September 27, 2013

Via Electronic Mail

The Honorable Ruth Johnson
Secretary of State
Executive Office
Richard H. Austin Building
430 West Allegan Street
Lansing, Michigan 48918

RE: State Bar of Michigan declaratory ruling request concerning issue advertisements about judges

Dear Secretary Johnson:

I write on behalf of the Center for Competitive Politics ("CCP"), a § 501(c)(3) nonprofit organization dedicated to protecting the First Amendment political rights of speech, petition, and assembly. CCP works to defend these freedoms through scholarly research, regulatory comments, and federal and state litigation. CCP takes this opportunity to comment upon the State Bar of Michigan's ("SBM") September 11, 2013 declaratory ruling request ("Request").

The SBM Request seeks to place severe burdens on Michiganders' First Amendment rights to speak about judges, judicial candidates, and court rulings. What is most disappointing about the request is that the SBM asks you to ignore not only the meaning of state law, but also the First Amendment and forty years of Supreme Court precedent.

I. Political speech is distinct from issue speech.

The SBM Request asks:

> [M]ust *all* communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State, *regardless* of whether such payments entail express advocacy or its functional equivalent?[1]

[1] State Bar of Michigan, Declaratory Ruling Request 5 (Sept. 11, 2013) (emphasis supplied).

The answer is, of course, no. The presence of the word "regardless" directly contradicts MICH. COMP. LAWS § 169.206(2)(b), which specifically *exempts* any payments that are not express advocacy or its functional equivalent from the definition of "expenditure."

But the SBM also asks whether it is possible for a communication to reference a judicial candidate without calling for that candidate's election or defeat. Is *all* speech referring to a candidate automatically political and therefore regulated?

Again, the answer is an unequivocal "no." This is a foundational principle of law that the SBM Request ignores. United States Supreme Court precedent, including the cases cited by the SBM, recognizes the marked difference between speech about candidates and speech about issues.

In *Buckley v. Valeo*,[2] the Supreme Court was tasked with interpreting Congress's efforts to regulate campaign finance through the Federal Election Campaign Act ("FECA") and its amendments. The *Buckley* Court noted that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[3] A key consideration in the political context is safeguarding issue speech from the unconstitutional chill that can result from campaign finance regulation:

> [f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals *and governmental actions*.[4]

Of course, FECA attempted to delineate this thorny distinction—but the *Buckley* Court found that it did so in a way that created a constitutional vagueness problem. Consequently, the Court noted that FECA "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[5] In delineating this distinction, the Court dropped the influential footnote 52, which listed "*Buckley*'s magic words"— "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' "vote against,' 'defeat,' [and] 'reject.'"[6]

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[2] 424 U.S. 1 (1976).
[3] *Id.* at 14 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).
[4] *Id.* at 42 (emphasis added).
[5] *Id.* at 44.
[6] *Id.* at 44 n. 52.

The distinction, then, between discussion of issues and discussion of candidates ("express advocacy") is not new: it has guided campaign finance law for almost forty years. *Buckley*'s distinction between issue speech and candidate speech rests at the core of every modern First Amendment campaign finance case.

The Supreme Court reiterated the importance of the constitutional carve-out for issue speech in *Federal Election Commission v. Wisconsin Right to Life*,[7] explaining its "functional equivalent" test for what speech may be regulated in the same manner as "express advocacy." *WRTL II* was a challenge to a federal law prohibiting nonprofit corporations from using general treasury funds to pay for electioneering communications. The Court had previously held that this prohibition was not unconstitutional on its face, but the *WRTL II* Court found that it *was* overly broad as applied to Wisconsin Right to Life. In so doing, it highlighted that the burden to demonstrate that speech is subject to regulation as express advocacy or its functional equivalent lies with the state, not the speaker.

Considering the practical difficulty inherent in distinguishing between express advocacy and issue speech, the Court noted that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[8] Because the speech Wisconsin Right to Life wished to engage in was not "the 'functional equivalent' of express campaign speech," and "the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy," the challenged prohibition was "unconstitutional as applied to the advertisements at issue."[9]

Thus, the Court reiterated that electioneering communications can be regulated in the same manner as express advocacy *only* to the extent that such communications *are its functional equivalent.* This limits such regulation to communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[10]

Thus, the SBM's assertion that "all advertising in judicial campaigns is the functional equivalent of express advocacy for purposes of MCFA"[11] misunderstands the law. *Buckley* and *WRTL II* both envision ads that mention candidates and yet are not the functional equivalent of express advocacy, and require that the dividing line to be drawn so as to "err on the side of protecting political speech rather than suppressing it."[12]

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[7] 551 U.S. 449 (2007) ("*WRTL II*").
[8] *WRTL II* at 457.
[9] *Id.*
[10] *Id.* at 470.
[11] Request at 4.
[12] *WRTL II* at 457.

