No. 02-305

In The Supreme Court of the United States

MIKE MOORE, Attorney General of Mississippi, and ERIC CLARK, Secretary of State of Mississippi,

Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA , CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IOWA, LOUISIANA, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NORTH CAROLINA, OKLAHOMA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS, THE NORTHERN MARIANA ISLANDS AND PUERTO RICO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment permits States to classify as "express electoral advocacy," and thereby subject to campaign finance disclosure requirements, thirty-second television advertisements that are entirely devoted to endorsing a candidate's qualifications for office.

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INTEREST OF THE *AMICI* STATES

The States of Arizona, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Michigan, Minnesota, Missouri, Nevada, North Carolina, Oklahoma, Utah, Vermont, Washington, West Virginia, and Wyoming and the Commonwealths of Massachusetts, the Northern Mariana Islands and Puerto Rico ("*amici* States") seek to protect a public interest of first-order importance: the ability to enforce meaningful campaign finance regulations, including disclosure requirements, with respect to unambiguous endorsements of political candidates by corporations, unions, PAC's, and all varieties of other "special-interest" organizations.

Although this Court upheld the constitutionality of disclosure requirements with respect to "express advocacy" of a candidate's election, *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976) (per curiam), the Fifth Circuit's decision in this case has emasculated such disclosure requirements of any practical effect. The Fifth Circuit adopted a definition of "express advocacy" that requires that a campaign advertisement "contain words that exhort viewers to take specific electoral action for or against [a candidate]." Pet. App. at 14a. This excessively narrow definition would exclude a whole range of unambiguous endorsements of a candidate's election. For example, "Smith is the candidate most qualified to serve" is a form of express advocacy that Smith should win the election, yet it would not qualify as express advocacy under the Fifth Circuit's definition because it lacks "words that exhort voters to take specific electoral action." Organizations wishing to endorse candidates without disclosing the amount (or sources) of their expenditures for these explicit endorsements can easily do so under the Fifth Circuit's definition simply by omitting

any words of exhortation. In this way, the Fifth Circuit's definition renders ineffective a State's effort to require disclosure of expenditures for express electoral endorsements.

The interests of the *amici* States in this case are distinct from the interests of the United States in its defense of the new Bipartisan Campaign Reform Act of 2002 (BCRA). That Act contains a definition of "electioneering communication" that differs from the "express advocacy" standard that this Court articulated in *Buckley,* which many States have enacted into their own campaign finance statutes. (A list of 26 States with statutes that either have been drafted or construed to conform to the "express advocacy" standard is contained in the Appendix to this brief.) Consequently, regardless of this Court's eventual disposition of the BCRA litigation, the *amici* States have a distinct and pressing need for this Court to determine whether the Fifth Circuit – in conflict with *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 487 U.S. 850 (1987) – has misconstrued the First Amendment by constraining the States to an unduly restrictive definition of "express advocacy."

ARGUMENT

There is no doubt that this case is worthy of the Court's review. It presents a square conflict on a First Amendment question of great national importance: whether campaign advertisements that explicitly endorse a candidate's qualifications for office may be regulated as "express advocacy" of the candidate's election, even if those advertisements do not contain words of exhortation (*i.e.*,

words "that exhort the viewer to take specific electoral action for or against a particular candidate," Pet. App. at 10a). As the Petition explains, different circuits and state supreme courts would decide the identical facts differently, being at odds with each other concerning the permissible scope of "express advocacy" under the First Amendment. Pet. at 20-21. The undisputed facts of this case, which involve four television advertisements that are devoted exclusively to extolling a particular candidate's qualifications for office, present an ideal record for resolving this important First Amendment question. Moreover, there are no procedural obstacles or difficulties that would make this Court's review of this case problematic.

Thus, the critical question concerning the appropriate disposition of the Petition involves the relationship of this case to the pending litigation over the constitutionality of BCRA, the new federal campaign finance statute. This BCRA litigation is under expedited consideration by the three-judge district court in *McConnell v. Federal Election Commission*, CIV. No. 02-583 (consolidated actions). Because Congress has provided for a direct appeal to this Court in section 403(a)(3) of BCRA, the Court needs to consider whether plenary review of this case would be duplicative of its review of the BCRA litigation. If it is, then the Court should simply hold this case in abeyance pending the ultimate resolution of the BCRA litigation.

