STATE ETHICS COMMISSION
ADVISORY OPINION
S.E.C. 2010-05

Whether Advisory Opinion No. 2001-32 is still valid so that the Georgia Ethics in Government Act (the "Act") does not apply to activity that is limited to independent spending that does not include express words of advocacy for or against a clearly indentified candidate.

ADVISORY OPINION

The Center for Individual Freedom (the "Center") has requested this Opinion to determine if the State Ethics Commission has changed its position on the regulation of independent spending that does not include express advocacy of an identified candidate or a political result. In its Advisory Opinion No. 2001-32, the Commission stated that the independent committee provisions of the Act were intended to reach groups which raise and expend funds to expressly advocate the election or defeat of a particular candidate. The statutory language "to advocate or defeat" as explained by the Commission was an acknowledgment and adoption of the express advocacy standard as outlined in Buckley v. Valeo, Secretary of the United States Senate, et al., 424 U.S. 1, 80 (1976).

As of this date, the express advocacy standard remains to be the standard under which independent expenditures are regulated in this State. The Commission therefore answers this request for advisory opinion in the affirmative; that is, yes at this time, Advisory Opinion No. 2001-32 remains to be the current advice from the Commission.

The Commission may adopt changes to this Advisory Opinion in the future upon the adoption of subsequent Commission rules regarding the regulation of independent spending.

Prepared by Stacey Kalberman, Executive Secretary
April 5, 2011

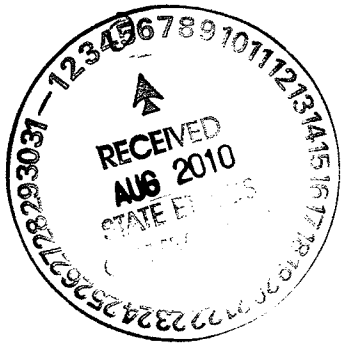
2010-05

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com



August 2, 2010

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

State Ethics Commission of Georgia
200 Piedmont Avenue, SE
Suite 1402 - West Tower
Atlanta, GA 30334

Post Mark Date
August 2, 2010

Re: Advisory Opinion Request

Dear Commissioners:

On behalf of our client, the Center for Individual Freedom (the "Center"), we are requesting confirmation that Advisory Opinion No. 2001-32 is still valid and that the Georgia campaign finance laws do not apply to activity that is limited to independent spending that does not include express words of advocacy for or against a clearly identified candidate.

The Center is a nonpartisan, nonprofit organization whose mission is to protect and defend individual freedoms and rights guaranteed by the U.S. Constitution. Its goals, principles, and activities are more fully described at its Internet website www.cfif.org. The Center is a corporation organized under the laws of the Commonwealth of Virginia and operates under § 501(c)(4) of the Internal Revenue Code. Its headquarters address is 917-B King Street, Alexandria, Virginia 22314.

The Center has a history of speaking out on public policy issues and vigorously defending its right to do so in federal courts and elsewhere. *See, e.g., Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 658 (5th Cir. 2006); *Ctr. for Individual Freedom v. Corbett*, No. 07-2792, 2008 WL 2190957, at *1 (E.D. Pa. May 5, 2008); *Ctr. for Individual Freedom v. Ireland*, No. 1:08-00190, 2008 WL 1837324, at *7 (S.D. W.Va. Apr. 22, 2008).

The Center is exploring its ability to communicate with members of the Georgia general public through mass media communications that may refer to clearly-identified candidates for state office, but will not expressly advocate anyone's election or defeat. Specifically, the communications will eschew words such as "vote for," "defeat," or "reelect." *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 (1976). If it proceeds with the communications, the Center will not coordinate its communications with any of the identified candidates or with their opponents.

On June 29, 2001, the Commission issued Advisory Opinion No. 2001-32 concluding that a not-for-profit 501(c)(4) organization was not required to register and report as an "independent committee," Ga. Code Ann. § 21-5-3(15), because the

organization's proposed communications did not include express words of advocacy pursuant to *Buckley v. Valeo*. The Advisory Opinion explained that the operative phrase in the definition of "independent committee," i.e., "affecting the outcome of an election," suffered from the same vagueness that the Supreme Court of the United States addressed in *Buckley*. Following *Buckley*'s guidance, the Advisory Opinion narrowed the statutory language to apply only to express candidate advocacy.

