

state constitutions and structural protections that constrain and disperse governmental authority. It also seeks to foster intellectual discourse and to promote education that reaffirms the imperatives of the U.S. Constitution and principles of economic liberty as they relate to contemporary conflicts. Its goals, principles, and activities are more fully described on its Internet website at <http://www.cfif.org>.

3. In this declaration I express some opinions. They are based on my lengthy experience working in the fields of public education and advocacy. My background includes nearly two decades' worth of such experience, working in various educational and advocacy positions at both for-profit and not-for-profit organizations, including experience as the chief executive officer for two not-for-profit corporations. Specifically, I have extensive experience concerning legislative, legal, and public policy issues, as well as grassroots mobilization efforts. As CFIF's President, I am called upon to provide expert commentary and opinion on constitutional and free-market issues, and I have appeared on numerous radio talk shows and television news programs, including national programs. I also have been a frequent contributor of op-eds and letters-to-the-editor in major print publications, with my writings having appeared in *USA Today*, the *Atlanta Journal-Constitution*, and *The Washington Times*, among others. In addition, I have been quoted in numerous newspaper and magazine articles. Also, in my role as a public educator, I have designed and implemented numerous public education and advocacy efforts, along with authoring several issue briefs and congressional testimony on issues of judicial confirmations, taxes, and campaign finance reform, among other topics.

4. CFIF often speaks publicly during the months prior to an election, focusing citizens' attention on important issues of public policy at a time when they are most attuned to those issues. Consistent with past practice, CFIF would like to communicate its views to the

residents of Caddo Parish, using candidates in the upcoming Caddo Parish District Court election on October 19, 2013, to illustrate the organization's views on justice issues to Parish residents. In fact, but for CFIF's concern that Defendants here would demand disclosure of CFIF's donors as a condition of speaking, CFIF would be finalizing its planned communications to Caddo citizens right now.

5. This situation is ironic because CFIF brought a lawsuit in 2004 to give clarity to Louisiana's campaign finance laws. That litigation – which culminated in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) – clarified and narrowly construed Louisiana's campaign finance laws to apply only to communications that include the so-called “magic words” of express advocacy (e.g., “vote for,” “elect,” “defeat”). CFIF knows what the “magic words” standard means and has been able to comply with that standard in speech around the country. The speech it contemplates for Caddo Parish would not employ magic words of express advocacy, but it would mention current candidates and their positions. Thus, CFIF is concerned that Defendants would assert that it meets the relaxed definition of express advocacy they have applied, as discussed below at ¶¶ 15-16.

6. Acting pursuant to the requirements of federal campaign finance law, which employs a bright-line standard for determining when speech is regulated, CFIF broadcast an advertisement in Louisiana in 2003 urging a prompt confirmation vote on the nomination of a judge to the federal bench. It was ready to speak in 2004 about issues related to state-level governance in Louisiana, but it failed to obtain a preliminary injunction in the *Carmouche* litigation and, by the time the Fifth Circuit issued its opinion in 2006, the window for CFIF to speak had long closed. More recently, believing that Louisiana regulators were still following *Carmouche*, CFIF began making preparations in 2012 to speak to Louisianans about a state-level

justice issue. But we discovered that, in the years since *Carmouche*, the Board had disregarded the Fifth Circuit's opinion and had begun employing a different and less precise test to determine what speech is regulated by the state's campaign finance laws. So we shifted our focus to other areas. But CFIF continues its longstanding desire to communicate its views to Louisiana residents.

7. CFIF's historical and continuing interest in Louisiana reflects that our activities are national in scope. For example, since 2000, CFIF has run broadcast and print advertisements in the District of Columbia and States including Alabama, Illinois, Pennsylvania, Virginia and West Virginia, as well as nationally, on matters of public importance ranging from constitutional rights to judicial issues to taxation issues to concerns about public corruption to the right of citizens not to be compelled to fund speech with which they disagree. If Louisiana and other states were free to use our independent discussion of public issues as a basis for imposing burdensome reporting and related requirements, the cumulative burden would seriously impair our ability to speak effectively. Moreover, it is unreasonable, unfair, and, quite frankly, punitive to require us to disclose our overall financial condition, income, etc., as a condition of being allowed to engage in public speech in Louisiana.

