CONSTITUTIONAL ISSUES IN DISCLOSURE OF INTEREST GROUP ACTIVITIES

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INTRODUCTION

The *Call To Action* issued by participants in the December 2000 *Summit on Improving Judicial Selection* declares that "[s]ome activities of special interest groups in recent judicial elections . . . have been pernicious" and recommends consideration of "creative ways, consistent with the right of free speech, in which state rules as to . . . financial disclosure can be applied to outside groups and individuals as well as candidates and political parties."[1] This Paper answers that call by examining the extent to which states may compel reporting of information from groups that independently undertake political activities designed to influence judicial elections.[2]

In 2000, interest group involvement in judicial elections reached a new high—and a new low.[3] The "pernicious" activities that troubled Summit participants were television advertising campaigns conducted principally (although by no means exclusively) by the U.S. Chamber of Commerce ("Chamber") and its affiliated state organizations. Experts estimate that entities other than candidates (including political parties) spent upwards of $16 million in just the five states with the most expensive elections: Alabama, Illinois, Michigan, Mississippi, and Ohio.[4] The advertising resulted in judicial campaigns

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1. *Call To Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1359 (2001).

2. Spending on activities that are coordinated with a candidate is typically treated as a campaign contribution, which may be limited in source and amount and may be subject to reporting requirements. *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 475 (2001) (reaffirming the functional equivalence of coordinated spending and a contribution); Buckley v. Valeo, 424 U.S. 1, 23-59 (1976) (per curiam) (upholding regulation of contributions, defined to include coordinated expenditures).

3. In this Paper, the term "interest group" refers to an entity other than a candidate, a political action committee, or a political party committee.

4. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 862 n.54.

that have been variously described as "nasty,"[5] "covered in muck,"[6] and "pandering to base, ignorant prejudices."[7]

The negative tone of advertising is beyond the reach of regulatory control, and states may not (while the Supreme Court's decision in *Buckley v. Valeo*[8] is still good law) cap independent electoral expenditures. *Buckley* has been interpreted to foreclose mandatory monetary limits on spending in an election, including judicial elections.[9] Moreover, attempts to bar "attack ads" would appear to be classic content restrictions violative of the First Amendment, irrespective of the identity of the sponsor. Unless public outrage causes objectionable interest group ads to backfire—whether against the judicial candidate supported by the group or against the group and its backers—we can therefore almost certainly expect more of the same in elections to come.[10]

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5. *See* Curt Guyette, *Justice at Any Price?*, DETROIT METRO TIMES, Oct. 10, 2000, *available at* http://www.metrotimes.com/editorial/story.asp?id=725.

6. Joe Hallett, *Supreme Court Race Features Outsider Mud*, COLUMBUS DISPATCH (Ohio), June 11, 2000, at 3B.

7. Robert Loeb, Letter to the Editor, *Political Excess a Natural Outcome When Judges Are Elected*, CHI. DAILY L. BULL., Apr. 4, 2000, at 2. For more about the character of advertising, see Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002).

8. 424 U.S. 1 (1976) (per curiam).

9. *See id.* at 39-59 (invalidating mandatory spending limits in federal elections, including caps on independent expenditures); *cf.* Suster v. Marshall, 149 F.3d 523 (6th Cir. 1998) (invalidating mandatory spending limits applicable to Ohio judicial candidates). The Supreme Court has also refused to carve an exception to this rule for spending by political action committees ("PACs"). *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 494-95 (1985) (finding full First Amendment protection for such spending, even though PAC donors have no say in how their funds are used). Moreover, states that want interest group donors to act as a brake on pernicious activity may face constitutional obstacles if they seek to achieve that end by mandating adoption of more democratic internal PAC procedures.

For two reasons, states are also unlikely to restrain skyrocketing spending by imposing limits on contributions to PACs. First, although such limits are constitutional, *see* Cal. Med. Ass'n v. FEC, 453 U.S. 182, 201 (1981), the evidence suggests that they are an ineffective means of restraining spending. *See, e.g.*, FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 158-59 (1992). Candidates operating under contribution limits have been able to raise (and spend) at least as much money as they did before the imposition of caps, by seeking smaller donations from more sources. There are good reasons to promote such small donor fundraising, but reducing overall expenditures is not one of them. Second, even if contribution limits were effective for that purpose, interest groups that do not conduct their activities through PACs involved in judicial campaigns are generally not PACs. Contributions to the interest groups have not been, and perhaps cannot be, limited. Whether or not such groups can be required to form PACs to conduct their advertising campaigns is one of the tricky constitutional issues of first impression raised by the current version of the McCain-Feingold bill. *See generally* McCain-Feingold-Cochran Campaign Reform Bill, S. 27, 107th Cong. (2001).