This is precisely the point: if the state wishes to regulate a particular communication, it bears the burden of showing that the communication is the functional equivalent of express advocacy. Any other rule would inevitably chill protected speech. The SBM attempts to shift this burden by creating a blanket category of "judicially-related speech" that is not countenanced by the statute, and is unsupported by case law.

II. The Michigan Compiled Laws specifically protect issue speech—including speech directed at or on the topic of judges.

a. The statute is clear: not all expenditures on communications are "express advocacy"—issue speech is specifically exempted.

Fortunately for Michiganders—and consistent with the Supreme Court's campaign finance jurisprudence—the state legislature has seen fit to specifically incorporate the distinction between political speech and issue speech into its campaign finance framework. Therefore, the Secretary should not promulgate a rule contravening the plain meaning of this statute.

And the statute is clear: "[a]n expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference" is *not* a regulated expenditure under the campaign finance law.[13] The statute specifically exempts issue speech from regulation, and instead the state's campaign finance laws only regulate expenditures for express advocacy. The statute does not differentiate judicial officer candidates from other candidate elections—the same rules apply to all.

The SBM requests that the Secretary define all issue speech concerning judicial officers as "the functional equivalent of express advocacy" and therefore subject to regulation as "expenditures."[14] But the Secretary is bound by the language of the statute, which directly contemplates—and exempts—issue speech from this definition.

The Michigan Supreme Court is quite clear about agency promulgation of rules: "when considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute."[15] While the courts do afford deference to an agency's

[13] MICH. COMP. LAWS § 169.206(2)(b) (2013) (exceptions to the definition of "expenditure").
[14] Request at 4.
[15] *SBC Mich. v. PSC* (In re *Complaint of Rovas*), 754 N.W.2d 259, 270 (Mich. 2008).

statutory interpretation, "in the end, the agency's interpretation cannot conflict with the plain meaning of the statute."[16]

Thus, this office would violate this principle in attempting to regulate any issue speech dealing with the judiciary as an expenditure, because the statute plainly exempts all issue speech from the definition thereof. And where speech expressly advocates the election or defeat of a judicial candidate, then it is—by definition—not issue speech. The SBM's Request goes beyond the plain meaning of the statute, and the rule it requests would therefore be invalid under Michigan law.

b. Issue speech aimed at and contemplating judges exists independent of political campaign material—and is consistent with our Nation's foundational values.

The SBM attempts to get around the clear constitutional and statutory hurdles to regulation of issue ads by arguing that, because judges decide cases, people do not engage in public advocacy on issues facing the judiciary. Thus, the reasoning goes, literally all communications mentioning judges must be deemed the functional equivalent express advocacy. Beyond misunderstanding the concept of express advocacy and its functional equivalent—as set forth in *Buckley* and other decisions—such reasoning is simply and obviously incorrect. Contrary to the assertions of the SBM, citizens often conduct issue campaigns on judicial matters. Just last year, thousands gathered outside the Michigan Supreme Court to voice their opinions about the state's new emergency manager law. Pictures and press reports vividly depict protestors outside the courthouse, and countless media interviews demonstrate these citizens's hope that, through their demonstrations, they might influence the Court's decision—wholly apart from any election.[17]

Similarly, citizens routinely attempt to influence the decisions of federal judges via issue speech such as protests, blog posts, and other forms of communication. The reality is that citizens spend money discussing judges—as well as cases and issues pending in the courts—for myriad reasons and in diverse contexts. Sometimes, citizens blog or otherwise publish substantive commentary on important judicial decisions.[18] Commentary on cases and judges is often used to

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[16] *Id.; see also People v. Dowdy*, 802 N.W.2d 239, 258 (Mich. 2011) ("Although this Court accords due deference to an agency's interpretation of a statute, we grant no deference to an interpretation that contravenes the language of a statute") (internal citation omitted).

[17] *See, e.g.*, Lynn Moore, *Local protestors organize bus to Supreme Court hearing on emergency manager law*, MLIVE (July 23, 2012) http://www.mlive.com/news/muskegon/index.ssf/2012/07/local_protestors_organize_bus.html.

