NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

MIKE MOORE, ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI and ERIC CLARK,
SECRETARY OF STATE OF THE 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**

PETITION FOR A WRIT OF CERTIORARI

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August 26, 2002

QUESTION PRESENTED

Whether an independently-sponsored, pre-election television advertisement that is entirely devoted to praising a candidate's qualifications for state elective office, and which contains a campaign slogan that sums up the advertisement's pitch for the candidate, is a form of "express electoral advocacy" under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and *Buckley v. Valeo*, 424 U.S. 1 (1976), so as to be properly subject to a state's election finance reporting and disclosure statute for independent expenditures.

LIST OF PARTIES

Parties to the proceedings are those as listed in the caption, to wit:

PETITIONERS:

Mike Moore, Attorney General of the State of Mississippi

Eric Clark, Secretary of State of the State of Mississippi

RESPONDENT:

Chamber of Commerce of the United States of America

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PETITION FOR A WRIT OF CERTIORARI

Mike Moore, Attorney General of Mississippi, and Eric Clark, Secretary of State of Mississippi, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. A, 1a) is reported at 288 F.3d 187 (5th Cir. 2002).

The district court opinion (App. B, 19a) is reported at 191 F.Supp.2d 747 (S.D. Miss. 2000).

JURISDICTION

The judgment and opinion of the Court of Appeals reversing the district court and remanding for entry of judgment in favor of Respondent was entered on April 5, 2002. A timely Petition for Rehearing En Banc was filed by Petitioners in the Fifth Circuit. On May 28, 2002, the Fifth Circuit denied the Petition. App. D, 47a.

The jurisdiction of this Court is timely invoked by Petitioners pursuant to 28 U.S.C. §1254(1). Respondent, plaintiff below, invoked federal question jurisdiction in the district court to review a complaint for declaratory judgment brought pursuant to 42 U.S.C. §1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 1, which provides in part: "Congress shall make no law...abridging the freedom of speech...."

U.S. Const. amend. 14, which provides in part that a state shall not "deprive any person of life, liberty, or property without due process of law...."

Miss. Code Ann. §23-15-801(j)(2001 rev.), of the state Election Code,

reproduced in App. E, 49a, which defines an "independent expenditure" and provides:

> 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.

Miss. Code Ann. 23-15-809(2001 rev.), which requires the reporting and disclosure of certain information regarding "independent expenditures," is reproduced in App. F, 50a.

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE LOWER COURTS.

This is a case which warrants the Court's attention and consideration to determine whether independently-sponsored, pre- election, pro-candidate television advertisements constitute "express advocacy" in support of a clearly identified candidate under *Buckley v. Valeo*, so that expenditures for the ads are subject to state election finance disclosure statutes. This is a recurring issue of national importance to states, which are entitled to their own election finance reporting and disclosure requirements for state elections. No set of facts--undisputed in the lower courts--could more squarely and starkly frame the issue

than those presented in this case. Under the Fifth Circuit's "narrow" interpretation of *Buckley*, 12a, no expenditure for any pro-candidate advertisement would ever be constitutionally subject to state disclosure laws if the ad omitted literal, "magic" words of exhortation or advocacy, such as "vote for Jones." At the same time, the Fifth Circuit, although asserting that its result is "compelled" by *Buckley*, further concedes that its conclusion is also "counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue." 17a. The Court should authoritatively resolve this dilemma, and this case presents the concrete set of facts upon which to do so.

In October 2000, immediately prior to the November 2000 general election in Mississippi, the Respondent Chamber of Commerce of the United States ("Chamber") expended over $400,000 to sponsor four frequently aired 30 second television advertisements, each of which favored an individual candidate (Prather, Smith, Cobb, or Starrett) for one of four contested positions on the Mississippi Supreme Court. See 51a - 54a. Three of the candidates--Chief Justice Lenore Prather, Presiding Justice Jim Smith, and Justice Kay Cobb--were incumbents in their respective races, and Circuit Judge Keith Starrett was a challenger in his race.