8. Voluntary donors support CFIF's work. Consistent with its commitment to individual freedom, CFIF staunchly and zealously guards the privacy of those donors. Similarly, many of CFIF's donors require assurances that their identities will not be publicly disclosed. Specifically, many wish to support CFIF anonymously because, while they support the work CFIF does in protecting and defending individual freedom, they want to avoid being associated with the sometimes-controversial nature of the issues in which CFIF engages. If we were required to publicly disclose our donors, our revenue would fall and, in turn, our ability to speak

would be impaired. Thus, we need clear and precise guidance to allow us to speak in ways that we can be confident will not be challenged on the basis of our practice of preserving the privacy of CFIF and its donors.

9. Through our Internet website and other means, we keep our donors informed as to our positions and activities. By donating to CFIF, our supporters pool their resources to support CFIF's speech on issues of public importance, since such speech would not be possible without collective resources.

10. Whenever we speak, we find persons who welcome what we have to say. Obviously, in some areas we achieve more success than in others. But, based on my experience, it is my strong opinion that a great many people in western Louisiana want to receive our speech. By suppressing our speech, Louisiana's campaign finance laws deprive those Louisianans of their right to hear what we have to say.

11. CFIF often speaks shortly before an election because the public is more focused on policy issues at that time. Also, candidates or ballot issues may raise issues of interest to CFIF or provide useful illustrations of CFIF's views. Thus, CFIF's issue advocacy often refers to candidates and their actions and calls upon those who see or hear the ads to take some issue-oriented action, such as asking for a continued or changed course of conduct by policy-makers. In addition to directly educating the public, such ads may stimulate additional public or candidate discussion of the issue, convince candidates of the importance of the issue (candidates also being particularly attuned to what is said during election periods), or induce candidates to commit to issue positions. Unfortunately, enforcement authorities sometimes view such ads as

favoring or disfavoring a candidate and equate that perceived tendency with express advocacy. By design, a stringent magic words definition prevents that risk.

12. As noted above, CFIF's planned public speech would address vital public issues relating to the administration of justice in Louisiana. It would refer to one or more of the candidates for election to the local Caddo Parish District Court to illustrate and persuade. We are well on our way toward preparing the actual ad that we plan to run. Concepts have been discussed, issues identified, and copy drafted. Yet we cannot finalize that ad and actually run it or pay our vendor until we obtain the relief we seek in this lawsuit. We need to be able to assess with confidence the regulatory consequences of our desired speech. We do not ask this Court to serve as a public censor, nor do we seek advance approval for our ad. Indeed, because we need the flexibility to tailor our ad right up until air time to ensure that it communicates effectively to then-prevailing interests, no system of advance approvals would be practical, even if such a system of prior restraint were constitutional. But we want the Court to understand that this uncertainty over the meaning of Louisiana's law is a real, concrete problem that, at this moment, is chilling our speech on important public issues.

13. The election for the Caddo Parish District Court will occur on October 19, 2013. This vote will likely be decisive, as there appear to be only two candidates on the ballot¹ and a candidate can avoid the November 16, 2013 run-off election simply by obtaining "50% + 1" of the vote. Thus, once the October 19 vote occurs, Louisianans who have been interested in justice issues will lose interest, destroying the effectiveness of our intended speech. I believe that we

¹ See La. Sec'y of State, *Candidate Inquiry*, available at <http://www.sos.la.gov/ElectionsAndVoting/GetElectionInformation/SearchForCandidates/Pages/default.aspx> (select election date of 10/19/2013, click the tab labeled "Races in a Parish," and then select "Caddo Parish - 09").

need at least ten days prior to October 19 to allow us to finalize our intended ad and disseminate it in a way and to an extent that will communicate effectively. The last business day that allows us this necessary time is October 9, 2013, so we have requested a ruling by that date. We only recently made a firm decision that we wanted to speak in Louisiana again and have worked diligently to prepare this case.

14. Even if it is not possible to provide a ruling by the requested date, CFIF remains interested in communicating with Louisiana residents, including those living in Shreveport, about justice issues and/or other topics and intends to use candidates in future elections to illustrate its views. Obtaining the judicial relief sought here is imperative to CFIF's future Louisiana speech and, until such relief is issued, CFIF must self-censor its public communications in Louisiana and artificially curtail its planning and budgeting related to speech activities in other states.

