTL* addressed a federal law restricting a category of speech—electioneering communication—that the Michigan Legislature has never opted to regulate. Decades after the express advocacy standard cured the otherwise-vague regulation of federal "expenditures," *see supra* 3, Congress sought to expand federal campaign finance law by defining a second, separate category of regulated speech in precise terms that avoided constitutional vagueness. This new "electioneering communication" law was limited to broadcast communications that (i) clearly identified a candidate for federal office, (ii) aired within a specific period, and (iii) targeted an identified



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audience of at least 50,000 persons. 2 U.S.C. § 434(f)(3)(A), (C). Given this “easily understood and objectively determinable” definition, the Supreme Court in *McConnell* held that the new law “raises none of the vagueness concerns that drove our analysis in *Buckley*.” 540 U.S. at 194. The Court further ruled that the law was facially valid: “[t]o the extent that” ads qualifying as electioneering communication are “the functional equivalent of express advocacy,” the Court reasoned, the government interest in regulating express advocacy applied equally to this new category of speech. *Id.* at 206. Speakers whose broadcasts qualified as electioneering communication but were *not* “functionally equivalent” to express advocacy would have recourse to as-applied challenges. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam).

*WRTL* was just such a case. There, a prospective speaker conceded that its planned ad met the statutory definition of “electioneering communication.” But, the speaker argued, the ad did not fall within the subset of electioneering communication that could constitutionally be restricted under *McConnell*. The Court was thus tasked with establishing “the standard . . . for determining whether an ad is the ‘functional equivalent’ of express advocacy.” 551 U.S. at 473 (Opinion of Roberts, C.J.). Under the principal opinion’s reasoning, an electioneering communication is functionally equivalent to express advocacy if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 469-70.

It is on this language that the State Bar seizes, viewing it as a roving license to regulate. *See* State Bar Letter at 3, 5. Yet even under federal law, the *WRTL* “test is only triggered if the speech meets the bright-line requirements of [the electioneering-communication statute] in the first place.” *WRTL*, 551 U.S. at 474 n.7. It does not alter the law regulating “expenditures” under the federal system. Nor does it touch laws—like the MCFA—that retain vague standards akin to the federal ones narrowed in *Buckley*. At most, *WRTL* simply reaffirms that lawmakers may choose to regulate certain categories of speech other than express advocacy, provided they “clearly mark the boundary” of covered speech. *See Buckley*, 424 U.S. at 41. That’s hardly a new development; *McConnell* announced the same conclusion in 2003, a point the Department acknowledged the following year. *See* Mich. Dep’t of State, 2004 Interpretive Statement at 4 (reasoning that even if *Buckley*’s express advocacy standard is not a “constitutional requirement,” it still controls in Michigan by virtue of “[t]he vagueness and over-breadth” that “still lurk” in the MCFA); *see also Carmouche*, 449 F.3d at 665 (“*McConnell* does not



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obviate the applicability of *Buckley*'s line-drawing exercise where . . . we are confronted with a vague statute."); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

2. The next case the State Bar invokes, *Citizens United*, stands for a similarly unexceptional proposition. 558 U.S. 310 (2010). The State Bar trumpets that "transparency enables the electorate to make informed decisions" and that lawmakers are permitted to regulate electioneering communications. State Bar Letter at 4, 5. True enough, perhaps. Yet as far as these points go, little has changed since *McConnell*. See *supra* 4. Like *WRTL* before it, *Citizens United* dealt exclusively with the federal electioneering communication law—whose "easily understood and objectively determinable" terms "raise[] none of the vagueness concerns that drove [the Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194. Again, legislators may well be able to craft laws that cover more than express advocacy in terms precise enough to avoid vagueness problems. Congress and some state legislatures have done just that. See *supra* 4. Michigan's lawmakers have not. Without a new law to interpret, the Department should reaffirm its objective construction of the MCFA's enduring, vague terms to avoid constitutional infirmity.

3. Lastly, the State Bar points to *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In *Caperton*, the Supreme Court held that the Due Process Clause can require recusal in "exceptional case[s]" where "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. According to the State Bar, these due-process interests somehow mean that all payments for speech "referring to" judicial candidates must be treated as campaign finance expenditures. State Bar Letter at 5. But even if *Caperton* had announced a state interest in governing new spheres of public discourse—and it did not—that interest could not be served by applying the MCFA in the vague and overbroad way the State Bar proposes. See *supra* 6-7.



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“First Amendment standards ‘must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal.’” *Citizens United*, 558 U.S. at 336 (quoting *WRTL*, 551 U.S. at 469) (some quotation marks omitted). Yet that is precisely what the State Bar’s proposal promises here. The Department should thus reaffirm its 2004 position that the MCFA regulates only express advocacy, as defined by the Supreme Court in *Buckley*.

Sincerely,

A handwritten signature in black ink, appearing to read "Caleb P. Burns".

Caleb P. Burns  
Thomas W. Kirby  
Samuel B. Gedge

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September 26, 2013

The Hon. Ruth Johnson  
Secretary of State  
Executive Office  
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Lansing, MI 48918

Re: Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State in the wake of three U.S. Supreme Court decisions -- *Federal Election Commission v. Wisconsin Right to Life*, *Caperton v. Massey Coal Company*, and *Citizens United v. Federal Election Commission*

Dear Secretary Johnson:

The Negligence Law Section of the State Bar is interested in the Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State. We are a voluntary organization that represents over 2,000 plaintiff and defense attorneys in Michigan. The governing council is comprised of an equal number of plaintiff and defense attorneys, so as to achieve a balanced perspective. Our members are active practitioners who frequently appear in court before the many fine judges who occupy the bench throughout Michigan. Though our views do not necessarily represent the State Bar, we share the concerns expressed by the State Bar in its request of September 11, 2013.

The Negligence Council has considered the Declaratory Ruling Request advanced in the September 11, 2013 letter from Bruce A. Courtade, President, and Janet K. Welch, Executive Director, of the State Bar of Michigan. After due consideration and discussion, we have decided to support the request.

**POSITION: SUPPORT**

Attorneys who are Negligence Section members are in court every day. Our clients expect and demand judicial impartiality and are concerned that issue ads are intended to influence judges and judicial opinions. The

SECRETARY OF STATE  
RUTH JOHNSON

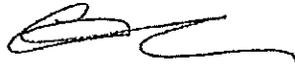
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fact that many judicial donors are not identified increases the anxiety and suspicion that undue influences may affect the decision making process. How is one to know if his/her opposition has contributed to a specific judge without knowing who has contributed? If a litigant knows the opposition has made a significant contribution to a particular judge, a motion to disqualify under Rule 2.003 might be warranted. Likewise, how is a judge to know if a litigant has contributed to his/her campaign without disclosure?

The Negligence Law Section supports the Declaratory Ruling Request of the State Bar of Michigan for these, and other related reasons. We join in their request to support open and full disclosure of contributions. We, too, believe that payments for communications referring to judicial candidates are expenditures and thus reportable to the Secretary of State. Open and fair elections foster the public's faith in the judicial system.