In accord with *Buckley v. Valeo*, 424 U.S. 1, 79-82, (1976), Mississippi election finance laws, like those of a number of other states, require "independent

expenditures" which expressly advocate the election of a clearly identified candidate to be reported and disclosed to the Secretary of State. Miss. Code Ann. §§23-15-801(j)(App. E, 49a), and -809(App. F, 50a). There is no substantive dollar limit on the amount of "independent" expenditures, which are presumptively not coordinated with a candidate, but they must be reported. When Mississippi Attorney General Mike Moore refused to immediately agree after informal discussions with the Chamber's attorneys that expenditures for the candidate ads were not reportable, and while the ads continued to run and the matter was still being reviewed and researched by the Attorney General's Office, the Chamber on October 23, 2000, preemptively filed an action against Petitioners for an expedited declaratory judgment in the United States District Court for the Southern District of Mississippi.

The complaint sought, *inter alia*, a declaration that the four advertisements were totally unregulatable "issue ads" which did not "expressly advocate the election" of the four candidates. App. K, 55a. The Petitioners Attorney General and Secretary of State answered, asserting that expenditures for the ads were subject to reporting and disclosure. App. L, 65a. The Chamber argued that expenditures for the ads did not have to be reported and disclosed because the ads were "educational" and omitted "magic words" of election advocacy, such as "vote

for" or "elect", mentioned by this Court as examples of express candidate advocacy in footnote 52 of *Buckley v. Valeo,* 424 U.S. at 44 n.52.[1]

On November 2, 2000, after an expedited hearing, briefing by the parties, and a review of videotapes of the Chamber's ads, the district court, Hon. Henry T. Wingate, District Judge, assessing the "essential nature" of the ads pursuant to *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986), issued a detailed opinion. 191 F.Supp.2d. 747 (S.D. Miss. 2000)(App. B, 19a). The district court concluded, *inter alia*, that the "advertisements at issue which favor four specific candidates for the popularly elected Mississippi Supreme Court expressly advocate their elections," and that "no reasonable viewer would construe the advertisements otherwise." 42a - 44a. Accordingly, the district court entered final judgment in favor of the Petitioners Attorney General and Secretary of State, holding that expenditures for the Chamber's ads were therefore subject to Mississippi's reporting and disclosure statute for independent expenditures. App. C, 45a.

On the Chamber's appeal, the Fifth Circuit panel (Circuit Judges Jolly and

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[1]The "magic" words are "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *See Buckley,* 424 U.S. at 44 n. 52; Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering,* 49 Cath. U. L. Rev. 107 (1999); Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws,* 8 SPG Kan. J. L. & Pub. Pol'y 90 (1999); Corrado, *On the Issue of Issue Advocacy,* 85 Va.L.Rev. 1803 (1999).

Parker, and District Judge Mills of the Central District of Illinois) reversed and remanded to the district court for entry of judgment in favor of Respondent Chamber. 288 F.2d 187 (5th Cir. 2002)(App. A, 1a). In the Fifth Circuit's view, the Chamber's ads did not contain "explicit words advocating the election of the featured candidates" or words "exhorting viewers to take specific electoral action during the elections," 13a, and therefore, the ads could not be the "express advocacy" in support of a candidate that it deemed required by *Buckley*. 17a. Under the Fifth Circuit's narrow view, the fact that the advertisements were run on election eve was "irrelevant." 15a. Accordingly, the Fifth Circuit held that the reporting and disclosure statute could not be constitutionally applied to the Chamber's ads under the First Amendment. A petition for rehearing en banc by the Fifth Circuit was denied, App. D, 47a, and this Petition follows.

B. FACTS

The subsidiary facts as found by the district court are not in dispute. The printed audio-video scripts of the four television advertisements at issue are reproduced at App. G, 51a (Prather); App. H, 52a (Smith); App. I, 53a (Cobb) and App. J, 54a (Starrett), and the actual videotapes of the ads--viewed by the district court and essential to a meaningful review--are included as exhibits in the district court record. The audio/video script of the Chamber's ad regarding

candidate Chief Justice Lenore Prather, 51a, reproduced verbatim below (but obviously lacking the visual effect of the actual ad), is typical of the other advertisements:

The Murphy Pintak Gautier Hudome Agency, Inc.