15. Notwithstanding the Fifth Circuit's decision in *Carmouche*, I have learned that the Board is applying the campaign finance laws to speech that does not use the magic words of express advocacy. For example, attached as Exhibit A is a copy of the Board's Memorandum in Opposition [to] Motion for Summary Judgment for *In the Matter of Louisiana Justice Fund*, Agency Tracking No. 2007-842 (Sept. 1, 2009). In its pleading, the Board asserted that the Louisiana Justice Fund paid for a television advertisement "making accusations against Royal Alexander, a candidate for Attorney General in the October 20, 2007 election" that constituted express advocacy under Louisiana's laws. The Board based its conclusion on the ad's script, which stated as follows:

Narrator: Royal Alexander. Shaking down contributors, selling favors. Alexander offered lobbying help to corporate executives in exchange for campaign contributions.

His email to contributors: If I become Attorney General I will be in a position to help your industry. Let me know when we can schedule a fund raiser.

The Times Picayune says Alexander's fund raising warrants an investigation to determine if he violated state laws.

Alexander: Public corruption is corrosive. (Sound bite from an Alexander ad).

Narrator: Don't let Alexander's ads fool you. He seems already on the take.

The ad then ends with a message urging persons to call the Louisiana Ethics Board and to request an investigation.

Id. The Board did not identify any magic words of express advocacy in the ad and took the position that this ad could be “for the purpose of supporting, opposing, or otherwise influencing” an election despite the absence of any magic words of express advocacy. Thus, the Board is not adhering to the definition imposed in *Carmouche*, leaving CFIF uncertain as to the standard that may be applied to CFIF's speech.

16. Attached as Exhibit B is a copy of the Board's Memorandum in Opposition [to] Motion for Summary Judgment for *In the Matter of Scott Wilfong and Capital Business Services LLC*, Agency Tracking No. 2008-757 (Nov. 4, 2009). In its pleading, the Board asserted that a flier entitled “POLITICIANS - SEX ENDANGERING POLICE OFFICERS,” mailed in late July 2008, and paid for by Scott Wilfong/Capital Business Services, L.L.C. “expressly advocated the defeat of a clearly identified candidate” and thus could be regulated under the state's campaign finance laws. The Board based its conclusion on the following language from the ad:

Police officers are still guarding and delivering Mayor Holden to his rendezvous While the Mayor dances the night away and fulfills his sexual fantasies, the body guards (Baton Rouge police officers) are being paid overtime at the tax payer's expense Please join with us in demanding legal and moral conduct from our public officials.

Id. Again, the Board identified no magic words of express advocacy and took the position that this flyer could be deemed regulated express advocacy even if it contained no magic words. As with the prior example, CFIF is left unable to be sure that enforcers will follow the narrow construction imposed in *Carmouche*.

17. As I indicated above, CFIF is able to and will refrain from express electoral advocacy using magic words. It will engage in independent public discussion of matters of public concern and importance that are not covered by the precise construction imposed on Louisiana law by *Carmouche*. Nevertheless, in light of the two attached documents issued by the Board, CFIF is reasonably concerned that (a) it cannot rely on Defendants to conform to *Carmouche*, and (b) Defendants may advance some other test, whether it is the views expressed in the attachments or some other theory they may develop. By effectively nullifying the certainty guaranteed by the Fifth Circuit's decision, the Board's actions have put CFIF back in the same position of uncertainty that existed pre-*Carmouche*.

18. Simply stated, because Defendants now claim they are not bound by the magic words narrowing construction imposed in *Carmouche*, but, rather, are free to apply other standards based on their assessment of other cases involving other laws, CFIF no longer can be confident of the boundary between speech content that triggers regulation and speech content that does not. There is a gray zone that may or may not be regulated, but that we must avoid; thus, CFIF cannot speak freely in Louisiana and must self-censor its speech activities in violation

of the First Amendment. CFIF asks the Court to restore the clear guidance *Carmouche* established, either by ordering Defendants to follow that test or by striking down the underlying statute for facial vagueness that has not been effectively cured.

Signed in Franklin, Tennessee, on September 20, 2013, under penalty of perjury.