Sincerely yours,



Steven B. Galbraith  
Chairman, SBM Negligence Law Section

SBG/mkf



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September 27, 2013

Via Electronic Mail

The Honorable Ruth Johnson  
Secretary of State  
Executive Office  
Richard H. Austin Building  
430 West Allegan Street  
Lansing, Michigan 48918

**RE: State Bar of Michigan declaratory ruling request concerning issue advertisements about judges**

Dear Secretary Johnson:

I write on behalf of the Center for Competitive Politics (“CCP”), a § 501(c)(3) nonprofit organization dedicated to protecting the First Amendment political rights of speech, petition, and assembly. CCP works to defend these freedoms through scholarly research, regulatory comments, and federal and state litigation. CCP takes this opportunity to comment upon the State Bar of Michigan’s (“SBM”) September 11, 2013 declaratory ruling request (“Request”).

The SBM Request seeks to place severe burdens on Michiganders’ First Amendment rights to speak about judges, judicial candidates, and court rulings. What is most disappointing about the request is that the SBM asks you to ignore not only the meaning of state law, but also the First Amendment and forty years of Supreme Court precedent.

**I. Political speech is distinct from issue speech.**

The SBM Request asks:

[M]ust *all* communications referring to judicial candidates be considered “expenditures” for purposes of the MCFA, and thus reportable to the Secretary of State, *regardless* of whether such payments entail express advocacy or its functional equivalent?<sup>1</sup>

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<sup>1</sup> State Bar of Michigan, Declaratory Ruling Request 5 (Sept. 11, 2013) (emphasis supplied).

The answer is, of course, no. The presence of the word “regardless” directly contradicts MICH. COMP. LAWS § 169.206(2)(b), which specifically *exempts* any payments that are not express advocacy or its functional equivalent from the definition of “expenditure.”

But the SBM also asks whether it is possible for a communication to reference a judicial candidate without calling for that candidate’s election or defeat. Is *all* speech referring to a candidate automatically political and therefore regulated?

Again, the answer is an unequivocal “no.” This is a foundational principle of law that the SBM Request ignores. United States Supreme Court precedent, including the cases cited by the SBM, recognizes the marked difference between speech about candidates and speech about issues.

In *Buckley v. Valeo*,<sup>2</sup> the Supreme Court was tasked with interpreting Congress’s efforts to regulate campaign finance through the Federal Election Campaign Act (“FECA”) and its amendments. The *Buckley* Court noted that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”<sup>3</sup> A key consideration in the political context is safeguarding issue speech from the unconstitutional chill that can result from campaign finance regulation:

[f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals *and governmental actions*.<sup>4</sup>

Of course, FECA attempted to delineate this thorny distinction—but the *Buckley* Court found that it did so in a way that created a constitutional vagueness problem. Consequently, the Court noted that FECA “must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”<sup>5</sup> In delineating this distinction, the Court dropped the influential footnote 52, which listed “*Buckley’s* magic words”—“express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”<sup>6</sup>

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<sup>2</sup> 424 U.S. 1 (1976).

<sup>3</sup> *Id.* at 14 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>4</sup> *Id.* at 42 (emphasis added).

<sup>5</sup> *Id.* at 44.

<sup>6</sup> *Id.* at 44 n. 52.

The distinction, then, between discussion of issues and discussion of candidates (“express advocacy”) is not new: it has guided campaign finance law for almost forty years. *Buckley’s* distinction between issue speech and candidate speech rests at the core of every modern First Amendment campaign finance case.

The Supreme Court reiterated the importance of the constitutional carve-out for issue speech in *Federal Election Commission v. Wisconsin Right to Life*,<sup>7</sup> explaining its “functional equivalent” test for what speech may be regulated in the same manner as “express advocacy.” *WRTL II* was a challenge to a federal law prohibiting nonprofit corporations from using general treasury funds to pay for electioneering communications. The Court had previously held that this prohibition was not unconstitutional on its face, but the *WRTL II* Court found that it *was* overly broad as applied to Wisconsin Right to Life. In so doing, it highlighted that the burden to demonstrate that speech is subject to regulation as express advocacy or its functional equivalent lies with the state, not the speaker.

Considering the practical difficulty inherent in distinguishing between express advocacy and issue speech, the Court noted that “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”<sup>8</sup> Because the speech Wisconsin Right to Life wished to engage in was not “the ‘functional equivalent’ of express campaign speech,” and “the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy,” the challenged prohibition was “unconstitutional as applied to the advertisements at issue.”<sup>9</sup>

Thus, the Court reiterated that electioneering communications can be regulated in the same manner as express advocacy *only* to the extent that such communications *are its functional equivalent*. This limits such regulation to communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>10</sup>

Thus, the SBM’s assertion that “all advertising in judicial campaigns is the functional equivalent of express advocacy for purposes of MCFA”<sup>11</sup> misunderstands the law. *Buckley* and *WRTL II* both envision ads that mention candidates and yet are not the functional equivalent of express advocacy, and require that the dividing line to be drawn so as to “err on the side of protecting political speech rather than suppressing it.”<sup>12</sup>

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<sup>7</sup> 551 U.S. 449 (2007) (“*WRTL II*”).

<sup>8</sup> *WRTL II* at 457.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 470.

<sup>11</sup> Request at 4.

<sup>12</sup> *WRTL II* at 457.

This is precisely the point: if the state wishes to regulate a particular communication, it bears the burden of showing that the communication is the functional equivalent of express advocacy. Any other rule would inevitably chill protected speech. The SBM attempts to shift this burden by creating a blanket category of “judicially-related speech” that is not countenanced by the statute, and is unsupported by case law.

II. The Michigan Compiled Laws specifically protect issue speech—including speech directed at or on the topic of judges.

a. The statute is clear: not all expenditures on communications are “express advocacy”—issue speech is specifically exempted.

Fortunately for Michiganders—and consistent with the Supreme Court’s campaign finance jurisprudence—the state legislature has seen fit to specifically incorporate the distinction between political speech and issue speech into its campaign finance framework. Therefore, the Secretary should not promulgate a rule contravening the plain meaning of this statute.

And the statute is clear: “[a]n 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” is *not* a regulated expenditure under the campaign finance law.<sup>13</sup> The statute specifically exempts issue speech from regulation, and instead the state’s campaign finance laws only regulate expenditures for express advocacy. The statute does not differentiate judicial officer candidates from other candidate elections—the same rules apply to all.

The SBM requests that the Secretary define all issue speech concerning judicial officers as “the functional equivalent of express advocacy” and therefore subject to regulation as “expenditures.”<sup>14</sup> But the Secretary is bound by the language of the statute, which directly contemplates—and exempts—issue speech from this definition.

The Michigan Supreme Court is quite clear about agency promulgation of rules: “when considering an agency’s statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute.”<sup>15</sup> While the courts do afford deference to an agency’s

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<sup>13</sup> MICH. COMP. LAWS § 169.206(2)(b) (2013) (exceptions to the definition of “expenditure”).

<sup>14</sup> Request at 4.