10. The Chamber has in fact declared that it intends to conduct similar activities during future judicial elections. *See* Katherine Rizzo, *Chamber Ads Failed in Ohio, Worked Elsewhere*, AP

That pressure can be exerted, however, only if the public is informed about the interests behind the ads. To date that information has not been readily available. When the advertiser is the Chamber, the interest served by the ad is reasonably clear. But often the sponsor nominally identified on the air is an entity created only for the campaign, with an innocuous-sounding name like "Citizens for a Strong Ohio" or "Citizens for an Independent Court."[11]

Moreover, interest groups involved in judicial elections have refused to reveal who has contributed to their advertising campaigns, the amounts contributed, or the precise sums expended on the advertisements.[12] Even when the general interest of the sponsor is evident, that additional information may be important. Major donors might be willing to bankroll nasty advertising campaigns as long as their involvement can be concealed, but they may be reluctant to explain their role to shareholders, customers, or other members of the public. In judicial elections, as elsewhere, sunshine is sometimes the best disinfectant.[13]

The question therefore remains whether states may compel interest groups to release information about their contributors and spending in judicial elections, without running afoul of the First Amendment. We argue that such requirements are constitutionally permissible.

NEWSWIRE, Nov. 8, 2000. The Chamber announced at a conference in April 2001 that twelve of its fifteen endorsed candidates won election in 2000. The extent to which its advertising was responsible for that success rate is certainly open to question, but the success is undoubtedly now serving to justify additional campaign involvement. As of August 2001, we already began to see evidence of the Chamber's involvement in the 2001 Pennsylvania Supreme Court election. *See* Josh Goldstein & Chris Mondics, *An Effort to Sway Pa. Court Election*, THE INQUIRER, Aug. 12, 2001, *available at* http://inq.philly.com/content/inquirer/2001/08/12/front_page/JUDGES12/htm?template=aprin.

11. Stations broadcasting paid advertising are required to identify the ad's sponsor. *See* 47 U.S.C. § 317(a) (1994 & Supp. V 1999); 47 C.F.R. § 73.1212 (2001). Some states also impose sponsorship identification requirements for political advertisements. The law governing such requirements is discussed below. *See* discussion *infra* Part IV.

12. In both Mississippi and Ohio, the Chamber filed preemptive actions for judgments declaring the inapplicability of the states' disclosure laws. A decision imposing Mississippi's reporting requirements on the Chamber, *see* Chamber of Commerce v. Moore, No. 3:00-cv-778WS, slip op., at 27 (S.D. Miss. Nov. 2, 2000), is now *sub judice* before the Fifth Circuit. *See* No. 00-60779 (5th Cir. Nov. 6, 2001); *infra* notes 41-50 and accompanying text. In Ohio, the litigation was stayed pending the determination of an administrative complaint about the failure to disclose. *See* Order, Chamber of Commerce v. Ohio Elections Comm'n, No. C2-01-0028 (S.D. Ohio Mar. 5, 2001). When the Ohio Elections Commission finally decided that the Chamber's ads were beyond its jurisdiction, the complainant (and intervenor in the litigation) petitioned to reactivate the case. The motion awaits decision.

13. We are indebted to Roy Schotland for pointing out the applicability of Justice Brandeis' famous point.

I. THE LAW OF CAMPAIGN FINANCE REPORTING[14]

As is usually the case with matters of campaign finance regulation, analysis of the question presented here begins with *Buckley*.[15] In reviewing the 1974 amendments to the Federal Election Campaign Act ("FECA"), the *Buckley* Court specifically considered whether the First Amendment permits the government to compel reporting of information concerning campaign contributions and expenditures.[16] The Court analyzed reporting requirements applicable first to candidates (and political committees) and then to interest groups (and individuals).