Jeffrey L. Mazzella

COPY

**STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW**

| | | |
|-------------------------------|---|--------------------------------------|
| BOARD OF ETHICS | * | |
| | * | DOCKET NO. 2009-0728-ETHICS-A |
| | * | |
| IN THE MATTER OF | * | |
| | * | |
| LOUISIANA JUSTICE FUND | * | AGENCY TRACKING NO. 2007-842 |

MEMORANDUM IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

NOW INTO COURT, comes the Louisiana Board of Ethics (sometimes hereinafter referred to as the "Board") who respectfully submits this Memorandum in Opposition to the Motion for Summary Judgment filed by Louisiana Justice Fund and respectfully represents:

The Louisiana Board of Ethics in its capacity as the Supervisory Committee on Campaign Finance Disclosure, at its March 13, 2008 meeting, concluded a private investigation into the representations contained in information received by the Board. The Board, by a majority vote of its membership, issued the following:

CHARGES

1.

That the Louisiana Justice Fund may have violated Sections 1491.1 and 1505.1D of the Louisiana Campaign Finance Disclosure Act ("CFDA") (La. R.S. 18:1491.1 and 1505.1D) by failing to register as a political committee for the year 2007.

Ex. A

2.

That the Louisiana Justice Fund may have violated Section 1505.1A and/or B of the CFDA (La. R.S. 18:1505.1A and/or B) by failing to file the campaign finance disclosure reports required of political committees by the provisions of Section 1491.6 of the CFDA (La. R.S. 18:1491.6) for the October 20, 2007 primary election based upon its opposition to the candidacy of Royal Alexander, a candidate for Attorney General in that election.

Or, In the Alternative,

That the Louisiana Justice Fund may have violated Section 1501.1 of the CFDA (La. R.S. 18:1501.1) by failing to file the campaign finance disclosure reports required for the October 20, 2007 primary election based upon its expenditures in opposition to the candidacy of Royal Alexander, a candidate for Attorney General in that election.

I. INTRODUCTION

Louisiana's Campaign Finance Disclosure Act (CFDA) is designed to ensure a "knowledgeable electorate."¹ It therefore requires complete disclosure of all transactions related to the financing of election campaigns, including the requirement that persons making independent expenditures in excess of \$500 file disclosure reports. The statute requiring independent expenditures to be reported states:

§1501.1. Reports by persons not candidates or committees

Any person, other than a candidate or a political committee, who makes any expenditure or who accepts a contribution, other than to or from a candidate or to or from a political committee, shall file reports of all information required by R.S. 18:1491.7 for such person if either said expenditures or said contributions exceed five hundred dollars in the aggregate during the aggregating period as defined for committees.

¹La. R.S. 18:1482.

Such reports shall be filed at the same time and shall contain the same information as reports required of political committees by this Part and shall be certified correct as required by R.S. 18:1491.6(A) by the person filing.²

A political action committee is defined as follows:

§1483. Definitions

(14)(a)(I) "Political committee" or "committee" means two or more persons, other than a husband and wife, and any corporation organized for the primary purpose of supporting or opposing one or more candidates, propositions, recalls of a public officer, or political parties, which accepts contributions in the name of the committee, or makes expenditures from committee funds or in the name of the committee, or makes a transfer of funds to or receives a transfer of funds from another committee, or receives or makes loans in an aggregate amount in excess of five hundred dollars within any calendar year.

The statutes requiring political committees to register with the Board and to file required campaign finance disclosure reports state:

§1491.1. Registration of political committees

A. Each political committee, including a subsidiary committee, which knows or anticipates that it will receive contributions or loans, make expenditures or loans, or make a transfer of funds to or receive a transfer of funds from another committee during a calendar year in the aggregate amount exceeding five hundred dollars shall file a statement of organization with the supervisory committee annually after January 1 and no later than January 31 of each calendar year.

²La. R.S. 18:1501.1.

§1505.1. Failure to submit report; failure to file report timely or properly

A. Failure to submit the reports required by this Chapter shall constitute a violation of this Chapter. Failure to submit any such report within three days after the final date for filing shall be presumptive evidence of intent not to file the report.

B. Failure to submit the reports required by this Chapter at the time required shall constitute a violation of this Chapter.

D. Failure to properly submit statements in accordance with R.S. 18:1491.1(E) shall constitute a violation of this Chapter.

The term "expenditure" is defined as follows:

"Expenditure" means a purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office, for the purpose of supporting or opposing a proposition or question submitted to the voters, or for the purpose of supporting or opposing the recall of a public officer, whether made before or after the election.³

The Justice Fund paid for advertisements making accusations against Royal Alexander, a candidate for Attorney General in the October 20, 2007 election. The Justice Fund registered with the Department of the Treasury, Internal Revenue Service on October 4, 2007, sixteen days prior to the October 20, 2007 election. The Justice Fund paid \$18,550 for the advertisement to run in the Shreveport area from

³ La. R.S. 18:1483(9)(a).