For the reasons that follow, however, plenary review of this case would *not* merely duplicate the Court's consideration of the BCRA litigation. Not only is the First Amendment question here distinct – and deserving of its own independent consideration – but also plenary review of this case will aid the Court's consideration of the First Amendment challenges to BCRA. "On occasion a petition

for certiorari may be held . . . until some event takes place that will aid or control the determination of the matter," including "an imminent" decision in a related case, and "[s]uch postponement may come about on the motion of a party or on the Court's own motion." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 311 (8th ed. 2002) (citations omitted). Likewise, two related cases before the Court, even when not consolidated for argument, may be scheduled for argument "in tandem." *Id*. at 683. Consequently, the *amici* States respectfully urge the Court to grant the Petition here and schedule this case for argument in tandem with argument in the BCRA litigation.

1. This Court's Review Is Necessary to Permit States to Enforce Their "Express Advocacy" Statutes.

The Fifth Circuit has adopted an interpretation of the First Amendment that requires the scope of an "express advocacy" statute to be confined so narrowly as to be essentially unenforceable as a practical matter. The Court should grant review to clarify that *Buckley* does not require such an interpretation.

When *Buckley* upheld the constitutionality of a disclosure requirement applicable to "express advocacy," the Court did not contemplate that this disclosure requirement would be essentially meaningless. On the contrary, the Court in *Buckley* upheld a disclosure requirement with respect to the category of "express advocacy" precisely because the Court thought that this disclosure requirement would substantially serve the "informational interest" of voters concerning the identity and extent of a candidate's support or opposition. *Buckley*, 424 U.S. at 81.

The Fifth Circuit thus misconstrued *Buckley* when it squarely ruled: "communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* and *MCFL*[1] unless they *also contain words that exhort viewers to take specific electoral action for or against the candidates*." Pet. App. at 14a (emphasis added). To make its holding even clearer, the court of appeals added: "favorable statements about a candidate do not constitute express advocacy, *even if the statements amount to an endorsement of the candidate*." *Id*. at 16a (emphasis added). Consequently, a whole range of communications that expressly advocate in favor of a candidate's election are excluded from the Fifth Circuit's definition:

> 1. "Chief Justice Smith is the best qualified candidate and deserving to hold this high office."
>
> 2. "Chief Justice Smith has served our State for six years with distinction. Chief Justice Smith is a model of integrity, fairness, and leadership. Chief Justice Smith should sit right where he is for another six years."
>
> 3. "Chief Justice Smith is everything our State would want in a Chief Justice. We are unqualified in our endorsement."

One can easily imagine additional examples, including any number of slight variations to the advertisements in this

[1] *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*").

case: "Chief Justice Lenore Prather – the best for Mississippi"; "Chief Justice Prather – she's the one for us"; and so forth.

The Fifth Circuit's excessively narrow definition of express advocacy has already started to wreak havoc with the enforcement of campaign finance regulations around the country. For example, in Ohio, the U.S. Chamber of Commerce has broadcast television advertisements comparing the two candidates seeking the same seat on the Ohio Supreme Court. One of these comparative advertisements divides the television screen in half, listing (and announcing) the positive attributes of one candidate and the negative attributes of the other. The advertisement explicitly asks viewers to "compare" the two candidates and concludes by emphasizing that there are "big differences" between the two.[2] Yet, citing the Fifth Circuit's decision in this case, the Chamber of Commerce has argued that its comparative advertisements in Ohio cannot be considered "express advocacy" because they lack words of exhortation synonymous with "vote for" or "vote against." Based on this argument, moreover, the Ohio Elections Commission has held that it cannot enforce that State's campaign finance regulations, including disclosure requirements, with respect to these advertisements, thereby rendering these regulations unenforceable.[3] It

[2] The storyboard for this comparative advertisement is included in the Appendix to this brief.

[3] Litigation concerning the Chamber's comparative advertisements in Ohio is pending before the Ohio Court of Appeals. *Common Cause/Ohio v. Ohio Elections Commission*, Ohio Court of Appeals, 10th District (Franklin County), No. 02AP-439 (and related cases).

contradicts all common sense to say that an advertisement comparing the qualifications of the two candidates competing for the same office, declaring one to be vastly superior to the other, is *not* "express electoral advocacy" subject to disclosure, but that is precisely what the Chamber of Commerce is now arguing in Ohio based on the reasoning of the Fifth Circuit's decision here. Given the circuit and state court split on the permissible scope of express advocacy under *Buckley*, *see* Pet. at 20-21, similar litigation is occurring or will occur in those States that have drafted or construed statutes to conform to *Buckley's* "express advocacy" standard.

