

Comment of the Michigan Campaign Finance Network Regarding the Request for a Declaratory Ruling by Robert S. LaBrant, dated February 19, 2010

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Interest of the Michigan Campaign Finance Network

The Michigan Campaign Finance Network is a nonprofit, nonpartisan organization that conducts research and provides public education on matters of money in Michigan politics. The organization values transparency, accountability and integrity in Michigan electoral and policy-making processes.

The Challenge to the Department of State

Monitoring money in politics is a unique area in election administration. Where money is spent to influence the outcome of elections, the public has a well-substantiated right to know whose money is being spent, so it can make an informed evaluation of the political speech it is hearing. The public also has a right to monitor matters of campaign spending, officeholder conduct and policy development for signs of corruption. If disclosure of political disbursements is insufficiently penetrating, the public may lose its ability to exercise the level of oversight necessary to protect our democracy.

The Department of State has an opportunity to end a decade of obfuscation and deception in Michigan political campaigns with the Declaratory Ruling that has been requested by Mr. LaBrant. The United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), has provided the Department a rock-solid constitutional foundation on which to define a robust campaign finance disclosure regime. If the Department fails to seize this opportunity, it is likely to be the final nail in the coffin of transparency, accountability and, indeed, integrity in Michigan election campaigns.

Disclosure Must Be Inclusive

The questions asked in Mr. LaBrant's request focus on the newly won rights of corporations to participate in Michigan's state elections. They ask about spending rules for corporate entities and the disclosure requirements for those activities. It is critically important that rules for disclosure apply to all election related spending, not simply a narrow new subset of campaign activity.

For the past decade, electioneering communications that could be described as candidate-focused “issue” advertisements have been a major feature of Michigan election campaigns. These communications have conveyed messages such as: A judicial candidate is soft on crime; A group of judicial candidates is in the pocket of special interests; A gubernatorial candidate is a job creator; A gubernatorial candidate is a job destroyer; A judicial candidate is unqualified for the bench; A judicial candidate can’t judge based on the facts of a case because he’s been asleep on the bench, and so on. All of those advertisements were designed to define the character, qualifications, or suitability for office of the candidates they featured. All of those advertisements studiously avoided the ‘magic words’ of express advocacy from *Buckley v. Valeo*, 424 U.S. 1, at 44, fn 52 (1976). There are no records of those advertisements in the Department’s campaign finance reporting system.

For the past several election cycles, the Michigan Campaign Finance Network has collected data on the spending for those candidate-focused electioneering communications from the public files of the television broadcasters and cable systems of this state. Our estimate, based on the data we have collected, is that there has been \$45 million worth of such advertising during the past decade, including: \$11.6 million in the 2002 gubernatorial campaign; \$18.1 million in the 2006 gubernatorial campaign; and, \$14.3 million during Supreme Court campaigns from 2000 through 2008, exceeding the amount raised by the Supreme Court candidates in their campaign committees. Those estimates are conservative and likely to be significantly lower than actual spending because they do not include spending data for radio advertisements.

It is our assumption that there are no records of those tens of millions of dollars worth of candidate-focused advertisements because the prevailing interpretation of the definition of a campaign expenditure in this state is dependent upon the presence of *Buckley’s* ‘magic words’ of express advocacy: “vote for,” “vote against,” “support,” “defeat,” and the like. That interpretation is a relic that ignores a decade of U.S. Supreme Court campaign finance decisions.

In *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. 449 (2007), the U.S. Supreme Court partially overturned the ban on corporate spending for electioneering communications in the weeks immediately preceding a federal election that was part of the Bipartisan Campaign Reform Act (BCRA) of 2002. In an ‘as-applied’ challenge, the Court recognized that there is such a thing as an authentic issue advertisement that should be exempt from BCRA, but in so doing the Court also upheld the concept of the functional equivalent of express advocacy. *Buckley’s* magic words need not be present “if an advertisement is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” 551 U.S. 449, _____. The functional equivalent of express advocacy is a term that matches well with the definition of an expenditure in the Michigan Campaign Finance Act, Section 6(2) (b), which defines an expenditure by exclusion of “communication that does not support or oppose a ballot question or candidate by name or clear inference.”