October 10, 2007 through October 12, 2007. It further expended \$624,000 on airing the advertisement statewide. The advertisement features accusations against Royal Alexander, a candidate for Attorney General in the October 20, 2007 and November 7, 2007 elections. The television communication ran as follows:

Narrator: Royal Alexander. Shaking down contributors, selling favors. Alexander offered lobbying help to corporate executives in exchange for campaign contributions.

His email to contributors: If I become Attorney General I will be in a position to help your industry. Let me know when we can schedule a fund raiser.

The Times Picayune says Alexander's fund raising warrants an investigation to determine if he violated state laws.

Alexander: Public corruption is corrosive. (Sound bite from an Alexander ad).

Narrator: Don't let Alexander's ads fool you. He seems already on the take.

The ad then ends with a message urging persons to call the Louisiana Ethics Board and to request an investigation.

The above advertisement expressly advocated the defeat of a clearly identified candidate, Royal Alexander. The advertisement against Mr. Alexander ran from October 10, 2007 through October 12, 2007 days prior to a contentious October 20,

*Context -
not supposed to
be a factor.*

2007 primary election in which the front-runner and Mr. Alexander were separated by only a 3% margin.⁴

A. The Justice Fund is correct that the CFDA applies only to communications that expressly advocate the election or defeat of a clearly identified candidate.

The United States Supreme Court in *Buckley* recognized that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”⁵ Therefore, the Court has “insisted that there be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”⁶ However, the governmental interests sought to be achieved by disclosure can be “sufficiently important to outweigh the possibility of infringement, particularly when the ‘free functioning of our national institutions’ is involved.”⁷

The *McConnell* Court adopted the *Buckley* Court’s articulation of the important governmental interests for disclosure: “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the

⁴ Buddy Caldwell 35.64%
Royal Alexander 32.44%

⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶ *Buckley* at 64.

⁷ *Buckley* at 66.

data necessary to enforce more substantive electioneering restrictions.”⁸ The famous quote from Justice Brandeis, used by the *Buckley* Court, and applicable here, is:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.⁹

The Justice Fund should not be allowed to make expenditures without disclosing its activity. *Buckley* makes clear that speech must rise to the level of “express advocacy” in order to be subject to disclosure.¹⁰ The Louisiana definition of “expenditure” must therefore be - and is intended to be - interpreted consistently with that directive. Of course, the underlying question is whether the Justice Fund engaged in “express advocacy” or “issue advocacy.” It is difficult to ascertain what issue the Justice Fund is furthering in its targeted attack against Royal Alexander in the days preceding a contentious state-wide election.

The Fifth Circuit in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) upheld the expenditure provision of the CFDA and limits the scope of the CFDA to express advocacy. The *Buckley* Court concluded that to preserve the definition of expenditure against invalidation on vagueness grounds, the

⁸ *McConnell v. FEC*, 540 U.S. 93, 103 (2003).

⁹ *Buckley* at 46.

¹⁰ *Buckley* at 81. (emphasis added)

definition "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate."¹¹

However, the question remains and left unanswered in *CFIF*: Is the presence or absence of the words "Vote for" or "Vote Against" the only delineation between issue advocacy and express advocacy. Only in a footnote does *Buckley* give examples of express words of advocacy or of election or defeat. Such a list of words is simply illustrative, not mandatory. The Court in *CFIF* states that "The [McConnell] Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation. The Board has never argued that the CFDA applies to anything other than express advocacy as set forth in *Buckley*."

Buckley simply requires is that the communications contain express words of advocacy of election or defeat. Such a requirement necessitates examination of the particular advertisement or communication to determine whether or not the contents of the advertisement or communication are expressly advocating the election or defeat of a candidate. Further, the Supreme Court in *Wisconsin Right to Life v. Federal Election Comm'n*, 127 S. Ct. 2652 (2007) ("WRTL II") determined that "an ad is the functional equivalent of express advocacy only if the ad is susceptible to no

¹¹ *Buckley* at 44.

reasonable interpretation other than as an appeal to vote for or against a specific candidate.¹² No advertisement was before the Court in *CFIF*, therefore the opinion was premised on a hypothetical “issue ad” which may or may not be produced in the future. This is an important distinction the Board and the Ethics Adjudicatory Panel have the wording of the advertisement before them in this matter and are therefore able to see that no issue is furthered by this advertisement and that the advertisement clearly advocates the defeat of Royal Alexander.