Review of the Fifth Circuit's decision, therefore, is necessary to restore common sense to the concept of "express advocacy" and to permit States to enforce their "express advocacy" statutes with respect to unambiguous endorsements of a candidate's election (whether or not those unambiguous endorsements also include words of exhortation). The Fifth Circuit itself recognized that its decision was "counterintuitive" and contrary to common sense, but felt compelled by *Buckley* to render its nonsensical decision. Pet. App. 17a. This Court, however, never intended the concept of "express advocacy" to be inconsistent with common sense, as the Court readily confirmed in *MCFL*, 479 U.S. at 249.

2. The First Amendment Question Here, While Related to an Issue in the BCRA Litigation, Is Sufficiently Distinct to Merit Separate Consideration.

Although the Court will address First Amendment issues in the BCRA litigation that are similar to the issue in this case, the Court should nevertheless grant review in

this case because Mississippi's "express advocacy" statute is narrower than BCRA.

BCRA contains a new definition of "electioneering communication" that encompasses any television advertisement that identifies a candidate for federal office, occurs within sixty days of a general election (or within thirty days of a primary), and is broadcast to viewers within the electoral territory where the candidate is running for office. BCRA § 201(a) (to be codified at 2 U.S.C. § 434(f)(3)(A)(I)). BCRA also contains a fallback definition of "electioneering communication" in the event that this Court holds the primary definition unconstitutional. The fallback definition embraces any television advertisement that "promotes or supports a candidate or attacks or opposes a candidate . . . (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Id*. (to be codified at 2 U.S.C. § 434(f)(3)(A)(ii)). Both definitions have been challenged as unconstitutional by the plaintiffs in *McConnell*. (The *McConnell* plaintiffs include the U.S. Chamber of Commerce, Respondent here.)

The constitutional challenge to the two definitions of "electioneering communication" in BCRA raises First Amendment questions closely related to the First Amendment question here. BCRA requires disclosure of the amount and sources of expenditures for "electioneering communications," as defined by the Act. BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(2)). Thus, the BCRA case – like this one – involves the task of drawing the line between political advertisements that may be subject to disclosure requirements because they support or oppose

candidates and those issue-discussion messages for which disclosure may not be mandated because they do not discuss candidates. *See Buckley*, 424 U.S. 60-84.

Thus, if this Court upholds the constitutionality of either definition of "electioneering communication" in BCRA, the Fifth Circuit's decision should be vacated and this case remanded for further consideration, because both definitions in BCRA are broader than the "express advocacy" statute that Mississippi seeks to apply to the four unambiguous endorsements of candidates in this case.

If this Court were to invalidate both BCRA definitions, however, review of the Fifth Circuit's decision here becomes even more imperative because the Fifth Circuit's express advocacy standard renders the States and the federal government unable to enforce any meaningful disclosure requirement. Reversal of the Fifth Circuit's decision is necessary to make clear that States may apply their "express advocacy" statutes to unambiguous campaign advertisements like those in this case.

Accordingly, regardless of the result of the BCRA litigation, this Court should grant certiorari – and give plenary consideration of the First Amendment question in this case – in order to review the Fifth Circuit's definition of "express advocacy" and, thus, to resolve the existing lower-court conflict over whether the First Amendment excludes explicit endorsements from the scope of "express advocacy" just because these endorsements lack words of exhortation.

3. Reviewing the Particular Television Advertisements in this Case Will Aid the Court in Evaluating the Constitutionality of BCRA.

Plenary review of this case will also aid this Court in its consideration of BCRA's constitutionality. The BCRA litigation involves a facial challenge to the federal statute without benefit of the statute's application to specific communications, whereas this case has the virtue of being an as-applied challenge to four specific advertisements. The Court's consideration of the First Amendment question here will illuminate the relative merits of the contending positions in the BCRA litigation on the First Amendment issues there. Also, addressing the scope of "express advocacy" under the First Amendment will help evaluate the various legislative options available to Congress when it was considering how to define the category of campaign communications subject to disclosure under BCRA.

a. The Court will benefit from reviewing the as-applied challenge here when also considering the facial challenge to BCRA.