With respect to reporting by candidates and committees, the Court began by acknowledging that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[17] But even under the exacting scrutiny required when government regulation significantly encroaches on constitutional rights, the Court recognized three government interests sufficient to outweigh the burdens:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely. . . . The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive . . . .[18]

Second, reporting requirements serve to combat the reality and appearance of corruption by exposing large contributions and expenditures to the light of day.[19] Finally, the reports can provide data that is essential in enforcing limits on contributions.[20] Finding that disclosure was the least restrictive means to achieve these ends, the Court held that candidates and committees could be required to file periodic reports disclosing their finances.[21]

The constitutional analysis is different, however, when the Court considers reporting requirements governing organizations that run electioneering ads *independently* from any particular candidate. Because there is no transfer of

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14. In this Paper, the term "reporting" refers to the process of filing campaign finance disclosure statements with a public agency responsible for collecting the statements and making them available for public inspection. "Reporting" must be distinguished from other forms of disclosure, such as the identification of a sponsor on the face of an ad or during the course of a broadcast. Sponsor identification is discussed below. *See* discussion *infra* Part IV.

15. 424 U.S. 1 (1976) (per curiam).

16. *Id.* at 11.

17. *Id.* at 64.

18. *Id.* at 66-67 (quotations and notes omitted).

19. *Id.* at 67.

20. *Id.* at 67-68.

21. *Id.* at 80-82.

money directly to a candidate, the *Buckley* Court found unpersuasive the anti-corruption rationale for disclosure.[22] The Court nevertheless upheld reporting requirements for independent expenditures as a minimally restrictive means of furthering the government's *informational* interest: "help[ing] voters to define more of the candidates' constituencies."[23]

The question of whether interest groups can be required to report contributions and expenditures for electioneering is therefore easily answered in the affirmative under the rubric of *Buckley*.[24] It is not so simple, unfortunately, to identify precisely what counts as the electioneering subject to such regulation. It is this definitional dispute that underlies the current controversy about interest group advertising campaigns, including those in judicial elections.

II. THE DISTINCTION BETWEEN "EXPRESS ADVOCACY" AND "ISSUE ADVOCACY"

Under *Buckley*, all spending by candidates and political committees can be presumed to be electioneering governed by reporting requirements.[25] Interest groups that are not political committees are another matter. Such groups might engage in electioneering and therefore be subject to regulation, but they might also be involved "purely in issue discussion" and thus fall outside the scope of mandatory campaign finance reporting.[26]

To ensure that FECA's reporting requirements for interest groups were constitutionally applied, *Buckley* narrowly construed the statutory language to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[27] According to the Court, that interpretation ensured that the regulations would apply only to "spending that is unambiguously related to the campaign of a particular federal candidate."[28] Unambiguous electioneering communications contained "express words of

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22. *Id.* at 80.

23. *Id.* at 81.

24. Despite its holding in *Buckley*, the Supreme Court has upheld the right of an individual to distribute anonymous leaflets in a ballot referendum. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995). However, *McIntyre* did not address reporting requirements, and as we argue below, its holding does not apply to interest groups engaged in television advertising campaigns for or against candidates. *See infra* notes 51-57 and accompanying text. The constitutionality of reporting requirements for contributions as low as $100 is firmly established in *Buckley*, and even first-dollar disclosure requirements may be sustained if they are evenhandedly applied to individuals and groups. *See, e.g.*, Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 33 (1st Cir. 1993).

25. *See* 424 U.S. at 79 (construing a "political committee" as an organization the major purpose of which is the nomination or election of a candidate). Political committees under federal law include both interest group PACs and political parties, although special rules apply to political parties.

26. *Id.* at 79.

27. *Id.* at 80.