B. The advertisement paid for by the Justice Fund is susceptible to no reasonable interpretation other than as an appeal to vote against Royal Alexander in the October 20, 2007 election.

The Justice Fund paid for advertisements making accusations against Royal Alexander, a candidate for Attorney General in the October 20, 2007 election. The Justice Fund registered with the Department of the Treasury, Internal Revenue Service on October 4, 2007, sixteen days prior to the October 20, 2007 election. The Justice Fund paid \$18,550 for the advertisement to run in the Shreveport area from October 10, 2007 through October 12, 2007, 8-10 days prior to the election. It further expended \$624,000 on airing the advertisement statewide. The source of the funding for this advertisement has never been disclosed.

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¹² WRTL at 2665-2666

The race between Royal Alexander and Buddy Caldwell was a very close race - in the general election Buddy Caldwell received 35.64% of the vote and Royal Alexander received 32.44% of the vote. The advertisement was a targeted attack on Royal Alexander that was run state-wide 10 days prior to the general election. The advertisement contained inflammatory language including: “shaking down contributors”; “selling favors”; “don’t let Alexander’s ads fool you.” The advertisement expressly advocated the defeat of a clearly identified candidate and is subject to no other reasonable interpretation other than as an appeal to defeat Royal Alexander, and therefore disclosure is required under *Buckley*, *CFIF* and *WRTL II*.

II. CONCLUSION

The goal of the Justice Fund appears to be to deprive the electorate of information critical to its decision making process in the crucial days preceding an important election. The Justice Fund wishes to express its views on a candidate in a pending election for one of the State’s highest offices. It has every right to do so. However, the citizens of Louisiana have a right to know the identity of persons advocating the defeat of a candidate in this state. No issue is advanced in the attack ad paid for by the Justice Fund. Royal Alexander was not holding any elected office at the time of the election and he had never held an elected office. The race for Attorney General was his first and only political race. The advertisement is

susceptible to no other reasonable interpretation other than as an appeal to defeat Royal Alexander in his election bid for the office of Attorney General. It is the opinion of the Board that he Justice Fund was required to register as a political committee and file required campaign finance disclosure reports of the expenditures made in connection with the October 20, 2007 election. Therefore, Your Honors should deny the Justice Fund's Motion for Summary Judgment in this matter.

Respectfully submitted,

THE LOUISIANA BOARD OF ETHICS



Alesia M. Ardoin (27267)

Trial Attorney

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Baton Rouge, LA 70821

Telephone: (225) 219-5600

Facsimile: (225) 318-7271

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to counsel by placing the same in the U.S. Mail, postage prepaid and properly addressed to their last known address, and via facsimile, on this 1st day of September, 2009 as follows:

James Lamb

Sandler Reiff & Young, P.C.

300 M. Street, S.E. Suite 1102

Washington D.C., 20003



Alesia M. Ardoin

Hand Delivered @ 2:30

STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW

FILED
STATE OF LOUISIANA

NOV 04 2009

DIVISION OF ADMINISTRATIVE LAW

BOARD OF ETHICS

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DOCKET NO. 2009-7510-ETHICS-B

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IN THE MATTER OF
SCOTT WILFONG AND
CAPITAL BUSINESS
SERVICES, LLC

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AGENCY TRACKING NO. 2008-757

MEMORANDUM IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

NOW INTO COURT, comes the Louisiana Board of Ethics (sometimes hereinafter referred to as the "Board") who respectfully submits this Memorandum in Opposition to the Exception of Lack of Subject Matter Jurisdiction filed by Scott Wilfong and Capital Business Services, LLC and respectfully represents:

The Louisiana Board of Ethics in its capacity as the Supervisory Committee on Campaign Finance Disclosure, at its July 29, 2009 meeting, concluded a private investigation into the representations contained in information received by the Board. The Board, by a majority vote of its membership, issued charges that Capital Business Services and Scott Wilfong may have violated Section 1501.1 of the Louisiana Campaign Finance Disclosure Act ("CFDA") by expending more than \$500 in connection with the distribution of a flyer that opposed the candidacy of Melvin "Kip" Holden for Mayor-President of the City of Baton Rouge/East Baton

Ex. B

Rouge Parish in connection with the October 4, 2008 election and failing to file required campaign finance disclosure reports.

