Florida Election Case Law Update

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by
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BACKGROUND

In the past few years, state and federal courts in Florida have stricken or modified a number of state election statutes on free speech and other constitutional grounds. Case decisions in other jurisdictions have called into question the validity of others. Therefore, the Florida Statutes do not always reflect the current state of the law on a particular election subject.

METHODOLOGY

Committee staff conducted legal research to identify case decisions which adversely impact existing Florida statutes. Staff also solicited input from the Division of Elections and Florida Elections Commission staffs to supplement the legal research process.

FINDINGS

MAJOR CASES HOLDING FLORIDA LAW UNCONSTITUTIONAL OR ADOPTING NARROWING CONSTRUCTION

Florida Right to Life, Inc. v. Crotty, No. 98-770-CIV-ORL-19A (M.D. Fla. 1998) (SEE APPENDIX "A")

Issues: Campaign Finance; Issue Advocacy; Independent Expenditures; Contributions to Charitable Organizations
Florida Statutes Affected: 106.011, 106.08, 106.085, 106.144, F.S.
Impact:

- *Independent Expenditures*: "unfair surprise" provision requiring notice of independent expenditures --- UNCONSTITUTIONAL
- *Candidate Endorsements*: requirement that organization file detailed statement concerning the organization and the method for selection of candidate *prior to* publication of endorsement --- UNCONSTITUTIONAL
- *Issue Advocacy*: narrowed the term "political committee" to organizations whose "major purpose" is to engage in "express advocacy," effectively excluding issue advocacy groups (except those groups expressly advocating the passage or defeat of a ballot issue) from registration and reporting requirements.
- *Candidate Contributions to Charities*: limited the reach of the Florida statute prohibiting candidate contributions to charitable and other philanthropic organizations to only those contributions made by a candidate *in exchange for political support* of the organization.

Author's Disclaimer: The plaintiffs in *Crotty* are currently pursuing an action for *permanent injunction* against the enforcement of certain Florida election statutes in federal district court. This section addresses the decision in the action for *temporary* injunction. Should the decision in the pending case differ substantially from the reported decision on the temporary injunction, wholesale changes to the legislative recommendations may be warranted.

Discussion:

Florida Right to Life, Inc., and its political committee ("plaintiffs") challenged a number of Florida's campaign finance statutes in federal district court in Orlando. The plaintiffs sought a preliminary injunction pursuant to the federal civil rights statute (42 U.S.C. s. 1983), charging that the Florida laws violated

the First and Fourteenth amendments to the U.S. Constitution. The *Crotty* court upheld Florida's $500 individual contribution limit[1] and the State's $1,000 limit on contributions to persons for the purpose of making independent expenditures.[2] However, the court temporarily enjoined the enforcement of two statutes and significantly narrowed the scope of two others.

Independent Expenditures

The *Crotty* court enjoined the State from enforcing the "unfair surprise" provision of Florida law requiring *notice of independent expenditures.* Section 106.085, F.S., requires an individual or organization making an independent expenditure of more than $1,000 on behalf of or in opposition to a candidate to provide two separate notices:

1. *Within 24 hours after obligating the funds* for the expenditure, provide notice and a general description of the expenditure.
2. Notice of the obligation of the expenditure must be made at least *five days prior to an election*.

The person making the independent expenditure must provide the notices to all candidates in the affected race and to the candidates' qualifying officer.

The court found that the *24-hour advance notice requirement* was an impermissible *prior restraint* on speech in violation of the First Amendment. Any government regulation or action which creates a legal impediment to or prevents expression from occurring is a prior restraint and is presumed to be constitutionally invalid. *Alexander v. United States*, 113 S.Ct. 2766, 2771 (1993). By requiring disclosure after funds have been obligated but in all likelihood *before actual publication*, the statute was "incompatible with the (free speech) requirements of the First Amendment." The court hinted that a more narrowly-drawn statute might pass constitutional muster.

The court also held that the five-day "no ambush" period for obligating funds was a content-based restriction which violated the First Amendment. It characterized the restriction as a ban on political speech during the five days immediately preceding an election, an "important time for the free interchange of political speech and ideas." The court enjoined enforcement of the ban, holding that it was not "narrowly tailored" to further a "compelling" state interest ("strict scrutiny" test).

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[1] § 106.08(1), F.S. (1997).

[2] § 106.071(3), F.S. (1997).