28. *Id.*

advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[29]

The narrowing construction, which created what has come to be known as the "magic words" test for "express advocacy," saved FECA's reporting requirement from constitutional infirmity. As so interpreted, the requirement was neither "void for vagueness" (insufficiently explicit about the range of expenditures that would be subject to regulation) nor substantially "overbroad" (applicable to political speech that does not contain an electioneering element).[30]

With the narrowing construction came a new set of problems. Indeed, even the *Buckley* Court recognized: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign."[31] A quarter of a century after *Buckley*, interest groups seeking to benefit a candidate's campaign while concealing their backers' identity run advertisements that avoid using "magic words" and claim that they are engaged in "issue advocacy." All but 1.2% of the television ads run by interest groups in the 2000 judicial campaigns fell into that category.[32]

Since *Buckley*, the Supreme Court has only once provided further elaboration of the distinction between express advocacy and issue advocacy. In the 1986 case of *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"),[33] the Court determined that a "Special Edition" of the respondent group's newsletter, which was distributed in advance of the 1978 elections, constituted express advocacy.[34] Among other things, the newsletter carried the title "Everything You Need to Know to Vote Pro-Life," encouraged readers to "vote pro-life," and indicated whether each of some 400 candidates held positions consistent with those of MCFL.[35] The Court concluded:

> The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy.[36]

In other words, in determining whether the interest group had made electioneering expenditures, the Court did not ask only whether the publication used "magic words" explicitly endorsing or opposing a particular candidate.

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29. *Id.* at 44 n.52.
30. *Id.* at 40-44, 77-80.
31. *Id.* at 45.
32. *See* DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 18 (2002).
33. 479 U.S. 238 (1986).
34. *Id.* at 251.
35. *Id.* at 243-44.
36. *Id.* at 249.

Instead, a communication that "in effect" and in "its essential nature" conveyed an explicit directive was deemed sufficient to subject the group to regulation.

Whether "express advocacy" requires the presence of "magic words" is now a hotly contested issue. Courts across the country are split on the issue: most courts have adopted the magic words test, but the Ninth Circuit and several other federal and state courts have upheld more context-sensitive tests for express advocacy.[37] Thus, the extent to which states can regulate advertising lacking magic words depends in part on the jurisdiction in which the elections are conducted.[38]

III. INTEREST GROUP ADVERTISING IN JUDICIAL ELECTIONS

Only two courts have addressed the meaning of express advocacy specifically in the context of judicial elections. In *Osterberg v. Peca*, the Texas Supreme Court did not need to resolve the controversy about "magic words," because the advertisement in question (like the "Special Edition" in *MCFL*) used the word "vote."[39] But the court (following the majority in *MCFL*) nevertheless

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37. *Compare, e.g.*, Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999) (granting preliminary injunction against definition of "express advocacy" in state law that went beyond magic words); FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1061-64 (4th Cir. 1997) (invalidating federal regulation defining express advocacy to include more than magic words); Me. Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996) (per curiam) (same), *with* FEC v. Furgatch, 807 F.2d 857, 864-65 (9th Cir. 1987) (finding express advocacy even without magic words); *State ex rel.* Crumpton v. Keisling, 982 P.2d 3, 10-11 (Or. Ct. App. 1999) (using *Furgatch* as the basis of a contextual definition of "expenditures" subject to Oregon's reporting requirements), *review denied*, 994 P.2d 132 (Or. 2000); Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 4 P.3d 808, 824 (Wash. 2000) (recognizing that an ad without magic words nevertheless was "unmistakable and unambiguous in its meaning, and present[ed] a clear plea for the listener to take action to defeat [the] candidate"); Elections Bd. of Wis. v. Wis. Mfrs. & Commerce, 597 N.W.2d 721, 733 (Wis.) (observing that *Furgatch* provided "an attractive alternative" to the magic words approach), *cert. denied*, 528 U.S. 969 (1999).

38. Connecticut and Oregon currently regulate such advertising. In addition, Mississippi's law has been construed to require disclosure of the Chamber's judicial campaign ads. *See supra* notes 41-50 and accompanying text. Connecticut's law has not been challenged, and Oregon's was upheld in *Crumpton*, 982 P.2d at 10-11.