McConnell v. FEC, filed the day BCRA was signed into law, is purely a facial challenge to the validity of the statute. Under the terms of the statute itself, its definition of "electioneering communication" and its related disclosure requirement does not take effect until November 6, 2002, and the FEC is not required to issue regulations implementing these provisions until December 22, 2002. BCRA § 402(c). Thus, no one has yet broadcast a TV advertisement that is subject to disclosure under BCRA nor has the FEC threatened any enforcement action with respect to any particular advertisement. Of necessity,

then, the First Amendment arguments of the plaintiffs in the BCRA litigation will involve hypothetical cases that conceivably could arise under the terms of the statute.

By contrast, this case involves four real-world advertisements that were broadcast in Mississippi during the election campaign of 2000, when four separate seats on the State's supreme court were under contention. The Mississippi Secretary of State and Attorney General specifically contemplated enforcement of the State's disclosure requirements with respect to these advertisements, giving rise to an immediate and concrete need to determine whether the First Amendment immunizes these ads from such disclosure requirements. For all the reasons that the adjudication of constitutional questions works best in the context of specific disputes involving concrete, real-world facts (in contrast to abstract or theoretical propositions involving hypothetical circumstances), a focus on the actual advertisements in this case sharpens and clarifies the First Amendment issue.

The benefits of focusing on the specific advertisements here can carry over into considering the facial challenge to BCRA. Is Congress constitutionally disabled from requiring disclosure with respect to advertisements that contain endorsements of federal candidates in language essentially the same as the endorsements contained in these four advertisements? In *Buckley*, this Court identified "Smith for Congress" as an example of "express advocacy" for which Congress could require disclosure. The four advertisements in this case are essentially the same as "Smith for Congress" for the reasons that the newsletter in *MCFL* is essentially the same as "Vote for Smith." *MCFL*, 479 U.S. at 249. The Fifth Circuit, however, disagreed, as does the Chamber of Commerce. Deciding whether the four

real-world advertisements in this case fall inside or outside of the range of communications equivalent to "Smith for Congress" will help the Court to answer the line-drawing questions that will arise in the BCRA litigation.

b. The Court's review of this case will aid in evaluating the alternatives available to Congress when it enacted BCRA.

When Congress confronted the task of defining the term "electioneering communication" for the purpose of the disclosure requirement in BCRA, Congress faced the need to balance two objectives. First, Congress needed to avoid the problem of vagueness, as this Court described it in *Buckley*. 494 U.S. at 79. Second, Congress needed to avoid enacting an excessively broad definition, as this Court also recognized in *Buckley*. *Id*. at 80.

When this Court articulated the "express advocacy" standard in *Buckley* to avoid constitutional difficulties with the way Congress had previously drafted its disclosure requirement in the Federal Election Campaign Act, it hoped that the "express advocacy" standard would solve both vagueness and overbreadth concerns. Unfortunately, when applied to actual advertisements in subsequent cases, the "express advocacy" standard has presented ambiguities of its own. As is evident from the disagreement and confusion among circuit courts and state supreme courts concerning the proper understanding of the "express advocacy" standard under the First Amendment, this "express advocacy" standard is not self-defining and self-applying. In the hands of some circuits (including the Fifth Circuit here), the "express advocacy" standard has turned into little more than a search for easily omitted

"magic words," and therefore robbed of all practicality, while other lower courts have endeavored to apply the "express advocacy" standard in a workable way. *See* Pet. at 20-21.

When deciding how to write the definition of "electioneering communication" in BCRA, Congress was aware of the conflict and confusion among the lower courts on how to implement the "express advocacy" standard. As a result, Congress decided to adopt a definition that does not depend on the "express advocacy" standard. (This point is true for both the primary definition and the fallback provision.)

When deciding whether it was permissible for Congress to adopt a definition of "electioneering communication" in BCRA that does not turn upon the "express advocacy" standard, it would be helpful if the Court had under review at the same time a case presenting a First Amendment question about the permissible scope of the "express advocacy" standard itself. If there are genuine difficulties in defining the proper contours of the "express advocacy" standard, perhaps those difficulties are good reasons to uphold Congress's alternative approach. Conversely, if this Court can clarify the "express advocacy" standard so that it is both sufficiently precise and sufficiently robust to serve the compelling – and, in *Buckley*, previously recognized – goals underlying the disclosure requirements that Congress had adopted, then perhaps there is less need for an alternative definition. On the other hand, perhaps there are two different ways to define the range of communications subject to such disclosure requirements, one being the "express advocacy" standard and the other being the approach taken in BCRA, with both alternatives being equally permissible under the

First Amendment. *Cf. Federal Election Comm'n v. Colorado Republican Party Campaign Comm.*, 533 U.S. 431, 465 (2001) ("Congress is entitled to its choice" between limiting contributions to parties and limiting coordinated expenditures by parties on behalf of candidates.).