	Client: U.S. Chamber of Commerce
:30 Television	Title: "Chief Justice"
Date: October 10, 2000	Spot #: USCC-1041

Video:	Audio:
Photo of gavel. Photo of Justice Prather begins as big blur and slowly comes into focus during spot.	Lenore Prather - Chief Justice of Mississippi's Supreme Court.
Font: Lenore Prather Chief Justice Common Sense Victims Rights	Lenore Prather - Using common sense principles to uphold the law.
Lenore Prather Independent First woman Justice 35 years experience	Lenore Prather - Putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests.
Justice Lenore Prather. A fair and independent voice.	The first woman appointed to Mississippi's Supreme Court, Lenore Prather has 35 years experience on the bench.
Learn more: www.litigationfairness.org	Lenore Prather. A fair and
independent	
	voice for Mississippi.
Paid for by U.S. Chamber of Commerce	

The district court in its opinion reviewed and analyzed each of the four ads and found that the thirty second commercials, aired at the very same time statewide judicial elections were being conducted, touted the background, qualifications, and judicial philosophy of the four identified Supreme Court candidates. 25a - 27a; 42a - 43a. The district court found that the commercials contained no true discussion of issues, provided only the background and experience of each favored candidate, repeatedly inserted the candidate names between qualification assertions, and concluded "with an emphatic phrase obviously designed to exhort support for the candidates' election to the Supreme Court." 42a. The text and audio of the ads ended with a campaign-like slogan, e.g. "Lenore Prather. A fair and independent voice for Mississippi" or "Justice Jim Smith - common sense on the bench." 51a - 52a. The district court found that the "essential nature" of the ads was to "provide explicit directives to vote for the named candidates"; although the ads did not contain the express words "vote for the candidate," the district court found that "no reasonable viewer would construe the advertisements otherwise." (emphasis supplied). 42a. The district court observed that "magic words" become unnecessary "when an advertisement clearly champions the election of a particular candidate...." 43a.

Moreover, the district court found that the Chamber's ads were "virtually the

same" as the advertisements being aired by the candidates themselves at the same time, 43a, and noted that the ads also displayed a website which linked the viewer to web pages which exhorted support for the election of Justice Cobb and Judge Starrett. *Id.*

Finding the Chamber's ads to be "a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure law", the district court concluded that the Chamber's ads favoring the four individual candidates for the Supreme Court "expressly advocate their elections." 44a. Accordingly, as noted above, it found that reporting and disclosure requirements did apply.

The Fifth Circuit opinion does not dispute or find clearly erroneous any of the underlying facts found by the district court. Instead, in its view, a "bright-line" test was required and the only fact of consequence was the omission of an active verb such as "vote for" or "elect" from the Chamber's ads as a call to electoral action and express advocacy for the candidate. 17a. In the Fifth Circuit's view, even the television airing of the Chamber's ads immediately prior to the 2000 general election day--a date which is an objective fact and known to all--was "irrelevant." 15a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to address an issue of national

importance to the substantial number of states which have election finance reporting and disclosure requirements for “independent” expenditures made in support of a candidate, to clarify what constitutes “express candidate advocacy” under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and *Buckley v. Valeo*, 424 U.S. 1 (1976), and to resolve an express split between the Circuits, and disagreement among lower federal and state courts, on this issue.

In *Buckley v. Valeo*, 424 U.S. 1, 82 (1976), this Court recognized that requiring the reporting and disclosure of independent expenditures in support of or against specific candidates "is a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic process of our...election system to public view." Under the unduly narrow and one sided view of the Fifth Circuit, however, the reporting and disclosure statutes of Mississippi and a number of other states will as a practical matter become essentially meaningless and empty letters--even in situations in which the "independent" ad is a virtual clone of a candidate's own advertisement, as here. 43a. In its opinion, the Fifth Circuit itself acknowledges that its restrictive, "magic words" approach to candidate advocacy "undoubtedly allows individuals and organizations to circumvent electoral regulations" by simply omitting active verbs of exhortation such as "vote" or "elect" from their ads, 11a, and that the result here "may be counterintuitive to a

commonsense understanding of the message conveyed by the television political advertisements at issue," 17a.