39. 12 S.W.3d 31, 35-36, 52 (Tex. 2000). In pertinent part, the ad's two screens ran as follows:

CONSIDER THIS:
Judge Peca was chosen by his peers El Paso's outstanding jurist
He graduated Summa Cum Laude.
He worked to reduce his docket for over seven years.
IF THAT'S ENOUGH, VOTE FOR HIM
But, if you want ONE who understands:
The Courthouse exists for the people . . . .
The spirit of the law . . . must be employed for justice . . . .

examined the communication "as a whole and in context" before holding that the ad constituted express advocacy.[40] In *Chamber of Commerce v. Moore*, the Southern District of Mississippi went a step farther by explicitly rejecting the magic words standard in favor of a comprehensive contextual analysis of the ad's "essential nature."[41]

Chamber of Commerce v. Moore involved an estimated $958,000 worth of television advertising broadcast during the 2000 campaigns for the Mississippi Supreme Court.[42] The Chamber's ads spoke in approving terms of four of the nine candidates, but did not use magic words to endorse their election. For example, an ad concerning incumbent Chief Justice Lenore Prather touted her thirty-five years of legal experience and contained the following encomium: "Lenore Prather—using common sense principles to uphold the law; Lenore Prather—putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests."[43]

The Chamber did not report its ads as "independent expenditures," a term defined under Mississippi law as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate."[44] According to the Chamber, the ads were exempt from the state's reporting requirements because they did not contain any of the canonical terms of express advocacy. To head off potential efforts to regulate the advertising, the Chamber went to federal court seeking a declaratory judgment that compelled reporting would violate the First Amendment.

The district court refused, however, to determine the scope of express advocacy in accordance with "the rigid, overly simplistic 'magic words' test of

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Efficiency at the expense of justice cannot be tolerated.

BRING THE COURTHOUSE BACK TO THE PEOPLE!

VOTE FOR HIS OPPONENT.

Id. at 35-36.

40. *Id.* at 52. Neither the concurring nor the dissenting opinion took issue with the majority's interpretation of express advocacy. The majority noted that "a message can be 'marginally less direct' than the examples listed in *Buckley* so long as its essential nature 'goes beyond issue discussion to express electoral advocacy.'" *Id.* (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986)). The court found that the second screen rendered the communication "unmistakable and unambiguous, suggestive of only one plausible meaning," and that the ad's contradictory pleas did "not diminish its essential express advocacy nature." *Id.* at 53 (quoting *Furgatch*, 807 F.2d at 864).

41. No. 3:00-cv-778WS, slip op. at 25-27 (S.D. Miss. Nov. 2, 2000) (appeal pending).

42. The Mississippi Secretary of State arrived at this estimate after surveying television stations. Schotland, *supra* note 4, at 877 & n.137. Before the survey was completed, the press estimated the cost at only $400,000. *See Shakeup on Miss. Supreme Court Called "Unprecedented,"* CLARION-LEDGER (Miss.), Nov. 8, 2000, *available at* http://www.clarionledger.com/news/0011/08/08supremeanal.html. The enormous disparity highlights the difficulty involved in tracking interest group spending without formal reporting requirements.

43. *Moore*, No. 3:00-cv-778WS, slip. op. at 6-7.

44. MISS. CODE ANN. § 23-15-801(j) (1999).

Buckley."[45] Rather, the court found that *MCFL* "moved away from a rigid, talismanic application of *Buckley*'s [magic words test] to an 'essential nature' inquiry."[46] Pursuant to this standard, the court conducted the following analysis of the Chamber's ads:

> Aired at the very time statewide judicial elections were being conducted in Mississippi, the advertisements contain no true discussion of issues. While the advertisements mention "victims rights" and a "common sense judicial philosophy," the advertisements present no elaboration of these points. Instead, while providing only the background and experience of each candidate, the advertisements repeatedly insert the candidates' names between qualification assertions and each advertisement concludes with an emphatic phrase obviously designed to exhort support for the candidates' election to the Mississippi Supreme Court.[47]

The court also noted that "these advertisements are virtually the same as the advertisements being aired by the candidates themselves."[48] Concluding that the ads "simply cannot be regarded as mere discussions of public issues," the court denied the Chamber's request for a declaratory judgment.[49] The district court's decision has now been appealed to the Fifth Circuit and remains *sub judice*.[50]

IV. THE LAW OF SPONSOR IDENTIFICATION

Related to the issue of the applicability of reporting regulations to political communications made by independent groups is the question of whether such groups may be required to disclose their financial sponsors in the

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45. *Moore*, No. 3:00-cv-778WS, slip op. at 25.

46. *Id.* at 25.

47. *Id.*

48. *Id.* at 26.