Clear inferences of support or opposition for a candidate can be drawn from the functional equivalent of express advocacy. *Buckley's* magic words should not be the definitive test of a reportable expenditure.

Furthermore, in view of *Citizens United v. Federal Election Commission*, the question is no longer one of permissibility of corporate spending for express advocacy, the functional equivalent of express advocacy or authentic issue advocacy. The Court's decision made allowance for all varieties of corporate independent spending in support or opposition to candidates, whether expressly stated or by inference. However, in Part IV of *Citizens United*, the Court held that government has an interest in providing the electorate with information about the sources of spending for election related communications, so citizens can make informed decisions in the political marketplace. **Plaintiff Citizens United claimed that disclosure requirements should apply only to the functional equivalent of express advocacy and the Court emphatically disagreed.** From *Buckley* through *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003), through *Wisconsin Right to Life* and *Citizens United*, the United States Supreme Court has upheld strong disclosure requirements. Even if disclosure has a chilling effect on an entity's political speech, the public's interest in knowing whose speech it is hearing is a higher order interest than that of a corporate aggregator of contributions that wants to provide anonymity to its donors. This is true even if the corporate political speaker utters no magic words of express advocacy.

Consider the actual example of the 2008 Michigan Supreme Court campaign. The candidates' campaigns and reported independent expenditures totaled \$3.7 million. Unreported and undisclosed "issue" advertisements by the Michigan Chamber of Commerce and the political parties totaled \$3.8 million. Literally, over half the money spent in the campaign was off the books, and the contributors to the Chamber and the parties had absolute anonymity.

This is particularly insidious in a Supreme Court campaign in light of the case of *Caperton v. Massey Coal Company*, 556 U.S. ___ (2009). In that case, the U.S. Supreme Court ruled that extraordinary spending by a campaign supporter of a West Virginia Supreme Court candidate created a probability of bias when the beneficiary of the campaign largesse heard an appeal case involving his supporter. The Court ruled that the litigant's campaign support deprived his legal opponent of his Due Process right to an unbiased judicial hearing. The Michigan Supreme Court has adopted a disqualification rule for itself to handle such eventualities, but if half the campaign spending is off the books, as it was in the 2008 Michigan Supreme Court campaign, participants in cases can't know when they rightfully should ask a justice to disqualify himself because of a probability of bias. It is damaging to the public's shared belief in impartiality of the judiciary to allow contributors to entities engaged in such campaign spending to hide behind the identity of the aggregator of funds.

Following are representative samples of the \$3.8 million worth of "issue" advertisements from the 2008 Michigan Supreme Court campaign that are not disclosed in the Department's campaign finance reporting system. In numerous showings of these ads, we

have yet to encounter a viewer who did not draw a clear inference of opposition to a candidate from them.

From the Michigan Republican Party:

<http://www.youtube.com/watch?v=lJIM378R8LY>

From the Michigan Democratic Party:

<http://www.youtube.com/watch?v=yMdoBAqAJ9U&NR=1>

From the Michigan Chamber of Commerce:

<http://www.youtube.com/watch?v=AEItXypyA8g>

In *Wisconsin Right to Life v. FEC*, the Court reviewed the test of authentic issue advocacy as it exempted Wisconsin Right to Life's advertisements from the BCRA ban on corporate funds. It noted that WRTL's advertisements referred to a legislative issue at hand, and WRTL sought to exhort the public to lobby the public officials named in the advertisement with respect to the matter; and there was no attempt to define the candidate's character, qualifications or fitness for office in the ads. The 2008 Michigan advertisements fail those tests of authentic issue advocacy. There is no legislative matter in the Michigan advertisements, and judges and justices are not lobbyable officials under Michigan law. All three advertisements do seek to define the candidates' character, qualifications or fitness for office: The Republican Party ad says, "Newspapers call Diane Hathaway unqualified for the Supreme Court;" The Democratic Party ad says, "Taylor was voted the worst judge on the Supreme Court," and it provides a checklist of negative attributes; the Chamber of Commerce ad displays a graphic with Diane Hathaway's photograph and a large-print message saying, "Diane Hathaway – Dangerous Rulings," while the narrator intones, "Hathaway, dangerous rulings."