The Petitioners Attorney General and Secretary of State respectfully submit that this case satisfies every criteria set forth in Supreme Court Rule 10 for the granting of a petition for writ of certiorari. As discussed below, the election finance reporting issues presented here are of significant public importance not only to Mississippi but also to a number of other states which have statutes that require reporting and disclosure of "independent expenditures" modeled on the language and admonitions of *Buckley*. And while the precise issue here will in all likelihood persist for these states for state elections regardless of the ultimate fate of the new Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, 116 Stat. 81, because of certain definitional differences between the new federal act and *Buckley* based statutes, this case nevertheless presents an appropriate and important companion case for consideration on the merits by the Court in conjunction with its review of the BCRA litigation. That litigation will necessarily come before this Court from a three-judge district court for expedited appellate review during this same term.

Moreover, the narrow "magic words" approach of the Fifth Circuit to candidate advocacy, on this factual record the most restrictive of any Circuit,

departs from a fair reading of this Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("MCFL"), which is the only post-*Buckley* decision by this Court to review an actual advertisement, and is inconsistent with footnote 52 of *Buckley* itself, which indicates that ads containing campaign-like slogans amount to "express advocacy."

Finally, as discussed further below, the Fifth Circuit's narrow and literal "magic words" approach to express candidate advocacy is the subject of a split in the Circuits, *see FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and disagreement between and among lower federal courts and state courts.

I. THE ISSUE PRESENTED IS OF EXCEPTIONAL PUBLIC IMPORTANCE TO STATES WHICH HAVE *BUCKLEY*-BASED STATUTES REQUIRING REPORTING AND DISCLOSURE OF INDEPENDENT EXPENDITURES THAT ADVOCATE SUPPORT FOR A SPECIFIC CANDIDATE.

It is beyond question that the central issue presented by this petition -- whether third party expenditures for election eve television ads which feature only a specific candidate, tout his or her qualifications, contain a campaign-like slogan, and are virtual clones of the candidates' own ads, are "express advocacy" for the candidate, and thereby subject to disclosure, even though the ads omit some "magic words" of advocacy such as "vote for" or "elect" -- is of significant

importance to Mississippi and a substantial number of other states with similar election finance laws for state elective races for judgeship and other offices. Does the First Amendment absolutely compel the result reached by the Court of Appeals?

More specifically, like that of a number of other states, Mississippi's reporting and disclosure statutes for "independent expenditures," Miss. Code Ann. §23-15-801(j) and -809, 49a and 50a, are modeled directly from the language and admonitions of this Court in *Buckley*, 424 U.S. at 60-82.[2] Under Mississippi's statute, and as permitted by *Buckley*, third parties who make expenditures over $200.00 that are not coordinated with an election campaign must publically report and disclose certain information to the Secretary of State if the expenditure is used for "expressly advocating the election or defeat of a clearly identified candidate...." §23-15-801(j); *see Buckley*, 424 U.S. at 80. In such circumstances, the organization or person making the third party expenditure must become accountable to the public by simply reporting and disclosing whether the

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[2] These states include, for example, California, West's Ann.Cal.Gov.Code § 82031; Delaware, 15 Del.C. § 8002(10); Idaho, I.C. § 67-6602(g); Iowa, I.C.A. § 56.13(1); Kansas, K.S.A. § 25-4150; Maine, 21-A M.R.S.A. § 1019; Massachusetts, M.G.L.A. 55 § 18A; Minnesota, M.S.A. § 10A.01 Subd. 18; New Hampshire, N.H. Rev. Stat. § 664:2(XI); Nevada, N.R.S. 294A.004; North Carolina, N.C.G.S.A. § 163-278.14A; Pennsylvania, 25 P.S. § 3246(g); and South Carolina, Code 1976 § 8-13-1300(17).

expenditure amount was in support of or in opposition to the candidate, certifying whether or not the expenditure was made in cooperation with the candidate or candidate committee, and identifying the source of any contributions that are over $200.00 in amount with regard to the candidate ad expenditure. Miss. Code Ann. §23-15-809(b), 50a. In accord with *Buckley*, there is no substantive dollar limitation on the amount of true "independent expenditures" that can be made, but they must be reported.