49. *Id.* at 25, 27. In the few days remaining between the issuance of the decision and Election Day, furious battles ensued over enforcement of the district court decision requiring disclosure and two collateral state court orders enjoining broadcasts of the ads. The complex details of that litigation are not relevant here, except to note that an appeal from the state court decisions is now pending in the Mississippi Supreme Court, *Chamber of Commerce v. Landrum*, No. 2000-CA-2048, *case submitted without oral argument* (Miss. Nov. 6, 2001).

50. The district court opinion has had an impact in Ohio, where the Chamber also ran advertisements during the 2000 judicial elections. Before that opinion was issued, the Ohio Elections Commission had denied, by one-vote margins, petitions filed by advocacy organizations asking the Commission to declare that the Chamber's advertisements constituted express advocacy. On the day before Election Day, however, a panel of the Commission, again by a one-vote margin, found probable cause to submit the question to the full Commission. The Commissioner, who switched his vote in favor of referral, stated that the Mississippi district court opinion had persuaded him to change his view. In April, however, the full Commission voted 4-3 in favor of dismissing the case, a decision that advocacy organizations have appealed in state court, where the matter remains pending.

communications themselves. The only case in which the U.S. Supreme Court has squarely addressed this question is *McIntyre v. Ohio Elections Commission*.[51]

In *McIntyre*, the Court held that Ohio's flat ban on the distribution of anonymous campaign literature violated the First Amendment.[52] The Court's decision rested largely on the identity of the party who had been prosecuted, a lone citizen pamphleteer in a local referendum election. In such a case, said the Court, mandatory disclosure of the author's identity could not be upheld on the ground of the state's interest in an informed electorate. That is, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."[53]

It is questionable whether *McIntyre*'s holding will be extended very far beyond its facts. First, the case involved the communication of a single individual circulating a homemade pamphlet, as opposed to a well-funded interest group conducting a mass media campaign. The Court specifically suggested that sponsorship identification requirements might be appropriate for corporations, even though they were unconstitutional as applied "to independent communications by an individual like Mrs. McIntyre."[54] Second, the election at issue in *McIntyre* was a referendum election where the state's interest in disclosure rests upon "different and less powerful interests" than the interest in guarding against corruption of candidates.[55] Since *McIntyre*, a majority of courts have upheld regulations requiring sponsor identification with respect to electioneering ads in support of or opposition to candidates.[56]

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51. 514 U.S. 334 (1995).

52. *Id.* at 357.

53. *Id.* at 348-49.

54. *Id.* at 354. Justice Ginsburg, in her concurring opinion, also distinguished the case of "an individual leafleteer" from one where "other, larger circumstances [may] require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring).

55. *Id.* at 356; *see also* Malcolm A. Heinicke, Note, *A Political Reformer's Guide to* McIntyre *and Source Disclosure Laws for Political Advertising*, 8 STAN. L. & POL'Y REV. 133 (1997) (arguing that *McIntyre* does not invalidate source disclosure rules applied to groups putting forth large-scale, organized political ads for ballot initiatives and candidate elections).

56. *See, e.g.*, Ky. Right to Life, Inc. v. Terry, 108 F.3d 637, 648 (6th Cir. 1997) (upholding state disclosure statute); FEC. v. Survivial Educ. Fund, Inc., 65 F.3d 285, 293-98 (2d Cir. 1995) (upholding federal disclosure regulations); *cf.* Ark. Right to Life State Political Action Comm. v. Butler, 983 F. Supp. 1209, 1226-30 (W.D. Ark. 1997) (denying plaintiffs' motion for summary judgment on the unconstitutionality of disclosure requirements for independent expenditures for candidate elections), *aff'd on other grounds*, 146 F.3d 558 (8th Cir. 1998), *cert. denied*, 525 U.S. 1145 (1999); Griset v. Fair Political Practices Comm'n, 23 P.3d 43 (Cal. 2001) (reversing, on technical grounds, judgment invalidating sponsor identification requirement and reinstating prior California Supreme Court decision upholding the requirement); Seymour v. Elections Enforcement Comm'n, 762 A.2d 880 (Conn. 2000) (upholding state disclosure statute), *cert. denied*, 121 S. Ct. 2594 (2001). *But see* Stewart v. Taylor, 953 F. Supp. 1047, 1055 (S.D. Ind. 1997) (discounting the distinction between candidate elections and referenda); Doe v. Mortham, 708 So. 2d 929, 934-35

Sponsor identification requirements interpreted to apply to genuine issue advocacy may not fare as well. Recently, the Second Circuit invalidated disclosure requirements that applied to any "political advertisement[]" that "expressly or implicitly advocate[d] the success or defeat of a candidate" and thus extended to "advocacy with respect to public issues."[57] The definitional dispute with respect to reporting of expenditures for "express advocacy" may thus replicate itself in the context of sponsor identification requirements. And the problem remains, as we noted earlier, that the name of a sponsor may disclose little of any value to the voters.