<sup>15</sup> *SBC Mich. v. PSC* (In re *Complaint of Rovas*), 754 N.W.2d 259, 270 (Mich. 2008).

statutory interpretation, “in the end, the agency's interpretation cannot conflict with the plain meaning of the statute.”<sup>16</sup>

Thus, this office would violate this principle in attempting to regulate any issue speech dealing with the judiciary as an expenditure, because the statute plainly exempts all issue speech from the definition thereof. And where speech expressly advocates the election or defeat of a judicial candidate, then it is—by definition—not issue speech. The SBM’s Request goes beyond the plain meaning of the statute, and the rule it requests would therefore be invalid under Michigan law.

- b. Issue speech aimed at and contemplating judges exists independent of political campaign material—and is consistent with our Nation’s foundational values.

The SBM attempts to get around the clear constitutional and statutory hurdles to regulation of issue ads by arguing that, because judges decide cases, people do not engage in public advocacy on issues facing the judiciary. Thus, the reasoning goes, literally all communications mentioning judges must be deemed the functional equivalent express advocacy. Beyond misunderstanding the concept of express advocacy and its functional equivalent—as set forth in *Buckley* and other decisions—such reasoning is simply and obviously incorrect. Contrary to the assertions of the SBM, citizens often conduct issue campaigns on judicial matters. Just last year, thousands gathered outside the Michigan Supreme Court to voice their opinions about the state’s new emergency manager law. Pictures and press reports vividly depict protestors outside the courthouse, and countless media interviews demonstrate these citizens’s hope that, through their demonstrations, they might influence the Court’s decision—wholly apart from any election.<sup>17</sup>

Similarly, citizens routinely attempt to influence the decisions of federal judges via issue speech such as protests, blog posts, and other forms of communication. The reality is that citizens spend money discussing judges—as well as cases and issues pending in the courts—for myriad reasons and in diverse contexts. Sometimes, citizens blog or otherwise publish substantive commentary on important judicial decisions.<sup>18</sup> Commentary on cases and judges is often used to

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<sup>16</sup> *Id.*; see also *People v. Dowdy*, 802 N.W.2d 239, 258 (Mich. 2011) (“Although this Court accords due deference to an agency’s interpretation of a statute, we grant no deference to an interpretation that contravenes the language of a statute”) (internal citation omitted).

<sup>17</sup> See, e.g., Lynn Moore, *Local protestors organize bus to Supreme Court hearing on emergency manager law*, MLIVE (July 23, 2012) [http://www.mlive.com/news/muskegon/index.ssf/2012/07/local\\_protestors\\_organize\\_bus.html](http://www.mlive.com/news/muskegon/index.ssf/2012/07/local_protestors_organize_bus.html).

<sup>18</sup> See, e.g., Lyle Denniston, *Analysis: History’s lessons on gun rights*, SCOTUSBLOG (Mar. 15, 2008) <http://www.scotusblog.com/?p=6827> (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

raise public awareness of issues. Similarly, it is not uncommon for groups to use past or future judicial decisions as a call for nonprofit fundraising.<sup>19</sup>

Federal judges, who are neither elected, nor subject to popular recall, are heavily insulated from political pressure. Yet the nation has a storied history of protests and demonstrations before the federal courts, including the United States Supreme Court. The marble plaza outside the Nation's high court has been the site of everything from civil rights protests,<sup>20</sup> to demonstrations about the influence of corporations,<sup>21</sup> to protests of the 40-year-old *Roe v. Wade* decision.<sup>22</sup> This is the very discussion of public issues and "government actions" contemplated—and protected—by *Buckley*.<sup>23</sup>

Indeed, the SBM's assertion that "a judge may not constitutionally be influenced by public advocacy" is unsupported and, in any event, impossible to police absent widespread censorship. In *Republican Party of Minnesota v. White*,<sup>24</sup> the Court specifically declined to prohibit judicial candidates from pledging how they would rule on certain types of cases, let alone from being "influenced by public advocacy."<sup>25</sup> Further, judges—even Supreme Court justices—sometimes take into account public opinion when deciding principles of constitutional law.<sup>26</sup> Academic studies tend to show that courts are influenced by their perception of public opinion,

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<sup>19</sup> See, e.g., Operation Rescue, *Here's How You Can Help Operation Rescue Recover the Supreme Court... And STOP ABORTION NOW!*, available at <http://www.operationrescue.org/noblog/here%E2%80%99s-how-you-can-help-operation-rescue-recover-the-supreme-court%E2%80%A6/> (last accessed Sept. 27, 2013) (donation drive to overturn Supreme Court decisions regarding abortion); Public Citizen, *Join the movement to take back democracy!*, available at <http://www.democracyisforpeople.org/> (last accessed Sept. 27, 2013) (petition drive, along with donation link, to overturn *Citizens United v. FEC*, 558 U.S. 310 (2010)).

<sup>20</sup> Bill Mears, *New rules for protests at Supreme Court*, CNN, (June 13, 2013) available at <http://www.cnn.com/2013/06/13/politics/court-protests/index.html> (noting "[t]he grounds outside the U.S. Supreme Court have long been a place for protests, rallies, and other 'expressive events'").

<sup>21</sup> Tony Mauro, *'Occupy the Courts' Protests Hit Supreme Court and Federal Courthouses Nationwide*, THE BLOG OF THE LEGALTIMES (Jan. 20, 2012) <http://legaltimes.typepad.com/blt/2012/01/occupy-the-courts-protests-hit-supreme-court-and-federal-courthouses-nationwide.html>

<sup>22</sup> Stokely Baksh, *Jan. 22 Photo Brief: 40th anniversary of Roe v. Wade, dancing at the Inaugural Ball, self-defense classes for Indian women, blood ivory*, BALTIMORE SUN (Jan. 22 2013) available at <http://darkroom.baltimoresun.com/2013/01/jan-22-photo-brief-40th-anniversary-of-roe-v-wade-dancing-at-the-inaugural-ball-self-defense-classes-for-indian-women-blood-ivory/#2> (collecting photographs of protests at the United States Supreme Court).

<sup>23</sup> See *Buckley*, 424 U.S. at 42.

<sup>24</sup> 536 U.S. 765 (2002).

<sup>25</sup> *Id.* at 788; see also *id.* at 792 (O'Connor, J., concurring) ("the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.")

<sup>26</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 450 n. 64 (2010) (Stevens, J., dissenting) (citing opinion polls on spending in political campaigns).

even if the court does not expressly cite it.<sup>27</sup> Issue speech is an effective means of advocating for general judicial philosophies or temperaments, even when the judges are relieved from political campaigns. That a state chooses to elect its judges is no reason to subject its citizens to greater burdens on their discussions of the pressing issues of the day—many of which are, for better or worse, decided in court.

Similarly, unlike legislatures, courts are nearly always in session. Some important issues may arise during election season and some may not. To allow issue speech concerning judicial decision-making during some times and not others, and regarding judges selected in some ways (election) and not others (appointment), is irrational. More importantly, it finds no support in the applicable statutes.

III. The test for judicial bias articulated in *Caperton* weighs against broadening the definition of “expenditure” to require disclosure of electioneering communications.