The Fifth Circuit's approach, unlike that of the district court, gives no weight whatsoever to the legitimate public and electoral interests served by the reporting requirements. Those legitimate interests are not something dreamed up to support Mississippi's statute or those of other states, but instead were defined by this Court itself in *Buckley* and other cases. The *Buckley* Court concluded that reporting and disclosure requirements "directly serve substantial government interests" and are a constitutionally proper means to curb the "evils of campaign ignorance and corruption." 424 U.S. at 68-69. Independent expenditure disclosure requirements "shed the light of publicity on spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 80. Similarly, because "independent expenditures" are not direct contributions to a campaign--and are not therefore subject to campaign contribution limitations--government has a substantial interest in requiring that

these "otherwise [un]reported" independent expenditures be publicly disclosed. *Buckley*, 424 U.S. at 80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (O'Connor, J., concurring). As *Buckley* expressed, disclosure of independent expenditures furthers First Amendment values "by opening the basic process of our...election system to public view." *Buckley*, 424 U.S. at 82. The "substantial" state interests furthered by disclosure of independent expenditures include informing the electorate of the sources and uses of money influencing candidates and voters; "deter[ing] actual corruption and avoid[ing] the appearance of corruption" through disclosure; and "gathering the data necessary to detect violations" of campaign laws, such as "coordinated" expenditures or actual contributions. *See Buckley*, 424 U.S. at 67, 80-81; *FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). The disclosure of expenditures may also lessen the risk that individuals will spend money to support a candidate for future special treatment after the candidate is in office.

Under the auspices of the Fifth Circuit's decision, any organization, association, unincorporated entity, or individual may now pour unlimited election-eve expenditures into advertisements which in content and context plainly support the election of a particular judge or other candidate for state elective office and yet, by the not-so-clever expedient of omitting an active verb such as "elect," or "vote,"

from the ad, may totally avoid even the minimum public accountability imposed by the reporting and disclosure statutes. The Fifth Circuit decision thus effectively opens and endorses a loophole that swallows the statute and submerges those legitimate state interests served by disclosure. If expenditures for the Mississippi Supreme Court candidate ads aired in this case do not have to be reported and disclosed, then the disclosure statutes have absolutely no teeth. Pursuant to the Fifth Circuit decision, no organization or individual desiring to influence the outcome of an election will ever be so unsophisticated as to include such "magic words" as "vote for" or "elect," in their pro-candidate ads, and instead "independent," unlimited expenditures for "clone" ads, not subject to candidate contribution limitations and not now even subject to reporting, will surely become the order of the day in state election races. If in fact *Buckley* absolutely compels the result reached in the Court of Appeals--and Petitioners do not believe that it does--then *Buckley* itself should be reexamined. *See Nixon v. Shrink Missouri Govt. PAC,* 528 U.S. 377, 406-410 (2000) (Kennedy, J., dissenting).

Moreover, it is no exaggeration to assert that this issue is an important subset of the ongoing national debate over the proper contours of election campaign finance reform, a controversy most recently evidenced in the federal sector in the passage of the Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, 116

Stat. 81. As the amount of money expended on candidate ads masquerading as "issue ads" not subject to reporting has skyrocketed over the past decade, the legitimate interests of the states and the "First Amendment values", *Buckley*, 424 U.S. at 82, that are furthered by the public disclosure of spending that is unambiguously candidate related have been ignored and undermined by virtue of decisions such as in this case. The Annenberg Public Policy Center of the University of Pennsylvania, for example, has reported a dramatic increase in expenditures for purported "issue ads" from the 1996 election cycle to the 2000 election cycle. *See Issue Advertising in the 1999-2000 Election Cycle,* http://www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf. For 1996, the Center was able to track an estimated $135-150 million dollars of expenditures for purported "issue ads" prior to the 1996 elections; for 1998, the amount rose to $230-351 million dollars; and for the 2000 cycle, the number rose to an estimated $509 million dollars[3]. Significantly, as reported by the Annenberg study, 94% of the televised "issue ads" aired in the two months before the November 2000 elections made a case for or against a specific candidate--they

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[3]This trend also holds true for state judicial elections. *See generally* Roy A. Schotland, *Financing Judicial Elections 2000: Change and Challenge*, 2001 L.Rev. M.S.U. --D.C.L. 849 (Fall 2001) (discussing 2000 state judicial election campaigns and noting that non candidate spending activity in such races was “not merely an increase but a change in kind”, at n.58 and

were candidate centered ads. *Id.* at p. 14.