V. POSSIBLE LINES OF ACTION

There would appear to be several possible courses of action open to secure additional disclosure of interest group contributions and expenditures for advertising in judicial elections that studiously avoids using magic words. First, disclosure proponents could seek to enforce existing reporting requirements under the authority of *Osterberg* and *Moore*. Advocates are now pursuing this strategy with respect to advertising run by the Chamber in the 2000 Ohio Supreme Court elections.

Jurisdictions that have already adopted a contextual approach to the definition of express advocacy would obviously be the most promising venues for such actions. But affirmative litigation in jurisdictions that have not yet considered the matter should be considered as well. Moreover, courts that have adopted the magic words test could be urged to reconsider their decisions in the special context of judicial elections.

For the purposes of regulating interest group advertising, judicial elections may be distinguished from ordinary elections on two grounds.[58] First, as Justice Potter Stewart recognized: "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."[59] Indeed, the Supreme Court has held that litigants are constitutionally entitled to proceed before "a neutral and detached judge."[60] The heightened interest in the impartiality of the judiciary—in reality and in appearance—has justified impositions upon core First Amendment activity that would be impermissible in other contexts.

(Fla. 1998) (striking requirement that name and address of sponsor be disclosed, while upholding requirement that advertisement state "paid political advertisement").

57. Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000).

58. For further discussion of the differences between judicial candidates and candidates for other elective office, see Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

59. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

60. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); *see also* Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Trust of S. Cal., 508 U.S. 602, 617-18 (1993) (stating that litigants are entitled to a judge free of influences "which might lead him not to hold the balance nice, clear and true").

For example, in *Cox v. Louisiana*,[61] the Supreme Court upheld a state statute that prohibited "pickets or parades in or near a building housing a court" if such activity is conducted with "the intent of interfering with, obstructing, or impeding the administration of justice."[62] The speech restriction was permissible because observers might believe that raucous demonstrations outside of a court would exert influence upon the process of justice taking place inside.[63] The government was entitled to counteract this perception because it may "properly protect the judicial process from being misjudged in the minds of the public."[64]

Courts have also upheld restrictions upon the activities of judicial candidates themselves. As Judge Posner has said: "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."[65] Thus, states may forbid judicial candidates from making promises as to how particular cases will be decided and may legitimately limit their First Amendment rights in other ways.[66] If the government can regulate the actual *content* of judicial candidate speech in furtherance of its interest in maintaining the integrity of the judicial process, a showing that extensive *independent* activity in judicial campaigns threatens public confidence in impartial justice might well justify disclosure of interest group campaign finances to a greater extent than in elections generally.

A second basis for distinguishing judicial elections from other elections lies in the nature of the contest. Judicial candidates are forbidden by codes of judicial conduct from staking out positions on issues that may come before the court. The claims of interest groups to be engaged in "a mere discussion of public issues that by their nature raise the names of certain politicians" should therefore be regarded with extreme skepticism.[67] Advertising about judicial candidates is, to the contrary, electioneering in its essential nature.

Proponents of disclosure might also consider a legislative strategy, if existing reporting requirements do not govern the advertising in question. After all, *Buckley* did not foreclose the option of drafting new laws that impose disclosure requirements, while avoiding the vagueness and overbreadth concerns raised by FECA. This approach is the one currently being pursued in Congress, with the

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61. 379 U.S. 559 (1965).

62. *Id.* at 560.

63. *Id.* at 565.

64. *Id.*

65. Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) (invalidating overbroad canon of ethics that limited judicial campaign pledges).

66. Most recently, the Eighth Circuit upheld Minnesota's limits on the ability of judicial candidates to make personal solicitations for campaign contributions and to engage in a variety of partisan activities. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 862-63, 883 (8th Cir.) (citing cases recognizing the difference between judicial candidates and candidates for other elective offices), *cert. granted*, 122 S. Ct. 643 (2001).

67. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

McCain-Feingold and Shays-Meehan bills.[68] A bill on that model would require reporting of communications that refer to a clearly identified candidate and that are broadcast during a specified period before an election. The bright line established by the test eliminates vagueness concerns, and research into the character of advertising in judicial elections demonstrates that the standard would not be substantially overbroad.[69] This approach is not without constitutional risk, but in the context of judicial elections, it may have an increased likelihood of success.

Other strategies have also been suggested to ensure that tests following the McCain-Feingold model are solicitous of First Amendment interests. For example, the bright-line test could be drafted to create only a presumption of reportable electioneering. The burden could then be placed on the state to prove with clear and convincing evidence that any group rebutting the presumption was in fact attempting to influence the outcome of the election. Securing such evidence would admittedly be difficult, but not impossible. Groups could not mail out solicitations for funds to mount a campaign for or against a judicial candidate and then claim to be engaged in issue discussion. They could not claim to be involved in mere "educational" efforts and then celebrate the success of the advertising campaign in terms of the number of endorsed candidates who won election—as the Chamber did this past April.[70]

Alternatively, or in conjunction with the rebuttable presumption, groups insisting that their advertising was a mere discussion of public issues that by their nature raise the names of certain judicial candidates, rather than an effort to influence the outcome of an election, could be given the option of filing a statement to that effect. Voluntary filers of such statements would be automatically exempt from reporting requirements, unless the state could muster proof that the statements were false. Assuming that most people see a difference between finding legal loopholes in the system and affirmatively lying to public authorities, the statements might promote more effective disclosure even if groups had no inculpatory mailings or post-election celebratory announcement to betray their true intent.

Just what information the new legislation would seek to have disclosed, and precisely what level of spending would trigger disclosure requirements, are matters more of policy than of constitutional jurisprudence. We know of no litigation since *Buckley v. Valeo* challenging the level of spending set to trigger the obligation to report in the first place, and as we noted earlier, states have a great deal of discretion in setting the monetary thresholds for contributions that trigger reporting of a donor's identity.[71] Clearly, the spending threshold should be set at a level that will capture serious players about whose involvement voters

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68. *See generally* McCain-Feingold-Cochran Campaign Reform Bill, S. 27, 107th Cong. (2001), Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. (2001).

69. CRAIG B. HOLMAN & LUKE P. MCLOUGLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 72-73 (Brennan Ctr. 2001).

70. *See supra* note 10.

71. *See supra* note 9 and accompanying text.

could be expected to care, but in our view, there is no absolute number or mathematical formula that will yield the "right" answer.[72] Any state seeking to draft new legislation will also face a host of questions about when, where, and how to disclose campaign financing, the details of which are beyond the scope of this Paper.[73]

Without enforcement actions or legislative initiatives, useful disclosure will be difficult to obtain. The press might be able to ferret out some information about the financial backers of interest groups ads, as it did in the 2000 elections, but information that can be obtained in this way will almost certainly be incomplete and may not become available until after the election is over. Investigative reporting, while very much to be encouraged and obviously constitutional, is therefore likely to be far less effective in creating incentives to change interest group conduct in judicial races.

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72. Richard Briffault argues that the appropriate threshold for disclosure should be the point at which an expenditure has a reasonable likelihood of affecting the outcome of a particular election—perhaps as high as five percent of the average expenditures of the winning candidate in the previous two or three elections for the particular office. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1788 (1999). In our view, the informational interests at stake suggest that the threshold might be well below that point. Frequently, it is the cumulative impact of moderate spending by a variety of related interests that has the potential for influencing outcomes. But we need information about the sources of that spending before we can assess what the influences are. That being said, we agree with Professor Briffault that the thresholds in many jurisdictions could be substantially raised and that using substantial thresholds mitigates constitutional concerns about expanding the scope of reporting requirements. *See id.* at 1788-89.

73. For a discussion of these questions, see WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS, at ch. 8 (Deborah Goldberg ed., Brennan Ctr. 2000), which is available in hard copy from the Brennan Center for Justice and is posted on the Center's website: www.brennancenter.org/programs/prog_ht_manual.html.