All of this is to say, **the Department's Declaratory Ruling must be expansive enough to require reporting of all candidate-focused electioneering communications, and disclosure of the ultimate sources of financing for those communications.** If the Department fails to do so, corporations will continue to support their candidates and oppose their political opponents by anonymously contributing to the political parties and nonprofit corporations such as the Michigan Chamber of Commerce and Michigan Civic Educational Fund, so they can spend without transparency or accountability for the actual sources of the money behind the speech.

Rules of Disclosure Must Be Comprehensive

Mr. LaBrant's scenario for a Chamber PAC III gives a clear starting point for inquiring as to the new rules of the campaign finance disclosure environment, inasmuch as it focuses on a single-purpose political committee. The rules affecting entities interacting with Chamber PAC III and its counterparts are equally critical. If robust disclosure rules do not apply to contributors to the new class of corporate-funded political committees, and, in turn, to their contributors, corporate supporters of candidates and ordinary influence

peddlers who are seeking anonymity will simply set up a system of Russian dolls – shells within shells – to avoid disclosure of their activity.

A new class of committees

Committees such as Chamber PAC III should constitute a new class of committee under the Michigan Campaign Finance Act. This class of committees must be prohibited from making contributions to candidates, since they will be fed by contributions from corporate entities, and they must be prohibited from making contributions to political or independent committees, as currently defined, since those committees are allowed to make direct contributions to candidates.

Any expenditure Chamber PAC III makes should be reported, whether it contains a message of ‘express advocacy,’ or not. All contributions to the committee should be disclosed, regardless of how the contribution will be used. Notice should be given to any potential contributor to Chamber PAC III, including the Michigan Chamber of Commerce, that its contribution will be used for electioneering purposes, and its contributions are, therefore, subject to disclosure rules that require information as to the ultimate source of the contribution.

Chamber PAC III should be required to file regular quarterly reports of contributions to, and expenditures of the committee. Any contribution to the committee after the regular report immediately preceding an election and through Election Day should be reported within 24 hours. Any expenditure for electioneering communications or independent expenditures less than 20 days before an election should be reported within 24 hours. Any electioneering communications or independent expenditures that are more than 20 days prior to an election should be reported within five days of the expenditure.

Committees of this corporate class should be free to make contributions to other committees of this class, ballot committees or political parties. Such contributions to political parties should be used by the recipient party in a segregated committee or account within the party that identifies that it uses corporate funds and does not make contributions to candidate committees. The contributions to such a political party committee or account should be reported in accordance with the same schedule as that in effect for other corporate electioneering entities. All expenditures made with such contributions should be disclosed as well.

Rules for donors

Any 501 (c) (4), 501 (c) (5) or 501 (c) (6) nonprofit multipurpose corporation that makes a contribution to Chamber PAC III should be required to make its contribution from a segregated committee or account maintained by the corporation for purposes of electioneering communications or independent expenditures supporting candidates. Any donor to that committee or fund should be given notice that its contribution will be used for electoral purposes and it is subject to disclosure rules that require information as to the ultimate source of the contribution. A nonprofit corporate donor to another corporate donor committee should report contributions to, and expenditures from a segregated

committee or account established for electioneering purposes, or it should report all of the corporation's receipts and expenditures, whichever it prefers to do.

Donor committees of this type should be required to make regular quarterly reports to the Department as to their contributions and expenditures. Any contributions to the corporation's political committee or account after it has filed its quarterly report that precedes an election should be reported within 24 hours, as is required for existing political committees.

In the event a nonprofit multipurpose corporation chooses to make its own electioneering communications or independent expenditures, those expenditures that are made less than 20 days before an election should be reported within 24 hours. Electoral communications more than 20 days before an election should be reported within five days.

Profit-making corporations, whether privately held or publicly held, that contribute to Chamber PAC III or a nonprofit donor corporation, should disclose their contributions to the Department and their shareholders on a schedule that is the same as that in effect for nonprofit corporations. In the event a profit-making corporation chooses to sponsor its own electioneering communications or independent expenditures, it should disclose its activity to the Department and its shareholders within 24 hours, if the electoral expenditure is within 20 days of the election it seeks to influence. If the electoral communication is more than 20 days before the election, the expenditure should be reported to the Department and the corporation's shareholders within five days.