Given the above, SBM is forced to rely upon *Caperton v. A.T. Massey Coal Co.*<sup>28</sup> to support its broad theory. As the SBM’s Request notes, the Supreme Court’s ruling in *Caperton* articulates the test for when a judge cannot—consistent with due process—decide a case. The SBM’s characterization of *Caperton*, however, reflects a misunderstanding of its holding. The Request asserts: “*Caperton v. Massey Coal Company* established that a judge who rules in cases involving the judge’s major campaign finance supporter deprives the opposing party of his or her due process right to an impartial court hearing.”<sup>29</sup>

True, *Caperton* held that a particular judge could not, consistent with due process, decide a specific case. There, the CEO of a corporate litigant likely to come before a judge contributed \$1,000 directly to a judge’s campaign, funded \$500,000 worth of independent expenditures in support of that judge, and donated \$2.5 million to a § 527 organization which actively supported that judge’s election.<sup>30</sup> This eclipsed the total amount spent by all other supporters of the candidate and exceeded by 300% the amount spent by the candidate’s own campaign committee.<sup>31</sup> The candidate was elected, and subsequently declined to recuse himself from the case involving the CEO’s company. The Court held that “[o]n these extreme facts the probability of actual bias rises to an unconstitutional level.”<sup>32</sup>

The Court did not, however, make the categorical ruling the SBM’s Request suggests. By contrast, it took pains to recognize that “most matters relating to

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<sup>27</sup> See, e.g., Lee Epstein and Andrew D. Martin, *Does Public Opinion Influence the Supreme Court?: Possibly Yes (But We’re Not Sure Why)* 13 U. PA. J. CONST. L. 263 (2010).

<sup>28</sup> 556 U.S. 868 (2009).

<sup>29</sup> Request at 2.

<sup>30</sup> *Caperton*, 556 U.S. at 837.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 886-87.

judicial disqualification [do] not rise to a constitutional level,”<sup>33</sup> and the resulting removal of the judge from the case was a remedy to “be confined to rare instances.”<sup>34</sup> The Court was careful to note that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal,” and that recusal was only appropriate in *Caperton* because “this is an exceptional case.”<sup>35</sup>

To determine whether a set of facts rises to the level of “exceptional,” courts must apply a multi-factor, fact-specific test, where “[t]he inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”<sup>36</sup> Because electioneering communications are, by definition, not express advocacy, they are not a relevant subject of disclosure under the *Caperton* standard. The multi-factor, fact-specific, case-by-case, and extremely rigorous standard which must be satisfied for the “probability of actual bias to rise to an unconstitutional level,” under *Caperton* would not be furthered in its application or implementation by requiring disclosure of electioneering communications that do not advocate the election or defeat of a candidate—judicial or otherwise.

Finally, the SMB notes that, “[t]o determine whether a campaign expenditure rises to the level where the candidate-beneficiary ought to be disqualified in a future case, the candidate and the public must know where the funds for the expenditure came from.”<sup>37</sup> This point misunderstands recusal. Indeed, if a judge is ignorant of the sources of expenditures that benefitted him—whether such benefit came directly or indirectly, deliberately or incidentally—those expenditures by definition cannot corrupt him. A candidate unaware of the sources of the funds that helped elect him need not be recused, just as a judge whose assets are in a blind trust avoids a conflict of interest by remaining ignorant of those hidden assets.

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<sup>33</sup> *Id.* at 876 (2009) (internal quotations and citations omitted) (alteration in original).

<sup>34</sup> *Id.* at 890.

<sup>35</sup> *Id.* at 884.

<sup>36</sup> *Id.* The dissenters in *Caperton*’s 5-4 decision would also have found that the standard for removal of a judge from a case is extremely high, and only dissented because they did not believe the majority was stringent enough in its analysis. They noted that “[i]n any given case, there are a number of factors that could give rise to a ‘probability’ or ‘appearance’ of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a ‘probability of bias.’” *Id.* at 892-893 (Roberts, C.J., dissenting). Consequently, even on the extreme facts at issue in that case, the dissenters would have declined to “open[ ] the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias.’” *Id.* at 902.

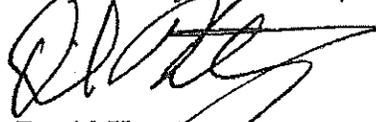
<sup>37</sup> Request at 4.

The distinction between political speech and issue speech is central to the practical application of the First Amendment. From *Buckley* through *WRTL II* and beyond, the Supreme Court has consistently sought to protect issue speech from regulations covering political speech. The Michigan Legislature has recognized this fact, and codified specific protections of issue speech via exemption from the definition of "expenditure." The goal is to protect the citizen's right to speak on governmental affairs, including court activity.

*Caperton's* extraordinary circumstances were just that: extraordinary. They do not suffice to lay aside the plain meaning of the statutory definition of "expenditure." The case simply is not a categorical ruling determining the universal propriety of public discussion of judges, as the SBM asserts.

The Center for Competitive Politics appreciates the Secretary's willingness to consider comments on the State Bar of Michigan's declaratory ruling request. Campaign finance regulations strike at the heart of the First Amendment rights to political speech and association, and must be crafted with great care. The SBM request is based on an incorrect reading of judicial precedents and faulty empirical observations (or more accurately, lack of any actual observation) of the extent to which citizens routinely engage in issue discussion surrounding judges and judicial cases and issues. Accordingly, the State Bar's request should be denied.

Respectfully submitted,



David Keating  
President

September 27, 2013

The Honorable Ruth Johnson  
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**Public Comments by the Brennan Center for Justice and Justice at Stake  
Re: State Bar of Michigan Declaratory Ruling Request Concerning Practical  
and Ethical Implications for Michigan Judicial Candidates of a 2004  
Interpretive Statement by the Secretary of State in the wake of three U.S.  
Supreme Court Decisions**

We write on behalf of the Brennan Center for Justice at N.Y.U. School of Law<sup>1</sup> and Justice at Stake<sup>2</sup> to comment on the request by the State Bar of Michigan for a declaratory ruling regarding interpretation of the Michigan Campaign Finance Act (MCFA) as applied to judicial election campaigns. For more than a decade, the Brennan Center and Justice at Stake have been tracking candidate fundraising and spending on television ads in state supreme court races, compiling estimates of total spending, and analyzing the tone and content of these ads. For the reasons herein, we support the State Bar's request for an updated interpretation of "expenditures" and urge that all electioneering spending in judicial campaigns be considered "expenditures" for the purposes of the MCFA, not merely spending that qualifies as express advocacy or its functional equivalent.

As explained in the State Bar's submission, the Department of State's 2004 interpretation of the MCFA, which exempts so-called "issue advocacy" advertisements from the "expenditures" subject to disclosure, is unnecessarily narrow in scope and out of keeping

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Its research, public education, and advocacy in this area focuses on improving selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches. This submission contains only the position of the Brennan Center and does not purport to represent the position of NYU School of Law.

<sup>2</sup> Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom, so that judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

with more recent Supreme Court precedent.<sup>3</sup> Reform is warranted. In Michigan's Supreme Court elections, political parties and special interest groups are spending record amounts on television ads that are electioneering by any reasonable definition, and the vast majority of this spending is undisclosed. As a result of lax disclosure requirements, Michigan has been buffeted by extreme spending and negative ads whose buyers are shielded by anonymity. Across the country, and in Michigan especially, we have seen negative advertising escalate, and with it, a severe deterioration of the public's perception of their state courts. Without adequate disclosure, judicial impartiality is called into question, as parties to lawsuits lack the information necessary to determine whether to seek recusal based on an adversary's support for a judge.