Commensurate with this recent and substantial escalation of expenditures for pre-election "issue ads," and the decisions of several lower federal courts, the issue presented here has over the past several years become an increasingly important topic for academic discussion and debate in law journals and reviews. *See, e.g.,* Thomas & Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Test*, 10 Stan. L. & Pol'y Rev. 33 (Fall 1998)(noting that "one of the most important challenges confronting the current finance system is deciding what constitutes 'express advocacy'" and that a "strict magic words test is an inadequate standard"); Anthony Corrado, *On the Issue of Issue Advocacy*, 85 Va. L. Rev. 1803 (Nov. 1999)(asserting that narrow "magic words" distinction has "detrimental effects with respect to the accountability of the electoral system and the competence of the electorate"); Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8-SPG Kan. J.L. & Pub. Pol'y 90 (Spring 1999); Glenn J. Moramarco, *Beyond "Magic Words"; Using Self Disclosure to Regulate Electioneering*, 49 Cath. U.L. Rev. 107 (Fall 1999); David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity*, 2000 Wis. L. Rev. 1117 (2000); Richard L. Hansen, *The*

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text).

Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. Rev. 265 (Dec. 2000).

The issue presented is an important one upon which the direct guidance of this Court is needed.

II. THIS CASE IS AN APPROPRIATE COMPANION CASE FOR CONSIDERATION IN THE SAME TERM AND IN CONJUNCTION WITH EXPEDITED APPELLATE REVIEW BY THIS COURT IN THE CONSOLIDATED *McCONNELL* ACTIONS.

The central issue presented in this case will in all likelihood persist for those states requiring disclosure of "independent expenditures" based on the language of Buckley, regardless of the ultimate outcome before this Court of the broader litigation challenges to the newly-enacted Bipartisan Campaign Reform Act of 2002 for federal elections, P.L. 107-155, 116 Stat. 81 ("BCRA").[4] The Bipartisan Campaign Reform Act contains a new requirement for disclosure of expenditures for federal election advertisements, called "electioneering communications," which is different from the *Buckley*-based standard of permitting reporting and disclosure of expenditures for non-coordinated ads that "expressly advocate the election or

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[4] *See generally*, http://www.law.stanford.edu/library/campaignfinance (Stanford University website containing links with text of BCRA, legislative history, complaints and other docketing information for pending legal challenges to BCRA, and various articles).

defeat of a clearly identified candidate."[5] The consolidated district court challenges pending in *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL)(D.D.C.) necessarily present a broader array of issues for determination given the substantial changes to federal campaign finance law brought about by BCRA.

Nevertheless, although the issue presented here would clearly stand on its own regardless of other matters on the Court's docket, Petitioners respectfully submit that the instant matter is a particularly appropriate companion case for the Court to also consider on the merits in the same term of Court as its expedited appellate review of any three-judge court decision in *McConnell v. FEC.* Any comprehensive treatment of election finance issues in this term should include this case. The states have a right to define their election finance laws differently than Congress' approach in BCRA. Just as federal election regulators need guidance as to the validity of Congress' efforts at campaign finance reform in BCRA, the states similarly need guidance as to the permissible scope and application of their own

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[5]Under Section 201 of BCRA, an "electioneering communication" which must be reported and disclosed under certain circumstances means, *inter alia*, a broadcast which refers to a clearly identified candidate for federal office and is made within 60 days before a general election. Sec. 201(a). Section 201 of the Act further provides that if this principal definition is invalid, then an "electioneering communication" means a broadcast which supports or opposes the election or defeat of a candidate and which "is suggestive" of no plausible meaning other than an exhortation to vote for the candidate, regardless of whether the broadcast expressly advocates a vote for or against the candidate.

reporting and disclosure statutes.