[18] *See, e.g.*, Lyle Denniston, *Analysis: History's lessons on gun rights*, SCOTUSBlog (Mar. 15, 2008) http://www.scotusblog.com/?p=6827 (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

raise public awareness of issues. Similarly, it is not uncommon for groups to use past or future judicial decisions as a call for nonprofit fundraising.[19]

Federal judges, who are neither elected, nor subject to popular recall, are heavily insulated from political pressure. Yet the nation has a storied history of protests and demonstrations before the federal courts, including the United States Supreme Court. The marble plaza outside the Nation's high court has been the site of everything from civil rights protests,[20] to demonstrations about the influence of corporations,[21] to protests of the 40-year-old *Roe v. Wade* decision.[22] This is the very discussion of public issues and "government actions" contemplated—and protected—by *Buckley*.[23]

Indeed, the SBM's assertion that "a judge may not constitutionally be influenced by public advocacy" is unsupported and, in any event, impossible to police absent widespread censorship. In *Republican Party of Minnesota v. White*,[24] the Court specifically declined to prohibit judicial candidates from pledging how they would rule on certain types of cases, let alone from being "influenced by public advocacy."[25] Further, judges—even Supreme Court justices—sometimes take into account public opinion when deciding principles of constitutional law.[26] Academic studies tend to show that courts are influenced by their perception of public opinion,

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[19] *See, e.g.*, Operation Rescue, *Here's How You Can Help Operation Rescue Recover the Supreme Court... And STOP ABORTION NOW!*, *available at* http://www.operationrescue.org/noblog/here%E2%80%99s-how-you-can-help-operation-rescue-recover-the-supreme-court%E2%80%A6/ (last accessed Sept. 27, 2013) (donation drive to overturn Supreme Court decisions regarding abortion); Public Citizen, *Join the movement to take back democracy!*, *available at* http://www.democracyisforpeople.org/ (last accessed Sept. 27, 2013) (petition drive, along with donation link, to overturn *Citizens United v. FEC*, 558 U.S. 310 (2010)).

[20] Bill Mears, *New rules for protests at Supreme Court*, CNN, (June 13, 2013) *available at* http://www.cnn.com/2013/06/13/ politics/court-protests/index.html (noting "[t]he grounds outside the U.S. Supreme Court have long been a place for protests, rallies, and other 'expressive events'").

[21] Tony Mauro, *'Occupy the Courts' Protests Hit Supreme Court and Federal Courthouses Nationwide*, THE BLOG OF THE LEGALTIMES (Jan. 20, 2012) http://legaltimes.typepad.com/blt/2012/01/occupy-the-courts-protests-hit-supreme-court-and-federal-courthouses-nationwide-.html

[22] Stokely Baksh, *Jan. 22 Photo Brief: 40th anniversary of Roe v. Wade, dancing at the Inaugural Ball, self-defense classes for Indian women, blood ivory*, BALTIMORE SUN (Jan. 22 2013) *available at* http://darkroom.baltimoresun.com/2013/01/jan-22-photo-brief-40th-anniversary-of-roe-v-wade-dancing-at-the-inaugural-ball-self-defense-classes-for-indian-women-blood-ivory/#2 (collecting photographs of protests at the United States Supreme Court).

[23] *See Buckley*, 424 U.S. at 42.

[24] 536 U.S. 765 (2002).

[25] *Id.* at 788; *see also id.* at 792 (O'Connor, J., concurring) ("the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.")

[26] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 450 n. 64 (2010) (Stevens, J., dissenting) (citing opinion polls on spending in political campaigns).

even if the court does not expressly cite it.[27] Issue speech is an effective means of advocating for general judicial philosophies or temperaments, even when the judges are relieved from political campaigns. That a state chooses to elect its judges is no reason to subject its citizens to greater burdens on their discussions of the pressing issues of the day—many of which are, for better or worse, decided in court.

Similarly, unlike legislatures, courts are nearly always in session. Some important issues may arise during election season and some may not. To allow issue speech concerning judicial decision-making during some times and not others, and regarding judges selected in some ways (election) and not others (appointment), is irrational. More importantly, it finds no support in the applicable statutes.

III. The test for judicial bias articulated in *Caperton* weighs against broadening the definition of "expenditure" to require disclosure of electioneering communications.