#### 2012 saw record spending, largely undisclosed, on obvious electioneering in judicial campaigns

In 2012, candidates, parties, and interest groups reported five million dollars of spending on Michigan Supreme Court races.<sup>4</sup> An estimated additional \$8.3 million<sup>5</sup> to \$13.9 million<sup>6</sup> was spent on TV ads that were electioneering under any reasonable definition, but were neither reported to the Bureau of Elections nor disclosed to the citizens of Michigan.<sup>7</sup> This spending was never documented because it fell outside of the current narrow definition of "expenditure," which does not include so-called "issue ads" that are clearly aimed at influencing voters without explicitly advocating a vote for or against a candidate. According to calculations by the Michigan Campaign Finance Network, undisclosed spending on television "issue ads" accounted for approximately 75 percent of all spending in the 2012 Michigan Supreme Court campaign.<sup>8</sup>

Television spending by non-candidates in Michigan far surpassed television spending by non-candidates in every other state in the 2012 judicial election cycle. Estimates for other states with non-candidate television spending in state supreme court campaigns ranged from a low of approximately \$160,000 in Iowa to nearly \$3.1 million in North Carolina—not equaling even half of the lowest estimate for Michigan's non-candidate spending.<sup>9</sup> To

<sup>3</sup> Letter from Brian DeBano, Chief of Staff, former Michigan Secretary of State Terri Land, to Robert LaBrant, former Executive, Michigan Chamber of Commerce (April 20, 2004), available at [http://michigan.gov/documents/sos/SBM\\_9-11-13\\_Declaratory\\_Ruling\\_Request\\_433928\\_7.pdf](http://michigan.gov/documents/sos/SBM_9-11-13_Declaratory_Ruling_Request_433928_7.pdf).

<sup>4</sup> Figure calculated by the Michigan Campaign Finance Network based on information reported to the Michigan Bureau of Elections. Information on file with the Michigan Campaign Finance Network.

<sup>5</sup> ALICIA BANNON ET AL., NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012 (forthcoming October 2013).

<sup>6</sup> Figure calculated by the Michigan Campaign Finance Network based on information reported to the Michigan Bureau of Elections. Information on file with the Michigan Campaign Finance Network.

<sup>7</sup> The different numbers represent differences in two methods of estimating total television spending. The higher estimate, from the Michigan Campaign Finance Network, is based on reports compiled by TV stations across Michigan that logged ads aired in state Supreme Court races. These estimates include a 15 percent agency fee for each advertisement. The lower estimate, by Kantar Media/CMAG, is based on an analysis of ads monitored by satellite technology, and does not include some local cable TV ads. This methodology is utilized to achieve homogeneity of national analysis. These estimates do not include agency fees.

<sup>8</sup> RICH ROBINSON, A CITIZEN'S GUIDE TO MICHIGAN CAMPAIGN FINANCE 2012: DESCENDING INTO DARK MONEY (June 2013), at 31, available at [http://www.mcfn.org/pdfs/reports/MCFN\\_2012\\_Cit\\_Guide\\_final\\_rev.pdf](http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev.pdf)

<sup>9</sup> ALICIA BANNON ET AL., NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012 (forthcoming October 2013).

put Michigan's judicial election spending in further perspective, estimated non-candidate television spending in *every other 2012 state supreme court campaign combined* amounts to \$8,793,090—less than was almost certainly spent by non-candidates in Michigan alone.<sup>10</sup>

As explained by the State Bar in their request for a declaratory ruling, in the context of judicial elections, there is no legitimate purpose for so-called “issue ads” intended to allow the public to influence an elected official. Unlike legislative and executive officials, judges must make decisions based strictly on applying the law to the specific facts of a case, not based on popular opinion or public pressure. Further, any argument that these ads are not intended to influence voters simply strains credulity.

In 2012 Michigan was flooded with negative ads smearing judicial candidates that were obviously aired to influence voters. Even the positive ads aired in Michigan were clearly created to influence Michigan voters in favor of one candidate or another. One ad run by the Michigan Republican Party described Supreme Court Justices Steven Markman and Brian Zahra and Appellate Judge Colleen O'Brien as honest judges with integrity who hold government and special interests accountable on the bench. The ad ended by saying “Tell Markman, O'Brien, and Zahra to keep fighting for Michigan, keep fighting for our jobs.”<sup>11</sup> The ending was crafted to allow the Republican Party to sidestep campaign disclosure laws by avoiding language explicitly imploring Michigan residents to vote for the three candidates – surely they knew Markman, O'Brien, and Zahra must make decisions based only on the facts before them, and not on public pressure. In any event, the ad obviously meant to promote the three candidates.

The Michigan Democratic State Central Committee also ran a number of similar advertisements that were disguised as issue ads, but were clearly intended to persuade Michigan residents to vote for candidates Connie Kelley, Shelia Johnson, and Bridget McCormack. One such ad described Kelley, Johnson, and McCormack as having “zero tolerance for violence against women and kids.” The ad also stated that the women have kept criminals off the street and helped keep kids out of gangs. After describing the positive qualities of these three judicial candidates, the advertisement ended by saying, “Kelley, Johnson, and McCormack. These three protect families.” The Democratic State Central Committee ran a total of six positive ads that were similar to the one described above. Each one described Kelley, Johnson, and McCormack as strong supporters of women, children, and families, and ended with the same line: “These three protect families.”<sup>12</sup> Again, the message was more than clear. These ads were meant to sway voters to vote for judges favored by the Democratic Party.

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<sup>10</sup> ALICIA BANNON ET AL., *NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* (forthcoming October 2013).

<sup>11</sup> *As Michigan Rebuilds* (storyboard), *BUYING TIME 2012: MICHIGAN*, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/as%20Michigan%20rebuilds%20sb.PDF](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/as%20Michigan%20rebuilds%20sb.PDF).

<sup>12</sup> *These Three* (storyboard), *BUYING TIME 2012: MICHIGAN*, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/protecting%20families%201%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/protecting%20families%201%20sb.pdf).

Lack of disclosure fosters extremely negative ads that harm public confidence in the courts

Inadequate disclosure of judicial campaign spending in Michigan judicial elections makes the state more susceptible to negative television advertisements. When ad sponsors do not need to disclose their identity, they are more likely to run harsh attack ads without fear of opprobrium or accountability to voters. Anonymity creates an environment that supports and encourages malicious behavior in judicial campaigns.

Twenty-one percent of all the judicial campaign ads that ran in Michigan in 2012 were negative in tone. Twenty percent of ads run by political parties were negative, and 100 percent of ads run by special interest groups were negative. A total of 3,273 negative ads aired in Michigan throughout the campaign season. This is far higher than any other state, none of which saw more than 2,000 such ads.<sup>13</sup> And the problem is getting worse – the 2012 Michigan Supreme Court campaign was the most negative, most expensive, and least transparent in state history.