Since then, the Supreme Court has issued three decisions regarding independent spending in connection with elections. The first, *McConnell v. FEC*, 540 U.S. 93 (2003), approved a new federal concept to regulate political speech known as an "electioneering communication." *McConnell* stressed, however, that it was not undercutting *Buckley's* vagueness holdings. The new standard it approved was "neither vague nor overbroad" and "raises none of the vagueness concerns that drove our analysis in *Buckley*." *Id.* at 190-194.[1]

The United States Courts of Appeals have agreed. The Fifth Circuit in *Center for Individual Freedom v. Carmouche* explained:

> *McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague [disclosure] statute....
>
> To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the [Louisiana campaign finance statute] and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the [Louisiana campaign finance statute] to express advocacy, we adopt *Buckley*'s definition for what qualifies as such advocacy.

---

[1] The "electioneering communication" provision applies to speech that refers to a clearly identified candidate by radio or television within 30 days of a primary election or 60 days of a general election and is directed to the candidate's electorate. 2 U.S.C. § 434(f)(3). The challenge to the "electioneering communication" provision in *McConnell* case was not a vagueness challenge, but primarily an unconstitutional overbreadth challenge. 540 U.S. at 697.

449 F.3d 655, 665 (5th Cir. 2006) (citing *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

The second Supreme Court decision, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), was an as-applied challenge to the "electioneering communication" provision that was facially challenged in *McConnell*. The Court in *WRTL* explained that *McConnell* upheld the "electioneering communication" provision because it regulated the "functional equivalent" of express advocacy and the challengers "had not carried their heavy burden of proving" that the provision "was facially overbroad and could not be enforced in *any* circumstances." 551 U.S. at 466 (internal quotations omitted). The Court concluded, however, that the advertisements before it did not amount to the "functional equivalent of express advocacy" because they were "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70.

The Court was clear that its analysis in this as-applied challenge was limited to speech that otherwise satisfied "the brightline requirements" of the "electioneering communication" provision. *Id.* at 475 n.7. Furthermore, the Court cited throughout its opinion *Buckley*'s recitation of the First Amendment harm that results when speech is regulated by vague statutes. *Id.* at 467-69, 474 (citing *Buckley*'s explanation of how vague statutes can result in unconstitutional regulation of speech based on intent and effect).

The third Supreme Court decision, *Citizens United v. FEC*, 130 S.Ct. 876 (2010), was a challenge to the federal prohibitions on corporate independent expenditures for express advocacy and "electioneering communications." The Court struck down the prohibitions, but upheld the attendant reporting requirements. 130 S.Ct. at 913-14. The Court relied on *Buckley*'s explanation of the government's interest in disclosure, *id.* at 914, which concluded that disclosure obligations may not be vague and must provide speakers with a brightline standard. 424 U.S. at 78-80. The speech before the Court in *Citizens United* – independent expenditures for express advocacy and "electioneering communications" – satisfied this requirement and did not require the Court to address vagueness.

None of the above-described Supreme Court cases disturb *Buckley*'s requirement that regulation of political speech, including disclosure requirements, must provide clear brightline guidance. Rather, all three cases approvingly cite *Buckley*. These precedents require that in the absence of a clear legislative standard like the federal

"electioneering communication" provision, vague statutory phrases used to regulate political speech must be narrowed to apply only to precisely-worded standards like the express advocacy standard of *Buckley*, or must be struck down as unconstitutional. *See* 424 U.S. at n.52.

Georgia has not enacted an "electioneering communication" statute or any other similarly precise legislation to regulate independent political spending. Accordingly, Advisory Opinion No. 2001-32 properly applied *Buckley*'s narrowing construction to the phrase "affecting the outcome of an election." Intervening Supreme Court cases and Georgia laws do not alter the Advisory Opinion's outcome.