This case, presenting an ideal set of facts for considering the permissible scope of the "express advocacy" standard under the First Amendment, provides this Court with the perfect opportunity to consider the relationship of the "express advocacy" standard to BCRA's definition of "electioneering communication." The Court should therefore schedule argument in this case in tandem with argument in the BCRA litigation. Rather than being merely duplicative, argument in this case will assist in focusing, refining, and illuminating the issues in the BCRA litigation, which otherwise threatens to be diffuse and unwieldy because of its procedural posture as an immediate facial challenge to that statute.

CONCLUSION

For the foregoing reasons, as well as those discussed in the Petition itself, the Court should grant the Petition for a Writ of Certiorari and schedule this case for argument in tandem with the BCRA litigation.

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** Arizona Attorney General Janet Napolitano has recused herself from matters concerning election law applicable to candidates for public office and has delegated her responsibilities in this case to Thomas Prose, Chief Assistant Attorney General.

APPENDIX A

State Statutes Based on "Express Advocacy" Standard

Ariz. Rev. Stat. § 16-901(14)

"Independent expenditure" means an expenditure by a person or political committee, other than a candidate's campaign committee, that **expressly advocates** the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate. . . .

Ark. Code Ann. § 7-6-201(10)

An "independent expenditure" is any expenditure which is not a contribution and: (A**) Expressly advocates** the election or defeat of a clearly identified candidate for office. . . .

Cal. Gov. Code § 82031

"Independent expenditure" means an expenditure made by any person in connection with a communication which **expressly advocates** the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

Colo. Rev. Stat. § 1-45-103(7)

"Independent expenditure" means payment of money by any person for the purpose of advocating the election or defeat of a candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of such candidate. "Independent expenditure" includes expenditures for political messages which unambiguously refer to any specific public office or candidate for such office, but does not include expenditures made by persons, other than political parties and political committees, in the regular course and scope of their business and political messages sent solely to their members. [This provision was limited to "express advocacy" in *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266 (App. 2001); *accord Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).]

Del. Code Ann. tit. 15, § 8002(10)

"Independent expenditure" means any expenditure made by any individual or other person (other than a candidate committee, or a political party) **expressly advocating** the election or defeat of a clearly identified candidate, which is made without cooperation or consultation with any candidate, or any committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any committee or agent of such candidate.

Fla. Stat. Ann. § 106.011(5)(a)

"Independent expenditure" means an expenditure by a person for the purpose of advocating the election or defeat of a candidate or the approval or rejection of an issue,

which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. [This provision was limited to "express advocacy" in *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998).]

Idaho Code § 67-6602(g)

"Independent expenditure" means any expenditure by a person for a communication **expressly advocating** the election, passage or defeat of a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the consent of, or in consultation with, or at the request of a suggestion of, a candidate or any agent or authorized committee of the candidate or political committee supporting or opposing a measure. As used in this subsection, "**expressly advocating**" **means any communication containing a message advocating election, passage or defeat including, but not limited to**, the name of the candidate or measure, or expression such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat" or "reject."

Ind. Code § 3-9-3-2.5(b)

[Disclosure is required pursuant to this section] whenever a person: (1) makes an expenditure for the purpose of financing communications **expressly advocating** the election or defeat of a clearly identified candidate. . . .

Iowa Code Ann. § 56.13

. . . Any person who makes expenditures or incurs indebtedness, other than incidental expenses incurred in performing volunteer work, to **expressly advocate** the nomination, election, or defeat of a candidate for public office shall notify the appropriate committee and provide necessary information for disclosure reports. . . .

Kan. Stat. Ann. § 25-4150

Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of $100 or more within a calendar year shall make statements containing the information required by K.S.A. § 25-4148, and amendments thereto. Such statements shall be filed in the office or offices required so that each such statement is in such office or offices on the day specified in K.S.A. § 25-4148, and amendments thereto. If such contributions are received or expenditures are made to **expressly advocate** the nomination, election or defeat of a clearly identified candidate for state office, other than that of an officer elected on a state-wide basis such statement shall be filed in both the office of the secretary of state and in the office of the county election officer of the county in which the candidate is a resident. If such contributions are received or expenditures are made to **expressly advocate** the nomination, election or defeat of a clearly identified candidate for state-wide office such statement shall be filed only in the office of the secretary of state. If such contributions or expenditures are made to **expressly advocate** the nomination, election or defeat of

a clearly identified candidate for local office such statement shall be filed in the office of the county election officer of the county in which the name of the candidate is on the ballot. Reports made under this section need not be cumulative.