Michigan's negative ads were not confined to any one party or ideology, and spanned all outside groups that bought TV time in the 2012 judicial race. The Michigan Democratic State Central Committee ran one attack ad against Supreme Court Justices Steven Markman and Brian Zahra claiming they always side with insurance companies. The ad went on to say that candidate Colleen O'Brien denied benefits to a cancer patient.<sup>14</sup> Another ad by the Democratic State Central Committee accused Justice Markman, Justice Zahra, and Judge O'Brien of protecting child pornographers and child rapists.<sup>15</sup>

The Michigan Republican Party also ran their own attack ads against candidates Connie Kelley, Shelia Johnson, and Bridget McCormack. One ad claimed Kelley was associated with "scandal-ridden Wayne County executive Bob Ficano,"<sup>16</sup> while another ad accused Johnson of having little experience and being a favorite of special interests.<sup>17</sup> The Judicial Crisis Network, a conservative Washington, D.C.-based group, ran a particularly nasty ad

<sup>13</sup> ALICIA BANNON ET AL., NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012 (forthcoming October 2013).

<sup>14</sup> *Insurance Court* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/insurance%20court%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/insurance%20court%20sb.pdf).

<sup>15</sup> *Protecting Children Rev* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/STSUPCT\\_MI\\_MIDSCC\\_PROTECTING\\_CHILDREN\\_REV.PDF](http://www.brennancenter.org/sites/default/files/analysis/STSUPCT_MI_MIDSCC_PROTECTING_CHILDREN_REV.PDF).

<sup>16</sup> *Hardly Tough on Crime* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/hardly%20tough%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/hardly%20tough%20sb.pdf).

<sup>17</sup> *Praised* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/praised%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/praised%20sb.pdf).



updated interpretation will help to strengthen the judiciary and the public's confidence in Michigan's courts.

Respectfully submitted,



Allyse Falce  
Brennan Center for Justice  
161 Avenue of the Americas  
New York, NY 10013



Matt Berg  
Deputy Director of State Affairs  
Justice at Stake  
717 D Street, NW Suite 203  
Washington, DC 20004

# RICHARD D. MCLELLAN

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September 27, 2013

Honorable Ruth Johnson  
Secretary of State  
Attn: Mr. Chris Thomas, Director of Elections  
Bureau of Elections  
PO Box 20126  
Lansing, MI 48901-0726

VIA E-mail

Re: State Bar of Michigan ("SBM") Declaratory Ruling Request ("DRR") Concerning  
Practical and Ethical Implications for Michigan Judicial Candidates of a 2004  
Interpretive Statement by the Secretary of State

Dear Secretary Johnson and Mr. Thomas:

This letter offers written comments concerning a "Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State" submitted by the State Bar of Michigan, an agency of the judicial branch of Michigan state government.

The State Bar of Michigan asks you to answer this question in the affirmative:

Must all payments for communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent?

For reasons set forth in this letter, I urge you not to respond to the DRR, and if you do respond, to interpret the law in the manner the legislature has adopted it, not as revised by the State Bar.

## **1. The Secretary of State May Not Unilaterally Expand the Reach of a Criminal Law Restricting Political Speech**

The State Bar is seeking a ruling that, in effect, you would unilaterally and administratively amend the Michigan Campaign Finance Act ("MCFA") to reflect the wishes of the State Bar. As the State Bar discusses extensively in their DRR, they believe that the present definition of "expenditure," a key definition in the MCFA used to distinguish between regulated and unregulated speech, should be expanded.

MCL §169.206 defines both what “expenditure” is and what it is not:

(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, the qualification, passage, or defeat of a ballot question, or the qualification of a new political party. Expenditure includes, but is not limited to, any of the following...

(2) Expenditure does **not include** any of the following...

(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**. (Emphasis supplied.)

The State Bar would have you read, and presumably enforce the MCFA, as if it read:

(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, the qualification, passage, or defeat of a ballot question, or the qualification of a new political party. Expenditure includes, but is not limited to, any of the following...

(2) Expenditure does not include any of the following:

(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; PROVIDED THAT ALL PAYMENTS FOR COMMUNICATIONS REFERRING TO JUDICIAL CANDIDATES REGARDLESS OF WHETHER SUCH PAYMENTS ENTAIL EXPRESS ADVOCACY OR ITS FUNCTIONAL EQUIVALENT ARE EXPENDITURES.

Another way to look at the State Bar’s scheme is that it asks you to move from subsection (2) the exemption language [“communication...if the communication does not support or oppose a ...candidate by name or clear inference’] to subsection (1), the regulatory subsection, for judicial candidates only.

As proposed by the State Bar, any person paying for a communication referring to a judicial candidate would be subject to the registration, reporting, and penalty provisions of the MCFA.

Under both existing law and the under State Bar’s amendment, an unlawful (meaning not reported) expenditure is subject to the following criminal penalty:

MCL §169.254(4). A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine

of not more than \$5,000.00 or imprisonment for not more than 3 years, or both, or, if the person is not an individual, by a fine of not more than \$10,000.00.

No matter how you look at it, what the State Bar asks you to do is not within the scope of your powers.

Article II, § 4 of the Michigan Constitution gives the legislature, not the secretary of state the power to enact election related laws:

The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

The elected secretary of state and the bureau of elections carry out and administer the laws passed by the legislature and the governor, including the Michigan Election Law, the MCFA, the Lobbyist Registration and Reporting Act, and other laws. The following sets forward the role of the secretary of state under the Michigan Election Law:

MCL §168.32. (1) In the office of the secretary of state, the bureau of elections created by former 1951 PA 65 continues under the supervision of a director of elections, to be appointed by the secretary of state under civil service regulations. The director of elections shall be vested with the powers and shall perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws.

Similarly, MCL §169.215 sets forth in detail the secretary of state's duties with respect to supervision and administration under the MCFA, including issuing rulings and interpretations under the MCFA.

But the power to issue declaratory rulings is limited. MCL §169.215(2) provides, in part, as follows:

A declaratory ruling or interpretative statement issued under this section shall **not state a general rule of law, other than that which is stated in this act**, until the general rule of law is promulgated by the secretary of state as a rule under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, or under judicial order. (Emphasis supplied.)

There is no authority whatsoever for the secretary of state to issue a ruling departing from "that which is stated in [the MCFA]" and expand the reach of the MCFA.

**2. The State Bar is precluded from using compelled dues to engage in partisan political**

**and philosophical issues unrelated to its purpose, including seeking to restrict political speech of others.**

In its Statement of Facts, the State Bar leaves out critical facts:

- a. The State Bar is a government agency whose members are compelled to make payments to the agency as a condition of acting as a lawyer.
- b. In *Keller v the State Bar of California*, 496 US 1 (1993), the U.S. Supreme Court ruled that a bar association receiving compelled dues must stay out of partisan political and philosophical issues unrelated to its purpose. The State Bar is subject to the constraints of the Keller decision.

This purported DRR, with its references to “dark money”, “electioneering” and other terms that are not part of Michigan’s laws, makes it clear that the State Bar is seeking to use the DRR process for ideological purposes. Its aim is clear, to achieve its political goals of silencing or burdening certain voices in judicial elections where the State Bar claims a special interest. Whether the proposals are appropriate or not is a subject for the political processes of the legislature and the State Bar is precluded, as an organization, from engaging in such activity.