On July 15, 2010, the Commission issued Advisory Opinion No. 2010-02 which reaffirmed Advisory Opinion No. 2001-32 by stating:

> If an expenditure does not expressly advocate the election or defeat of a clearly indentified candidate, then it is not by definition campaign related and is not reportable under the Act ....

However, Advisory Opinion No. 2010-02 also states:

> Persons, PACs or independent committees which make expenditures solely to engage in issue discussion (*Buckley*, supra at 79) when there is no specific mention of a candidate or identifiable reference to a candidate, are not required to report such expenditures under the Act....

It is certainly true that a communication that does not reference a candidate would not constitute express advocacy of a candidate and, therefore, could not be regulated by the campaign finance laws. This, however, is not the test articulated by *Buckley* and Advisory Opinion No. 2001-32 which require that a communication use explicit words to expressly advocate the election or defeat of a clearly identified candidate in order for it to be subject to disclosure or any other campaign finance regulation.

We respectfully request an advisory opinion confirming that Advisory Opinion No. 2001-32 remains valid and that the Georgia campaign finance laws do not apply to communications that do not use explicit words of express candidate advocacy.

Sincerely,

Jan Witold Baran
Caleb P. Burns

2010-05
Supplement

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

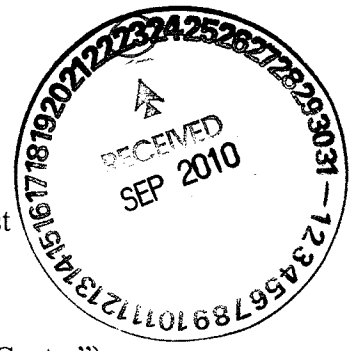
www.wileyrein.com

Post Mark Date
Sep 20, 2010

September 20, 2010

Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

State Ethics Commission of Georgia
200 Piedmont Avenue, SE
Suite 1402 - West Tower
Atlanta, GA 30334



Re: Supplement to August 2, 2010, Advisory Opinion Request

Dear Commissioners:

On behalf of our client, the Center for Individual Freedom (the "Center"), we are submitting this Supplement to our August 2, 2010, Advisory Opinion Request. During the September 2, 2010, Commission meeting, Commissioner Alexander sought clarification on the extent to which the "functional equivalent" of express advocacy concept related to the Center's request. In short, the "functional equivalent" of express advocacy concept is immaterial to the vagueness issue raised in the request.

The Supreme Court of the United States has held that the government may burden political speech that is express advocacy or its "functional equivalent." However, any such burden, including disclosure requirements, must be clearly defined to satisfy the heighted vagueness standards that apply in the First Amendment context. Accordingly, any regulation of political speech – be it regulation of express advocacy, the "functional equivalent" of express advocacy, or any other political content the government may constitutionally regulate – must be described in terms that are clear, precise and objective. The Center's request relates to the vagueness of existing Georgia campaign finance laws. This vagueness issue is separate and distinct from the question of the other types of political speech, e.g., the "functional equivalent" of express advocacy, that Georgia could constitutionally regulate with an appropriately clear statute. No such other statute exists under Georgia law.

1. Vague Statutes Must be Narrowed to Apply Only to Express Advocacy

The Supreme Court has explained that speech about how we are governed and those who govern lies at the very core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 44-45, 47-48, 71 n.85. Requiring those who speak on such topics to disclose their funding sources is a substantial burden on that core speech. *Id.* at 64. The First Amendment demands exceptional clarity of legislation burdening core speech. Where ordinary economic or social activity is regulated, little is lost by steering well clear of forbidden activity that is not clearly proscribed. In that context, due process ordinarily is satisfied if a statute gives "adequate notice" of what should be avoided.

Id. at 77. But speech concerning how we govern ourselves is one of our most "precious freedoms," *id.* at 41, the regulation of which requires heightened precision and "an even greater degree of specificity." *Id.* at 77 (internal quotations omitted). The reason is simple: to avoid any risk that speakers will "hedge and trim" and "steer far wider" of speech that possibly may trigger regulation. *Id.* at 41 n.48, 43, 78-79. In short, vagueness burdens core speech to which legislation may not lawfully apply. *Id.* at 79-80.