Oral argument before the three-judge court of the United States District Court for the District of Columbia in the consolidated actions in *McConnell* is scheduled for December 4, 2002, and Section 403(a) of BCRA provides for expedited review by appeal directly to this Court under shortened time lines. The Act generally becomes effective on November 6, 2002. Given the similarity of the subject matter, and the importance of the campaign finance issues in each, the cases could be and should be considered on their merits at the same term of Court. Should this Court in a review of *McConnell* re-examine the approach of *Buckley* or change the parameters of the various holdings in *Buckley*, then this case should have the benefit of the Court's guidance. On the other hand, the fact-specific nature of this case may provide a practical, real world context that is beneficial to this Court's consideration of certain issues in the facial challenges in the *McConnell* actions. On its merits, this case presents a pressing constitutional question that is independent of those in *McConnell* but that may illuminate the related questions that will be presented in *McConnell*.

The writ should be granted for this additional reason.

III. ON THIS RECORD, THE FIFTH CIRCUIT'S DECISION DEPARTS FROM THE DECISION OF THIS COURT IN *MASSACHUSETTS CITIZENS*

FOR LIFE AND IS INCONSISTENT WITH *BUCKLEY* ITSELF.

In reversing the district court, the Court of Appeals candidly admits that its result may be "counterintuitive." 17a. The Fifth Circuit purported to justify this anomalous result on the ground that its conclusion was "compelled" by the First Amendment and *Buckley* because the Chamber ads did not contain magic words such as "vote for" or "elect", exhorting viewers to take specific electoral action. *Id*. Petitioners submit that neither *Buckley* nor *MCFL* fairly compel the severe result reached by the Fifth Circuit. When considered in the context of a case in which the district court found, *inter alia*, that the Chamber's ads were virtually identical clones of the candidate's own positive campaign ads, where the ads were run immediately prior to the November 2000 general election date, where the content touted the candidates' qualifications and philosophy, where the ads contained a campaign-like slogan, and where the district court also found that no reasonable person could have thought that the televised ads were anything other than supporting the election of the featured candidate, the Fifth Circuit decision is the most extreme application of the "magic words" test to date.

First, the Fifth Circuit's opinion is inconsistent with a fair reading of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), relied upon by the

district court. In this Court's only application of the *Buckley* Court's "express advocacy" phrase to an actual advertisement, *MCFL* indicates that the "magic words" contained in footnote 52 of *Buckley* should not be considered as exhaustive or definitive nor should they be interpreted to foreclose a common sense review of the "essential nature" of the advertisement. *MCFL*, 479 U.S. at 249.

Most importantly, and contrary to the Fifth Circuit's ruling, *MCFL* suggests that an advertisement can constitute express advocacy if its "effect" is to provide an explicit directive to vote for a candidate. *MCFL*, 479 U.S. at 250. The Fifth Circuit opinion requires an explicit directive, but *MCFL* only requires that the advertisement "in effect" supply the explicit directive to vote for the candidate. The two things are different. Moreover, under *MCFL*, this determination must be made based on the "essential nature" of the ad. *Id*. More specifically, *MCFL* reads in pertinent part as follows:

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

479 U.S. at 249 (emphasis supplied). This is not, Petitioners submit, only the mere stuff of analysis by computer word search, as the Court of Appeals would have it.

Otherwise, this Court in *MCFL* would only had to have observed that the advertisement in fact contained the magic word "vote," without any further gloss or discussion of the "effect" or "essential nature" of the ad.[6]

Second, the Fifth Circuit decision is inconsistent with *Buckley* because the ads in question are the functional equivalent of certain "magic words" given as examples of "express advocacy" in footnote 52 of *Buckley*, 424 U.S. at 44 n. 52. Indeed, the effect of the Chamber ads is no different from the campaign slogan "Smith for Congress" or "support" listed by *Buckley* in footnote 52 as constituting examples of express candidate advocacy. The Prather ad, for example, specifies the candidate -- Lenore Prather; specifies the office -- "Chief Justice of Mississippi's Supreme Court," and closes with a campaign slogan -- "A fair and independent voice for Mississippi." The essential nature of this ad is plainly a functional equivalent to the campaign slogan "Smith for Congress," which constitutes "express advocacy" under *Buckley*, and with due respect it is only the unduly narrow approach of the Fifth Circuit, which refuses to give any weight to