Endorsements

Similarly, the court temporarily enjoined enforcement of section 106.144, F.S., requiring groups which endorse candidates through political advertisements to file a detailed statement *prior to* publishing, broadcasting, or distributing the advertisement. The statement must contain certain facts about the organization and the manner in which the candidate was selected for endorsement. The court found that the statute was an unconstitutional prior restraint on free speech.

Issue Advocacy

The *Crotty* court significantly narrowed the scope of two other provisions of Florida law in the areas of issue advocacy and limitations on candidate contributions to charities.

The plaintiffs in *Crotty* argued that the definition of "political committee" was overbroad and could be unconstitutionally applied to groups involved solely in "issue advocacy." *Issue advocacy* generally refers to ads run by non-candidate groups and organizations which support or oppose a particular public issue, but *do not expressly advocate* the election or defeat of a candidate.[3]

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[3] Critics charge that such ads, which typically include the name or likeness of a candidate, are a loophole increasingly being used by political parties and other groups to circumvent contribution limits. Irrespective, the U.S. Supreme Court decision in *Buckley v. Valeo*, 96 S.Ct. 612 (1976), and the prevailing opinion of most federal courts suggest that issue advocacy ads which do not expressly advocate the election or defeat of a candidate using *express words of advocacy* (i.e. "vote for," "vote against," "elect," "support," "defeat," etc.) may be beyond the scope of the government to regulate. See, e.g., *Buckley v. Valeo*, 96 S.Ct. 612, 645-47 (1976); *Federal Elec. Comm'n v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616, 623 (1986); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F.Supp.2d 740, 743 (E.D. Mich. 1998) (government can regulate express advocacy but issue advocacy cannot be prohibited or regulated, citing *Buckley and MCFL*); *West Virginians for Life, Inc. v. Smith*, 960 F.Supp. 1036, 1039 (S.D.W.Va. 1996) (it is clear from *Buckley* and its progeny that the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which cannot); *Maine Right to Life Committee, Inc. v. Federal Elections Commission*, 914 F.Supp. 8 (D. Maine 1996) , *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997) (*Buckley* adopted a bright-line test that expenditures must in express terms advocate the election or defeat of a candidate in order to be subject to limitation); but see, *Federal Elec. Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987) (ad can expressly advocate in the

A statute is overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also sweeps within its coverage speech or conduct which is protected by the guarantees of free speech and association. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The overbreadth of a statute must not only be real, but also *substantial*, when judged in relation to the statute's plainly legitimate sweep. *Doe v. Mortham*, 708 So.2d 929, 931 (Fla. 1998), *quoting*, *Broadrick v. United States*, 93 S.Ct. 2908, 2915-18 (1973). However, application of the First Amendment overbreadth doctrine is "strong medicine," and a court will only use it to invalidate a statute if it cannot place a limiting construction on the challenged statute. *Id.*

Section 106.011(1), F.S., defines a "political committee" as:

> [A] combination of two or more individuals, or a person other than an individual, the primary or *incidental purpose* of which is to *support or oppose* any candidate, *issue*, or political party, which accepts contributions or makes expenditures during a calendar year in an aggregate amount in excess of $500.

(emphasis added). The plaintiffs in *Crotty* charged that the Florida statute was overbroad because it: 1) included *issues* as well as candidates; and, 2) impermissibly regulated "issue advocacy" by regulating the "incidental" support of candidates.[4]

The court agreed that the statute was overly broad as written. But, instead of relegating the statute to the constitutional dustbin, the court limited the reach of the definition of "political committee" to organizations whose "major purpose" is engaging in "express advocacy" as that term is defined in *Buckley*.[5] *Crotty*, at 11-12 & fn. 5, 8; see also *Buckley v. Valeo*, 96 S.Ct. 612, 646-47 & fn. 52 (1976)

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absence of "magic" words if the content and context of the ad unmistakably advocate in support or opposition to a candidate and no alternative reading could be suggested).

[4] "Issue advocacy," by its very nature, has an incidental effect on the election or defeat of candidates. See *Federal Elec. Comm'n v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616, 623 (1986) (*Buckley* Court acknowledged that candidates may be intimately tied to public issues).

[5] Significantly, the court had earlier concluded that *Buckley* required "explicit words of advocacy" to support a finding of express advocacy, and that an ad which creates an "unmistakable impression" of advocacy was insufficient. Thus, although it is never specifically stated, there is little doubt that *Crotty* stands for the premise that a group must use *express words* of advocacy in its advertising in order to mandate registration as a political committee.

(discussing express advocacy standard). By defining "political committee" in this narrow fashion, the court effectively excluded issue advocacy groups from its reach --- except for those groups expressly advocating the passage or defeat of a ballot issue.