The DRR states that the “members of the State Bar of Michigan are interested parties” and later states that “as lawyers and judges, members of the State Bar of Michigan are affected by the 2004 interpretive statement only as it relates to judicial campaigns.”

The State Bar’s document is not a proper declaratory ruling request; it is a political document in an ideological campaign to restrict political speech with which it does not agree. The State Bar’s purpose is to expand the scope of reportable activity administratively, with the attendant discouragement of political speech, and it has a political effect of advancing the relative political impact of lawyers in judicial campaigns.

The proper course is for you to reject the DRR as not meeting the requirements under the Michigan Campaign Finance Act or the Administrative Procedures Act.

**3. The DRR does not set forth a reasonably complete statement of facts necessary for the ruling.**

A DRR, under both the Michigan Campaign Finance Act (“MCFA”) and the Administrative Procedures Act (“APA”) is intended as a method whereby a person may request guidance from an enforcement agency as to the applicability to an actual state of facts.

The State Bar’s DRR does not state an actual state of facts appropriate for a DRR, but is a general statement of the State Bar’s legal views as to the applicability of certain Supreme Court cases covering political communications not outside the scope of the MCFA. As a government agency bound by the Keller decision, the State Bar is prohibited from engaging in campaign finance activities regulated by the MCFA.

It is not requesting a DRR to guide its campaign related conduct. Instead, it is trying to improperly restrict the political speech rights of others by trying to convince the Secretary of State to go outside the Michigan law and impose the State Bar’s version of the law. This

separate political purpose is reflected in the DRR's title requesting a ruling "Concerning Practical and Ethical Implications for Michigan Judicial Candidates." The MCFA does not give the secretary of state authority to give advice on ethical considerations, these are matters properly the responsibility of the Supreme Court.

For many decades, the Michigan election officials have provided guidance to people involved in elections and campaign matters. But the DRR and interpretive rulings have generally focused on the application of laws enforced by the Secretary of State, not on requests to unilaterally impose standards from unrelated federal litigation in place of statutory law. There is no question that the three U.S. Supreme Court decisions cited by the State Bar -- *Federal Election Commission v. Wisconsin Right to Life*, *Caperton v. Massey Coal Company*, and *Citizens United v. Federal Election Commission* -- are significant cases interpreting the potential scope of state election laws. But they do not empower you to unilaterally impose their standards as part of Michigan's law without enactment by the Michigan legislature.

The request should be rejected for failing to state sufficient facts to issue a ruling.

#### **4. The scope of unregulated independent political speech in Michigan has been established by the U.S. Supreme Court in *Citizens United v. Federal Election Commission***

*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is a US constitutional law case, in which the United States Supreme Court held that the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations, or labor unions.

It is clear that the decision applies to the government of Michigan since the Court in the *Citizens* case directly overruled a Michigan case, *Austin v Michigan State Chamber*, which did restrict political independent expenditures by corporations.

The State Bar now seeks to have you ignore the ruling in *Citizens United* and tell the public that "all payments for communications referring to judicial candidates be considered 'expenditures' for purposes of the MCFA." In adopting the MCFA, the legislature chose to treat all elections uniformly. The legislature did not distinguish between political speech concerning executive and legislative candidates and those concerning judicial candidates. That is the law. It is not a subject for your discretion because the State Bar wants a change.

If you feel compelled to respond to the DRR the proper advice is that the definition of "expenditure" in MCL §169.206 is consistent with *Citizens United v. Federal Election Commission* and both the Michigan law and the *Citizens* case treat all candidate elections uniformly without special treatment for judicial candidates.

#### **5. The *Caperton* Case cannot be the basis for administratively changing the scope of Michigan's political speech regulations.**

*Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), is a case in which the United States Supreme Court held that the Due Process clause of the Fourteenth Amendment requires a judge to recuse himself or herself not only when actual bias has been demonstrated or when

the judge has an economic interest in the outcome of the case, but also when "extreme facts" create a "probability of bias."

Recognizing that the case involved "extreme facts," the Supreme Court has already adopted Court Rules to address a potential similar situation in Michigan by including the subject in its disqualification rules.

But the State Bar DRR asks for much more. It is clear that it wants the Secretary of State to interpret the MCFA in a way directly contrary to the law enacted by the legislature. It seeks to impose a new general requirement based on an out of state case that the Court recognized was extreme facts.

This law is clear. It gives persons involved in all forms of political speech a clear line separating political speech subject to the registration, reporting and criminal penalties of the MCFA, on the one hand, and free speech under the First Amendment not subject to the extensive state speech regulatory scheme.

In adopting the MCFA, the legislature chose to treat all elections uniformly. The legislature did not distinguish between political speech concerning executive and legislative candidates and those concerning judicial candidates.

The State Bar's DRR includes the following:

The Department of State's 2004 interpretive statement did not distinguish between political advertisements concerning executive and legislative candidates and those concerning judicial candidates.

No, it did not because a declaratory ruling is required to reflect the law as it is. And an updated declaratory ruling on the same subject would also not distinguish between political advertisements concerning executive and legislative candidates and those concerning judicial candidates because that is not what Michigan law requires, regardless of the Caperton decision.

The State Bar is simply wrong when it urges you to ignore the controlling statutory law in Michigan and rule that unrelated court cases such as Caperton

necessitate(s) clarifying that ruling to exempt advertisements concerning judicial candidates from its scope so that such communications fall within the definition of "expenditure" for purposes of MCFA disclosure requirements.

The 2004 ruling did not exempt advertisements concerning judicial campaigns from its scope. The exemption is provided in the law, and because the law required it then, as it requires it now, a uniform treatment of all political speech was reflected in the 2004 interpretation.

**6. All persons have the right to engage in constitutionally protected speech even with respect to judicial candidates.**

The State Bar's entire theory is that First Amendment protected speech related to judicial candidates is different from other protected speech. The DRR poses the following question:

What other purpose might someone have to make expenditures concerning candidates during a campaign than to urge their election or defeat?

The State Bar then sets about setting up a straw man for the purposes of shooting it down to make their case.

Using the language of court cases, the State Bar describes “authentic issue advocacy” only as an effort to motivate viewers to contact a public official to act on a matter of policy. It goes on to say “such advocacy does not apply to judicial candidates.” The State Bar also proposes “the standard formula for this type of ad.”

The State Bar straw man suggests that the Wisconsin Right to Life case establishes some sort of constitutional “standard” that the First Amendment political speech right only extends to “genuine issue ads” dealing with legislative issues. It goes on to say that because judges do not deal with legislative issues, there can be no “issues” that can be subject of voter communications related to the judiciary.

By deciding itself that “authentic issue advocacy” is limited and that it “does not apply to judicial candidates,” the State Bar suggests that Michigan law must *ipso facto* change to conform to their theory.

But the State Bar is wrong.

For example, many groups picket the U.S. Supreme Court regarding pending cases knowing full well that the Justices are unaffected. But for their own purposes, these groups want to give visibility to their causes. The State Bar position would allow the government to determine what is not a “genuine issue” and ban communications (without registration, recordkeeping, reporting and hiring a lawyer) that doesn’t meet their test.