The Supreme Court in *Buckley v. Valeo* addressed two facially vague federal campaign finance provisions. The first provision imposed a dollar limit on spending "relative to a clearly identified candidate." *Id.* at 41-42. The lower court had tried to cure the phrase's vagueness by narrowing the expenditure limit to speech "advocating the election or defeat of a candidate." *Id.* at 42. But that narrowing construction did not "eliminate the problem of unconstitutional vagueness." *Id.* Speakers still could not be confident what enforcers might conclude about implied meanings or subjective understandings or purposes. *Id.* at 42-47. *Buckley* held the provision's unconstitutional vagueness could "be avoided only by reading [it] as limited to communications that include explicit words [that] in express terms advocate the election or defeat of a candidate." *Id.* at 43-44.

The second vague federal provision addressed in *Buckley* required disclosures with respect to "expenditures" "for the purpose of influencing" an election. *Id.* at 77. This statutory language posed "similar vagueness problems" to the provision first discussed. *Id.* at 79. To prevent similar needless burden on core speech, the Court also construed this vague provision to apply to "communications that expressly advocate" by using explicit words such as "vote for," "elect," "support," or "cast your ballot for." *Id.* at 80 & n.108 (citing n.52). Thus, with respect to provisions limiting or burdening core speech, including disclosure provisions, *Buckley* rejected vague standards that could turn on subjectively inferred meanings or purposes, and demanded an explicit and objective express advocacy standard.

A decade after *Buckley*, the Supreme Court addressed a federal provision burdening speech "in connection with" an election. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986) ("*MCFL*"). However, there was no precise and objective definition under federal law of the required "connection." The Court held "in connection with" to be vague pursuant to *Buckley*. *Id.* at 248-49. To cure the vagueness, the Court construed "in connection with" narrowly to mean explicit words of express advocacy for the election or defeat of a clearly identified

candidate. *Id.* Thus, *MCFL* endorsed *Buckley*'s vagueness holding, including its demand for explicit and objective criteria.

2. Statutes That Are Not Vague May Regulate the "Functional Equivalent" of Express Advocacy

Congress eventually decided that the narrowing construction employed in *Buckley* and *MCFL* to save legislation from vagueness did not encompass many ads that functioned as electoral advocacy but avoided explicit wording. To regulate ads functionally equivalent to express advocacy, Congress imposed spending and disclosure burdens on "electioneering communications," a new category to which it gave the following detailed, objective, and precise definition: (a) broadcasts in certain media during (b) defined pre-election time periods that (c) referred to clearly identified candidates and (d) were targeted to specified numbers of voters where the identified candidates were running. *See FEC v. McConnell*, 540 U.S. 93, 194 (2003) (discussing 2 U.S.C. § 434(f)(3)(A)(i)).

The Supreme Court in *McConnell* held that the electioneering communication provision was facially valid. First, it was not vague. Its precise, detailed, and objective statutory definition simply "raises none of the vagueness problems that drove our analysis in *Buckley*." *Id.* Thus, the dispositive issue became whether the government could justify burdening the content that the clear definition encompassed. That was a substantive issue of overbreadth and narrow tailoring, not vagueness.

The Court found that because many ads encompassed by the new standard were the "functional equivalent" of express advocacy, the reason for regulating express advocacy accepted in *Buckley* also justified burdening those ads. *McConnell*, 540 U.S. at 205-06 ("The justifications for the regulation of express advocacy apply equally to ads aired during [the electioneering communication] periods if the ads are intended to influence the voters' decisions and have that effect.") That was sufficient to establish that the standard was not *facially* overbroad and was narrowly tailored. *Id.* at 207. *McConnell* left for another day the issue of whether the electioneering communication standard could be overbroad *as applied* to a situation where specific communications were not the "functional equivalent" of express advocacy.

That day came in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL*"). The ads at issue unquestionably fell within the statute's explicit

electioneering communication definition—they were ads referring to candidates in their home jurisdictions broadcast shortly before elections—but they addressed a policy question unrelated to the candidates' campaigns. The Court accepted *McConnell*'s holding that the statute was facially valid, but it held that the statute's prohibition was unconstitutional as applied because the ads in question were not the "functional equivalent" of express advocacy. *Id.* at 464-65, 476-77.