Ky. Rev. St. Ann. §121.015(12)

"Independent expenditure" means the expenditure of money or other things of value for a communication which **expressly advocates** the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them; . . .

Me. Rev. Stat. Ann. § 1019

For the purposes of this section, an independent expenditure is any contribution or expenditure by a person, party committee, political committee or political action committee aggregating in excess of $50 in an election that **expressly advocates** the election or defeat of a clearly identified candidate, other than by contribution to a candidate or a candidate's authorized political committee. Any person, party committee, political committee or political action committee that makes an independent expenditure must file a report with the commission. . . .

Mass. Gen. Laws ch. 55, § 18A

Every individual, group or association not defined as a political committee, who makes an independent expenditure or expenditures in an aggregate amount exceeding one hundred dollars during any calendar year for the purpose of promoting the election or defeat of any candidate or candidates shall file with the director, or with the city or town clerk if such candidate or candidates seek public office at a city or town election, within seven business days after making such independent expenditure or expenditures, on a form prescribed by the director, a report stating the name and address of the individual, group or association making the expenditure or expenditures; the name of the candidate or candidates whose election or defeat the expenditure promoted; the name and address of the person or persons to whom the expenditure or expenditures were made; and the total amount or value; the purpose and the date of the expenditure or expenditures.

For the purposes of this section the term "independent expenditure" shall mean an expenditure by an individual, group, or association not defined as a political committee **expressly advocating** the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or a nonelected political committee organized on behalf of a candidate, or any agent of a candidate and which is not made in concert with, or at the request or suggestion of, any candidate, or any nonelected political committee organized on behalf of a candidate or agent of such candidate.

Minn. Stat. § 10A.01(18)

"Independent expenditure" means an expenditure **expressly advocating** the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Miss. Code Ann. § 23-15-801(j)

The term "independent expenditure" shall mean an expenditure by a person **expressly advocating** the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

Mont. Admin. R. 44.10.323(3)

"Independent expenditure" means an expenditure for communications **expressly advocating** the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee. An independent expenditure shall be reported as provided in ARM 44.10.531.

Nev. Rev. Stat. § 294A.004

"Campaign expenses" and "expenditures" mean:

1. Those expenditures contracted for or made for advertising on television, radio, billboards, posters and in newspapers; and
2. All other expenditures contracted for or made, to **advocate expressly** the election or defeat of a clearly identified candidate or group of candidates . . . .

N.H. Rev. Stat. Ann. § 664:2(XI)

"Independent expenditure" means expenditures by a person, political committee, or other entity **expressly advocating** the election or defeat of a clearly identified candidate which are made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which are not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

N.C. Gen. Stat. § 163-278.6(9a)

The term "independently expend" or "independent expenditure" means an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party. . . .

N.C. Gen. Stat. § 163-278.14A(a)

Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted "to support or oppose the nomination or election of one or more clearly identified candidates":

(1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)" or "anti-(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

(2) Evidence of financial sponsorship of communications whose essential nature **expresses** electoral **advocacy** to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

(b) Notwithstanding the provisions of subsection (a) of this section, a communication shall not be subject to regulation as a contribution or expenditure under this Article if it:

(1) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, or magazine, unless those facilities are owned or controlled by any political party, or political committee;

(2) Is distributed by a corporation solely to its stockholders and employees; or

(3) Is distributed by any organization, association, or labor union solely to its members or to subscribers or recipients of its regular publications, or is made available to individuals in response to their request, including through the Internet. [Subsection (2) of § 163-278.14A(a) was held unconstitutional by the U.S. District Court for the Eastern District of North Carolina on the ground that it extended beyond "express advocacy".]

Ohio Rev. Code Ann. § 3517.01(B)(17)

"Independent expenditure" means an expenditure by a person advocating the election or defeat of an identified candidate or candidates, that is not made with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of any candidate or candidates or of the campaign committee or agent of the candidate or candidates. [Ohio Admin. Code § 111-302 provides: "A 'Communication advocating election or defeat' means a communication that **includes, but is not limited to**, expressions such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' or 'vote against,' 'defeat,' or 'reject'.]