I. INTRODUCTION

Louisiana's Campaign Finance Disclosure Act (CFDA) is designed to ensure a "knowledgeable electorate."¹ It therefore requires complete disclosure of all transactions related to the financing of election campaigns, including the requirement that persons making independent expenditures in excess of \$500 file disclosure reports. The statute requiring independent expenditures to be reported states:

§1501.1. Reports by persons not candidates or committees

Any person, other than a candidate or a political committee, who makes any expenditure or who accepts a contribution, other than to or from a candidate or to or from a political committee, shall file reports of all information required by R.S. 18:1491.7 for such person if either said expenditures or said contributions exceed five hundred dollars in the aggregate during the aggregating period as defined for committees. Such reports shall be filed at the same time and shall contain the same information as reports required of political committees by this Part and shall be certified correct as required by R.S. 18:1491.6(A) by the person filing.²

§1505.1. Failure to submit report; failure to file report timely or properly

A. Failure to submit the reports required by this Chapter shall constitute a violation of this Chapter. Failure to submit any such report

¹La. R.S. 18:1482.

²La. R.S. 18:1501.1.

within three days after the final date for filing shall be presumptive evidence of intent not to file the report.

B. Failure to submit the reports required by this Chapter at the time required shall constitute a violation of this Chapter.

D. Failure to properly submit statements in accordance with R.S. 18:1491.1(E) shall constitute a violation of this Chapter.

The term "expenditure" is defined as follows:

"Expenditure" means a purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office, for the purpose of supporting or opposing a proposition or question submitted to the voters, or for the purpose of supporting or opposing the recall of a public officer, whether made before or after the election.³

Capital Business Services and Scott Wilfong d/b/a SSW & Associates paid for advertisements making accusations against Melvin "Kip" Holden, a candidate for Mayor-President in the October 4, 2008 election. Capital Business Services is a limited liability company registered with the Secretary of State. Scott Wilfong is holds 100% ownership in the company. Capital Business Services paid for the printing and mailing of a flier opposing the candidacy of Melvin "Kip" Holden. The flier features accusations against Melvin "Kip" Holden, a candidate for Mayor-President for the City of Baton Rouge- Parish of East Baton Rouge in the October 4,

³ La. R.S. 18:1483(9)(a).

2008 election. The flier, titled POLITICIANS - SEX ENDANGERING POLICE OFFICERS, contained the following language:

Police officers are still guarding and delivering Mayor Holden to his rendezvous....While the Mayor dances the night away and fulfills his sexual fantasies, the body guards (Baton Rouge police officers) are being paid overtime at the tax payer's expense....Please join with us in demanding legal and moral conduct from our public officials.

The flier was mailed in late July 2008 to over 18,000 residents of East Baton Rouge Parish. The above flier expressly advocated the defeat of a clearly identified candidate, Melvin "Kip" Holden, in the October 4, 2008 election.

A. The CFDA applies only to communications that expressly advocate the election or defeat of a clearly identified candidate.

The United States Supreme Court in *Buckley* recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."⁴ Therefore, the Court has "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."⁵ However, the governmental interests sought to be achieved by disclosure can be "sufficiently important to outweigh the

⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵ *Buckley* at 64.

possibility of infringement, particularly when the ‘free functioning of our national institutions’ is involved.”⁶

The *McConnell* Court adopted the *Buckley* Court’s articulation of the important governmental interests for disclosure: “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.”⁷ The famous quote from Justice Brandeis, used by the *Buckley* Court, and applicable here, is:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.⁸

Wilfong and Capital Business Services should not be allowed to make expenditures without disclosing its activity. *Buckley* makes clear that speech must rise to the level of “express advocacy” in order to be subject to disclosure.⁹ The Louisiana definition of “expenditure” must therefore be - and is intended to be - interpreted consistently with that directive. Of course, the underlying question is whether Wilfong and Capital Business Services engaged in “express advocacy” or “issue advocacy.” It is difficult

⁶ *Buckley* at 66.

⁷ *McConnell v. FEC*, 540 U.S. 93, 103 (2003).

⁸ *Buckley* at 46.

⁹ *Buckley* at 81. (emphasis added)

to ascertain what issue Wilfong and Capital Business Services is furthering in its targeted attack against Holden in the weeks preceding a contentious parish-wide election.