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[6]The Court of Appeals further erroneously suggests that a review of advertisements to determine whether they discuss issues (which would be non-regulatable speech) or only endorse a candidate's qualifications would be an "impermissible" inquiry. 10a. On the contrary, under *MCFL*, a determination of whether an ad is indeed "issue discussion" or goes beyond that is a valid point of evaluation. *MCFL*, 479 U.S. at 249. Similarly, the panel errs by holding that the timing of dissemination of an ad - an objectively determinable fact - is "irrelevant" to this

the legitimate interests of the states in reporting and disclosure requirements, which suggests otherwise. Review by this Court is warranted to correct the Fifth Circuit's departure from this Court's decisions and to clarify the proper standard to be applied in such cases.

IV. THE PETITION SHOULD ALSO BE GRANTED TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS AND AMONG LOWER FEDERAL COURTS AND STATE COURTS.

In addition, the Petition should be granted to resolve an express split between the Circuits and disagreement among lower federal courts and state courts regarding this issue. Both the district court here and the Fifth Circuit acknowledged this division. 32a; 7a - 9a. Several Circuit Courts of Appeal, along with the Fifth Circuit, have adopted a narrow and restrictive "magic words" test, although none of those other courts have actually considered that approach when faced with third party sponsored, pro-candidate election eve television ads that tout a specific candidate's qualifications, contain campaign-like slogans, and are virtual clones of the candidates' own advertisements. *See FEC v. Christian Action Network*, 110 F.3d 1049, 1051-1052 (4th Cir. 1997)(express advocacy is restricted to communications that "literally include words which in and of themselves

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inquiry. 15a.

advocate the election or defeat of a candidate"); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Citizens for Responsible Govt. State Political Action Committee v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000)(communications which do not contain "express words" that advocate the election or defeat of a candidate are deemed "issue advocacy"which is constitutionally shielded from regulation); *Maine Right to Life Comm. v. FEC*, 914 F.Supp. 8 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996).

In contrast, and in addition to the district court here, other federal and state courts, mindful of the important governmental and public interests served by reporting and disclosure requirements as well as balancing important First Amendment considerations, have properly moved beyond an absolutist, mechanical word search and recognize that, consistent with *MCFL*, the clear effect of an election ad may amount to express advocacy in support of a specifically identified candidate. The Fifth Circuit decision here explicitly rejects, 10a, and conflicts with, the rule in the Ninth Circuit. *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.)(express advocacy standard is met if the advertisement, viewed "as a whole, and with limited reference to external events, is susceptible of no reasonable interpretation but as an exhortation to vote for or against a specific candidate"), *cert. denied*, 484 U.S. 850 (1987). The very same election eve

advertisements at issue here, if televised in California or the other states of the Ninth Circuit, would plainly be subject to reporting and disclosure requirements as express advocacy in support of a clearly identified candidate. In the states of the Fifth Circuit, and the other Circuits utilizing a strict and literal "magic words" approach to candidate advocacy, however, even the minimum requirement of reporting and disclosure for expenditures for such ads is constitutionally impermissible.

Similarly, other lower federal courts and state courts are in disagreement with the rule adopted in the Fifth Circuit. *See FEC v. National Organization for Women*, 713 F.Supp. 428, 434 (D.D.C. 1989); *Elections Bd. of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721, 723-24, 731 (Wisc.) ("the definition of the term express advocacy is not limited to the specific list of 'magic words' such as 'vote for' or 'defeat' found in *Buckley* footnote 52"), *cert. denied*, 528 U.S. 969 (1999); *Osterberg v. Peca*, 12 S.W.3d 31, 53 (Tex.), *cert. denied*, 530 U.S. 1244 (2000); *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. Ct. App. 1999), *review denied*, 994 P.2d 132 (2000).

This Court's review is necessary to resolve the square conflict in circuit law and the disagreement in the lower federal and state courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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