Okla. Stat. Ann. tit. 74, ch. 62, App., 257:1-1-2

"Independent expenditure" means an expenditure made by a person to **advocate** the election or defeat of a clearly identified candidate, or, taken as a whole and in context, **expressly** urges a particular result in an election, but which is not made to, controlled by, coordinated with, requested by, or made upon consultation with a candidate, committee, treasurer, deputy treasurer or agent of a committee.

Pa. Stat. Ann. § 3246(g)

Every person, other than a political committee or candidate, who makes independent expenditures **expressly advocating** the election or defeat of a clearly identified candidate, or question appearing on the ballot, other than by contribution to a political committee or candidate, in an aggregate amount in excess of one hundred dollars ($100) during a calendar year shall file with the appropriate supervisor, on a form prepared by the Secretary of the Commonwealth, a report which shall include the same information required of a candidate or political committee receiving such a contribution and, additionally, the name of the candidate or question supported or opposed.

Tenn. Code Ann. § 2-19-120(a)

Whenever any person makes an expenditure for the purpose of financing a communication that **expressly advocates** the election or defeat of a clearly identified candidate . . . through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public

political advertising, a disclaimer meeting the requirements of subdivision (a)(1), (2), (3) or (4) shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication. . . .

Tex. Elec. Code § 253.062

[This section requires reporting of "direct campaign expenditures," which has been construed by the Texas Supreme Court to be limited to "express advocacy." *Osterberg v. Peca*, 12 S.W.2d 31 (Tex. 2000).]

Utah § 20A-11-901(1)(a)

Whenever any person makes an expenditure for the purpose of financing an advertisement **expressly advocating** the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, the advertisement: . . . if not authorized by a candidate or his campaign committee, shall clearly state the name of the person who paid for the advertisement and state that the advertisement is not authorized by any candidate or candidate's committee.

Vt. Stat. Ann. tit. 17, § 2881

"[P]olitical advertisement" means any communication, including communications published in any newspaper or periodical or broadcast on radio, television or over any public address system, placed on any billboards, outdoor

facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers or other circulars, or in any direct mailing, which expressly or implicitly advocates the success or defeat of a candidate. . . .

Vt. Stat. Ann. tit. 17, § 2882

All political advertisements shall contain the name and address of the person who paid for the advertisement. . . .

[These Vermont sections were held unconstitutional insofar as they encompassed "implied" as well as "express" advocacy. *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).]

Other Relevant State Statutes

Alaska Stat. § 15.13.135(b)

An individual, group, or nongroup entity who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, **or any other communication that supports or opposes a candidate for election to public office**

(1) shall comply with AS 15.13.090; and

(2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

Mich. Comp. Laws Ann. § 169.251

A person, other than a committee, who makes an **independent expenditure,** advocating the election of a candidate or the defeat of a candidate's opponents or the qualification, passage, or defeat of a ballot question, in an amount of $100.01 or more in a calendar year shall file a report of the **independent expenditure,** within 10 days, with the clerk of the county of residence of that person. The report shall be made on an **independent expenditure** report form provided by the secretary of state and shall include the date of the expenditure, a brief description of the nature of the expenditure, the amount, the name and address of the person to whom it was paid, the name and address of the person filing the report, together with the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure. The filing official receiving the report shall forward copies, as required, to the appropriate filing officers as described in section 36.

APPENDIX B

The Murphy Pintak Gautier Hudome Agency, Inc.

Client: U.S. Chamber of Commerce

Title: "Cook & Black Compare"

30 Television
Date: October 19, 2000

Spot #: USCC-1063

Video:	Audio:
Blue Box & Red Box next to each other with points appearing in respective boxes as announcer reads.	Music Up & Under ANNOUNCER: Deborah Cook and Tim Black. Compare. Justice Cook is an experienced Ohio Supreme Court Justice. Tim Black is a municipal court judge who's never heard an appeal. On education Deborah Cook has voted to require instructors who are paid actually have to teach. And Justice Cook regularly rules on important death penalty cases. Tim Black has never ruled on a death penalty case but he's ruled on many traffic cases.

Closing board:

Deborah Cook & Tim Black Big Differences

Learn more: www.LitigationFairness.org
Paid for by U.S. Chamber of Commerce

Supreme Court Justice Deborah Cook and Municipal Judge Tim Black. Big differences.