Given the above, SBM is forced to rely upon *Caperton v. A.T. Massey Coal Co.*[28] to support its broad theory. As the SBM's Request notes, the Supreme Court's ruling in *Caperton* articulates the test for when a judge cannot—consistent with due process—decide a case. The SBM's characterization of *Caperton*, however, reflects a misunderstanding of its holding. The Request asserts: "*Caperton v. Massey Coal Company* established that a judge who rules in cases involving the judge's major campaign finance supporter deprives the opposing party of his or her due process right to an impartial court hearing."[29]

True, *Caperton* held that a particular judge could not, consistent with due process, decide a specific case. There, the CEO of a corporate litigant likely to come before a judge contributed $1,000 directly to a judge's campaign, funded $500,000 worth of independent expenditures in support of that judge, and donated $2.5 million to a § 527 organization which actively supported that judge's election.[30] This eclipsed the total amount spent by all other supporters of the candidate and exceeded by 300% the amount spent by the candidate's own campaign committee.[31] The candidate was elected, and subsequently declined to recuse himself from the case involving the CEO's company. The Court held that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level."[32]

The Court did not, however, make the categorical ruling the SBM's Request suggests. By contrast, it took pains to recognize that "most matters relating to

[27] *See, e.g.*, Lee Epstein and Andrew D. Martin, *Does Public Opinion Influence the Supreme Court?: Possibly Yes (But We're Not Sure Why)* 13 U. PA. J. CONST. L. 263 (2010).
[28] 556 U.S. 868 (2009).
[29] Request at 2.
[30] *Caperton*, 556 U.S. at 837.
[31] *Id.*
[32] *Id.* at 886-87.

judicial disqualification [do] not rise to a constitutional level,"[33] and the resulting removal of the judge from the case was a remedy to "be confined to rare instances."[34] The Court was careful to note that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," and that recusal was only appropriate in *Caperton* because "this is an exceptional case."[35]

To determine whether a set of facts rises to the level of "exceptional," courts must apply a multi-factor, fact-specific test, where "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."[36] Because electioneering communications are, by definition, not express advocacy, they are not a relevant subject of disclosure under the *Caperton* standard. The multi-factor, fact-specific, case-by-case, and extremely rigorous standard which must be satisfied for the "probability of actual bias to rise to an unconstitutional level," under *Caperton* would not be furthered in its application or implementation by requiring disclosure of electioneering communications that do not advocate the election or defeat of a candidate—judicial or otherwise.

Finally, the SMB notes that, "[t]o determine whether a campaign expenditure rises to the level where the candidate-beneficiary ought to be disqualified in a future case, the candidate and the public must know where the funds for the expenditure came from."[37] This point misunderstands recusal. Indeed, if a judge is ignorant of the sources of expenditures that benefitted him—whether such benefit came directly or indirectly, deliberately or incidentally—those expenditures by definition cannot corrupt him. A candidate unaware of the sources of the funds that helped elect him need not be recused, just as a judge whose assets are in a blind trust avoids a conflict of interest by remaining ignorant of those hidden assets.

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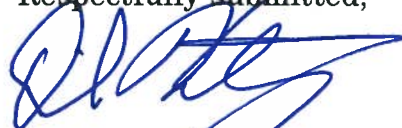
[33] *Id.* at 876 (2009) (internal quotations and citations omitted) (alteration in original).
[34] *Id.* at 890.
[35] *Id.* at 884.
[36] *Id.* The dissenters in *Caperton*'s 5-4 decision would also have found that the standard for removal of a judge from a case is extremely high, and only dissented because they did not believe the majority was stringent enough in its analysis. They noted that "[i]n any given case, there are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a 'probability of bias.'" *Id.* at 892-893 (Roberts, C.J., dissenting). Consequently, even on the extreme facts at issue in that case, the dissenters would have declined to "open[ ] the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias.'" *Id.* at 902.
[37] Request at 4.

The distinction between political speech and issue speech is central to the practical application of the First Amendment. From *Buckley* through *WRTL II* and beyond, the Supreme Court has consistently sought to protect issue speech from regulations covering political speech. The Michigan Legislature has recognized this fact, and codified specific protections of issue speech via exemption from the definition of "expenditure." The goal is to protect the citizen's right to speak on governmental affairs, including court activity.

Caperton's extraordinary circumstances were just that: extraordinary. They do not suffice to lay aside the plain meaning of the statutory definition of "expenditure." The case simply is not a categorical ruling determining the universal propriety of public discussion of judges, as the SBM asserts.

The Center for Competitive Politics appreciates the Secretary's willingness to consider comments on the State Bar of Michigan's declaratory ruling request. Campaign finance regulations strike at the heart of the First Amendment rights to political speech and association, and must be crafted with great care. The SBM request is based on an incorrect reading of judicial precedents and faulty empirical observations (or more accurately, lack of any actual observation) of the extent to which citizens routinely engage in issue discussion surrounding judges and judicial cases and issues. Accordingly, the State Bar's request should be denied.

Respectfully submitted,



David Keating
President