Like *McConnell*, *WRTL* involved an overbreadth and narrow tailoring rather than a vagueness challenge. The Court stressed that its holding that the statute could not be applied to ads that were not the "functional equivalent" of express advocacy only affected speech that already met the facially clear and valid definition of electioneering communication. 551 U.S. at 474 n.7. That definition provided the precise standard demanded by *Buckley* to survive a vagueness challenge. Thus, *WRTL* did not in any way diminish the First Amendment's heightened standard of facial clarity for such statutes.

The Supreme Court's most recent pronouncement, *Citizens United v. FEC*, 130 S.Ct. 876, 915 (2010), also did not involve any vagueness issues. *Citizens United* held that reasonable disclosure—as opposed to prohibitions—could be required of all electioneering communications, whether or not they were the "functional equivalent" of express advocacy. In so doing, the Court examined the disclosure provision under the slightly lower standard of justification—"exacting" rather than "strict" scrutiny—that applies where speech is burdened by disclosure obligations, but not banned outright. The Supreme Court held that, as to all electioneering communications, the government's informational interests were sufficient to satisfy the "exacting scrutiny" test applicable to disclosure requirements. *Id.* at 915-16.[1]

Nothing in *McConnell*, *WRTL*, or *Citizens United* suggests that disclosure statutes may be more vague than *Buckley* and *MCFL* had allowed. *Buckley* applied the same express advocacy standard to both disclosure requirements and expenditure limits.

---

[1] The approach by the Supreme Court in *Citizens United* was entirely consistent with the approach taken in *Buckley*. After *Buckley* addressed the threshold vagueness issue, it proceeded with its analysis of the substantive First Amendment claim that disclosure obligations impaired First Amendment rights. 424 U.S. at 80-81. The Supreme Court used the same "exacting" scrutiny standard to conclude in *Buckley*, as it did in *Citizens United*, that the government's informational interests overcame the First Amendment harm. *Compare Buckley*, 424 U.S. at 64, 80-81 with *Citizens United*, 130 S.Ct. at 914. The only difference between the two analyses was that *Citizens United* did not address the threshold vagueness issue discussed in *Buckley* because the federal electioneering communication provision before the Court in *Citizens United* was not vague.

424 U.S. at 76-80. In a case brought by the Center, the Fifth Circuit similarly applied *Buckley*'s express advocacy standard to a Louisiana disclosure statute. *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665-66 (5th Cir. 2006).

3. Georgia Does Not Have a Clear Statute to Regulate the "Functional Equivalent" of Express Advocacy

As noted in our original request, Georgia has not enacted a statute that has the clarity of the federal electioneering communication provision. If Georgia had a clear electioneering communication statute, it could regulate express candidate advocacy as well as its "functional equivalent." *See Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (*McConnell* "states that *legislatures* may employ standards other than a bright-line distinction between express and issue advocacy as long as they are precise in regard to the types of activities that will subject an individual or group to regulation") (emphasis in original). However, Georgia has no electioneering communication statute. Commissioner Alexander recognized as much during the September 2, 2010, Commission meeting when he qualified his comments by stating that his concern may not be with the proposed response to our request, but with Georgia law.

* * *

In sum, any regulation of political speech must be precise, clear, objective and free from vagueness. The content of the political speech regulated – be it express advocacy, the "functional equivalent" of express advocacy, or some other type of political speech that the government may constitutionally regulate – does not alter this constitutional command. Georgia law does not contain a statute that satisfies this requirement. Rather, it regulates political speech "affecting the outcome of an election." Ga. Code Ann. § 21-5-3(15). The Commission correctly determined in Advisory Opinion No. 2001-32 that this standard was unconstitutionally vague and imposed *Buckley*'s express advocacy narrowing construction. Intervening Supreme

Court cases and Georgia laws do not alter the Advisory Opinion's outcome which we respectfully request the Commission to reaffirm.

Sincerely,

Jan Witold Baran
Caleb P. Burns