To answer the State Bar’s question, “What other purpose might someone have?” here are some examples of communications not related to a particular case but might be used during a judicial campaign:

- As a voter, consider the impact of the personal lives of judicial candidates on their fitness for office.
- Don’t forget to vote on the nonpartisan ballot. Judicial races are important.
- Ignore the advertisements listing lawyers and judges supporting judicial candidates. They are a special interest group and the citizens should decide.
- Voters should demand judicial candidates disavow “secret communications” related to campaigns.
- When you vote for judges, vote for candidates that are sensitive to the needs of our community.
- Tell judicial candidates and the board of commissioners to oppose an expensive new courthouse.

All of these communications would be swept up in the State Bar's claim that all "communications referring to judicial candidates be considered 'expenditures'... regardless of whether such payments entail express advocacy or its functional equivalent?"

**Conclusion**

For all of these reasons, I urge you to reject the proposed ruling by the State Bar of Michigan.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Richard D. McLellan". The signature is written in black ink and is positioned to the right of the typed name.

Richard D. McLellan

Copy to: Janet Welch

**Bourbonais, Lori (MDOS)**

---

**From:** Quiroga, Evelyn (MDOS)  
**Sent:** Tuesday, September 24, 2013 10:14 AM  
**To:** 'mayerjohn3373@yahoo.com'  
**Cc:** Sheltroun, Lucinda (MDOS)  
**Subject:** RE: Comment on State Bar of Michigan request for declaratory ruling

John:

Thank you for your email. I have forwarded it on for consideration to the appropriate staff member here at the Bureau of Elections. e

Evelyn Quiroga, Director  
Disclosure Data Division  
Michigan Bureau of Elections  
Phone: 517.335.2790



Follow us on Twitter @MichCFR

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**From:** SOS, Disclosure  
**Sent:** Tuesday, September 24, 2013 10:01 AM  
**To:** Quiroga, Evelyn (MDOS)  
**Subject:** FW: Comment on State Bar of Michigan request for declaratory ruling

Disclosure email.

*Lucinda J. Sheltroun*  
*Bureau of Elections*  
*Phone: 517-335-2659*  
*FAX: 517-373-0941*

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**From:** John Mayer [REDACTED]  
**Sent:** Sunday, September 22, 2013 9:36 PM  
**To:** election@michigan.gov; SOS, Disclosure  
**Cc:** [REDACTED]; [REDACTED]; [REDACTED]  
**Subject:** Comment on State Bar of Michigan request for declaratory ruling

September 22, 2013

The Honorable Ruth Johnson  
Secretary of State  
Executive Office  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48918

Re: Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State in the wake of three U.S.

Supreme Court decisions -- *Federal Election Commission v. Wisconsin Right to Life* (2007), *Caperton v. Massey Coal Company* (2009), and *Citizens United v. Federal Election Commission* (2010).

Dear Secretary Johnson:

It is my privilege to join the State Bar of Michigan in urging you to overrule the 2004 Interpretive Statement and issue the declaratory ruling requested by the State Bar.

The authoritative statement on the practical effects of the 2004 Interpretive Statement on Michigan campaign finance is to be found in the Michigan Campaign Finance Network's *A Citizen's Guide to Campaign Finance 2012: Descending Into Dark Money*--on the Internet at [http://www.mcfn.org/pdfs/reports/MCFN\\_2012\\_Cit\\_Guide\\_final\\_rev..pdf](http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev..pdf)

At page 31, the *Citizen's Guide* highlights the problem at the State level:

*The 2012 Supreme Court campaign was the most expensive and least transparent in history. The major party nominees for the court raised \$3,382,048 in their campaign committees. The political parties and various political action committees reported independent expenditures of \$1,617,884. Candidate focused issue advertising that was not reported to the Bureau of Elections, most of which was sponsored by the state Republican and Democratic Parties, totaled \$13.85 million. The Michigan Campaign Finance Network compiled records of the undisclosed television spending from the public files of state broadcasters and cable systems.*

*The candidates' share of campaign spending, 17.9 percent, was a record low. The unreported spending for television advertisements, 73.5 percent, was a record high. And there certainly was additional spending that was not reported. MCFN has collected 13 different direct mail pieces about the candidates that were paid for by the Michigan Republican Party. Only two of the 13 were paid for with regulated (reported) funds.*

*The practice of high volume, unreported television advertising about Michigan Supreme Court candidates has been a regular feature of campaigns since 2000. Since that time reported spending has totaled \$26.6 million, while unreported television advertising has totaled \$34.7 million. Just 43 percent of all Supreme Court campaign spending has been reported since 2000.*

As the State Bar letter points out, this problem is no longer limited to Michigan Supreme Court elections. *The Citizen's Guide*, at page 35, reports that in the 2012 election:

*The most expensive trial court campaign, by far, was the contest in Oakland County's 6th Circuit. Five incumbents, Judges Leo Bowman, Phyllis McMillen, Denise Langford Morris, Wendy Potts and Michael Warren, faced two challengers, Deborah Carley and William Rollstin, in the contest to fill five seats. The incumbents each raised at least \$100,000 in cash plus a minimum of \$11,000 in-kind support. Rollstin raised just \$11,180 in cash plus \$34,642 in-kind, while Carley raised \$36,875 in cash and \$37,851 in-kind. All five incumbents retained their seats.*

*The remarkable feature of the 6th Circuit campaign was the presence of \$2 million in unreported television issue advertising, sponsored by two DC-based nonprofit corporations, Judicial Crisis Network and Americans for Job Security. The Judicial Crisis Network ads touted*

*the "Rollstin-Carley plan for the court," while Americans for Job Security sponsored attack ads directed at Judge McMillin. Reportedly, there was also voluminous direct mail sponsored by the nonprofits, but there is no way to estimate the amount of that spending. Such unaccountable spending has long been a part of Supreme Court campaigns, but it is new to have this anonymous spending in a trial court campaign.*

It is respectfully urged that the cited Supreme Court decisions, together with the MCFN data discussed above, provide a rock-solid basis for overruling the 2004 Interpretive Statement and issuing the declaratory ruling requested by the State Bar.

Thank you for your consideration. Please contact me if I can be of further assistance to you in resolving this matter.

Sincerely,

/s/ John P Mayer

John P Mayer  
14126 Ziegler Street  
Taylor MI 48180  
734-558-5593

cc: Bruce Courtade  
Brian Einhorn  
Janet Welch

In addition to the above comments, the Department received separate e-mails indicating support of the State Bar of Michigan's request for a declaratory ruling from:

Jim and JoEllen Rudolph

Lawrence Glazer

Janet Boone

Karen Michaels

William Berardo, Esq.

Bob and Johanne Balwinski

Nicholas and Anna Kondak

Barbara Case

Tim Roraback

Kathleen Rollins

Garth McAllister

Douglas McClennen

Walter Thomas Johnson

Ross E. Pechta

Susan L. Johnson

Bill Baedke

Christine Harvey

Gary Kohut

James Gualdoni

Susan Wooley

Paul Rosen

Jennifer Grieco

Carol Hogan

Audrey Bornstein

Mona H. Scott

Don Zimmer

Joan Ferrante

Lisa White

Thomas Pinta

Kathleen Maisner

Rick Whitson

Ron Raspbury

Peter Morgan

George Piner

Deborah D'Arcy