The Fifth Circuit in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) upheld the expenditure provision of the CFDA and limits the scope of the CFDA to express advocacy. The *Buckley* Court concluded that to preserve the definition of expenditure against invalidation on vagueness grounds, the definition "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate."¹⁰ The Board has never argued that the CFDA applies to anything other than express advocacy as set forth in *Buckley*.

Buckley simply requires that the communications contain express words of advocacy of election or defeat. Such a requirement necessitates examination of the particular advertisement or communication to determine whether or not the contents of the advertisement or communication are expressly advocating the election or defeat of a candidate. Further, the Supreme Court in *Wisconsin Right to Life v. Federal Election Comm'n*, 127 S. Ct. 2652 (2007) ("WRTL II") determined that "an ad is the functional equivalent of express advocacy only if the ad is susceptible to no

¹⁰ *Buckley* at 44.

reasonable interpretation other than as an appeal to vote for or against a specific candidate.¹¹ No advertisement was before the Court in *CFIF*, therefore the opinion was premised on a hypothetical “issue ad” which may or may not be produced in the future. This is an important distinction the Board and the Ethics Adjudicatory Panel have the wording of the advertisement before them in this matter and are therefore able to see that no issue is furthered by this advertisement and that the advertisement clearly advocates the defeat of Holden.

B. The advertisement paid for by Wilfong and Capital Business Services is susceptible to no reasonable interpretation other than as an appeal to vote against Holden in the October 4, 2008 election.

Wilfong and Capital Business Services paid for advertisements making accusations against Holden, a candidate for Mayor-President of Baton Rouge in the October 4, 2008 election. The advertisement was a targeted attack on Holden that was mailed to over 18,000 registered voters just weeks before the primary election. The advertisement contained inflammatory language making allegations that Holden was having an affair with a married woman and was beaten by her husband. The flier even included a picture that was doctored to show Holden with a busted lip and a black eye.

¹¹ WRTL at 2665-2666

This body *In the Matter of the Louisiana Justice Fund, 2009-0728-ETHICSA*, recently found that an ad describing Royal Alexander, a candidate for Attorney General in the October 20, 2007 election, as “on the take” expressly advocated the rejection of Royal Alexander as a candidate and “cannot reasonably be interpreted to be anything other than an appeal to vote against Royal Alexander.” The flier at issue here also cannot reasonably be interpreted to be anything other than an appeal to vote against Mayor Holden. The flier expressly advocated the defeat of Holden and is subject to no other reasonable interpretation other than as an appeal to defeat Holden, and therefore disclosure is required under *Buckley, CFIF, WRTL II* and this tribunal’s recent decision *In the Matter of the Louisiana Justice Fund*.


II. CONCLUSION

The goal of Wilfong and Capital Business Services appears to be to deprive the electorate of information critical to its decision making process in the crucial days preceding an important election. Wilfong and Capital Business Services wishes to express its views on a candidate in a pending election for an important parish-wide office. It has every right to do so. However, the citizens of Louisiana have a right to know the identity of persons advocating the defeat of a candidate in this state. No issue is advanced in the attack ad paid for by Wilfong and Capital Business Services. The flier is susceptible to no other reasonable interpretation other than as an appeal

to defeat Holden in his re-election bid. Wilfong and Capital Business Services are therefore required to file campaign finance disclosure reports of the contributions and expenditures made in connection with the October 4, 2008 election. Therefore, Your Honors should deny Wilfong and Capital Business Services' Exception of Lack of Subject Matter Jurisdiction in this matter.

Respectfully submitted,

THE LOUISIANA BOARD OF ETHICS

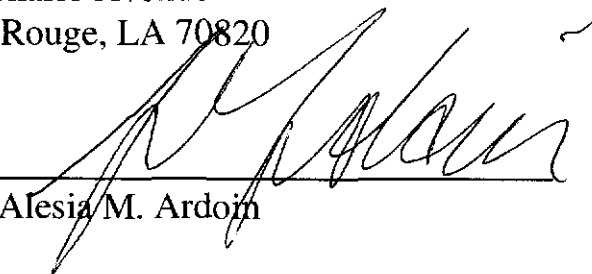


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to counsel by placing the same in the U.S. Mail, postage prepaid and properly addressed to their last known address, and via facsimile, on this 4th day of November, 2009 as follows:

Crosby C. Lyman
1559 Sharlo Avenue
Baton Rouge, LA 70820



Alesia M. Ardoin