Disclosure of the type suggested here is not onerous to the corporate entities who wish to exercise rights of political speech in election campaigns. As an example, selected pages from the Michigan Chamber of Commerce's Form 990 tax returns that correspond to the election campaigns of 2004, 2006 and 2008 are included with this comment to illustrate that the type of bookkeeping suggested here is already operational for the Chamber. On its 2004 Form 990, the Chamber shows "Iss Adv Special Dues" of \$1,445,411. On the 2006 and 2008 returns, it shows "Issue Advocacy Program" expenses of \$3,598,368 and \$3,274,194, respectively. The 2006 return notes that, "Special membership assessments are provided for the issue advocacy program." The 2008 return says that, "The Michigan Chamber of Commerce from its general treasury makes issue advocacy advertising expenditures." In summary, the Michigan Chamber's electioneering moneys are from its general treasury, but they are raised through a special process and there is already a separate accounting for the receipt and expenditure of those funds. The disclosure suggested in this comment merely makes public already existing internal accounting, so the public knows who is speaking through the Chamber's megaphone.

In the event a multipurpose corporation such as the Chamber makes a contribution to a corporate electioneering committee that is in addition to moneys raised for electioneering purposes, and the contribution is drawn exclusively from the regular dues of its members, the additional contribution could be characterized as being from the general treasury of the contributor, rather than naming individual dues payers.

Conclusion

Since 2000, Michigan's weak campaign finance regulations have allowed more than \$45 million worth of television campaign advertisements to go unreported. There is no record of that spending in the state campaign finance reporting system. The advertisements carried disclaimers, as required by state law, but there is no record of who gave the money that paid for those advertisements to the entities named on those disclaimers. The voters of Michigan were deprived on any knowledge of who paid for some of the most widely noted state campaign advertisements of the decade.

In its recent decision in *Citizens United v. Federal Election Commission*, the United States Supreme Court ruled that corporations are now free to make independent expenditures supporting or opposing candidates for public office. In the same case, by a vote of 8-1, the Court ruled that corporate entities that sponsor electioneering communications or independent expenditures may be required to disclose the contributors whose money paid for the electioneering communications, whether the communications use words of express advocacy, or not. In its Opinion, the Court said,

“The 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.” *Citizens United v FEC*, Slip. Op. at 55 (Jan.21, 2010), 558 U.S. ____ (2010) .

It is important for shareholders of corporations to know about the corporation's political contributions and expenditures, so they can make sure management is operating the corporation in shareholders' interest. Particularly, institutional investors, such as public pension funds and mutual funds, may find political activity undertaken by management of a publicly-owned corporation to be antithetical to shareholder value and profitability. However, if political contributions and expenditures are not publicly disclosed, shareholders are not able to hold management accountable for its actions. As the case of Meijer, Inc. in Acme Township illustrates, this can be the case even for a privately held corporation.

The U.S. Supreme Court acknowledges that disclosure may have a chilling effect on some speakers. However, it has recognized that citizens' right to know whose political speech they are hearing takes priority over a speaker's interest in remaining anonymous or hiding behind the identity of a fund aggregator.

Roberts S. LaBrant has asked the Department of State for a Declaratory Ruling to define rules for how campaign entities using corporate funds can operate and how their activity must be disclosed.

The Michigan Campaign Finance Network has offered suggestions for provisions of a Declaratory Ruling that would serve the public interest by bringing real transparency and accountability to state election campaigns, while avoiding onerous requirements for corporate entities that wish to engage in electioneering activity.

If the Department's Declaratory Ruling fails to create rules that bring authentic transparency and accountability to state campaigns, the malevolent campaign finance shell game that has concealed donors' identities and deceived the voters of this state for the past decade is likely to grow relative to the size of the disclosed campaigns. That would be very harmful to democracy.

The Department should do the right thing and craft a Declaratory Ruling that establishes a robust campaign finance disclosure regime and restores transparency, accountability and integrity to Michigan election campaigns.