Candidate Contributions to Charities

The final provision of law impacted by the *Crotty* decision addresses candidate contributions to charitable and other philanthropic organizations. Florida law prohibits a candidate, political committee, or political party from soliciting contributions from, or making contributions to, "any religious, charitable, civic, or other ... organizations established primarily for the public good," with certain exceptions. § 106.08(5), F.S. (1997). The court noted that a "contribution" under Florida law includes any donation "made for the purpose of influencing the results of an election." § 106.011(3), F.S. (1997).

The plaintiffs alleged that the law operated to bar contributions by candidates to organizations engaged exclusively in issue advocacy. The court looked to the definition of "contribution" to limit the reach of the Florida statute to contributions made by a candidate *in exchange for political support* of the organization. Reading in this new *quid pro quo* requirement allowed the statute to survive constitutional scrutiny.

Recommendations for Legislation:

Independent Expenditures

The court invalidated two Florida notice requirements relating to independent expenditures which mandate:

- Notice of the obligation of an expenditure at least 5-days prior to an election; and,
- 24-hour advance notice of independent expenditures to candidates in the affected race.

With regard to the *5-day "no ambush" period*, staff suggests that the requirement be removed from Florida law. It is unlikely that any temporal prohibition restricting someone from making an independent expenditure proximate to the date of an election will pass constitutional muster. Particularly informative on this point is the *Crotty* court's citation to a federal district court decision striking down a Montana ban on election-day speech:

> It is hard to imagine a more important time for the interchange of political speech and ideas than on election day. The possibility of fraud or

> misinformation via paid political advertising is present on the day before election day or in the weeks or months that precede the election, just as surely as it is a possibility on election day.

Crotty, No. 98-770-CIV-ORL-19A, at 21-22, *citing, Nat'l Right to Life Political Action Comm. v. McGrath*, 982 F.Supp. 694, 696-97 (D.Mont. 1997). Also instructive is the case of *Town of Lantana v. Pelcznyski*, 303 So.2d 326 (Fla. 1974), where the Florida Supreme Court held that a final election week *7-day notice requirement* for attack ads violated free speech guarantees.

Staff also recommends eliminating the *24-hour advance notice requirement*. The only viable alternatives appear to be to require "after-the-fact" or "contemporaneous" notice coinciding with the initial publication of the independent expenditure ads. The *Crotty* court intimated that such a requirement would stand at least a fair chance of passing constitutional muster. However, such a requirement fails to serve the statute's purpose of providing *advance* notice and preventing "unfair surprise," since candidates and campaigns will undoubtedly learn of the ads soon after they are published.

Endorsements

The *Crotty* court temporarily enjoined the enforcement of the provision of Florida law requiring groups endorsing candidates to file a statement concerning the organization and the manner in which the candidate was selected for endorsement *before* publishing, broadcasting, or distributing the advertisement.

Staff recommends that Florida law be amended to eliminate the endorsement notice requirement. The *Crotty* court invalidated the advance notice component of the endorsement notice requirement. For the reasons stated above in connection with the independent notice requirements, contemporaneous notice does not appear to serve any practical purpose.

The only remaining purpose served by the endorsement notice provision is to provide information about the endorsement's sponsors and sources of funds. Groups spending more than $500 are already required to register as either a *political committee* or *committee of continuous existence*, and periodically report on contributions and expenditures. Maintaining the endorsement notice requirement in any form would only have a substantial impact on those groups endorsing candidates or referendum issues *and spending less than $500*. Therefore, staff recommends repealing section 106.144, Florida Statutes.

Issue Advocacy

The *Crotty* court re-wrote the definition of "political committee" to save from

striking the statute on overbreadth grounds. The court limited the reach of the statute to those organizations whose "major purpose" is to engage in "express advocacy," presumably through the use of political advertisements using express *words* of advocacy (i.e. "vote for," vote against," "defeat," etc.). The court's purpose appears to have been to insure that those engaging in issue advocacy (other than those expressly advocating the election or defeat of a specific *ballot* issue) were not required to register and report as a political committee.

The *Crotty* decision *does not* appear to impact groups receiving or making *contributions* in excess of $500 per year. Recall that contributions under Florida law are essentially anything of value "made for the purpose of influencing the results of an election." § 106.011(3)(a), F.S. (1997). Groups making or receiving contributions would still be required to register and report as a political committee, post-*Crotty*. The *contribution* side of the equation does not affect pure issue advocacy groups, which do not expend or receive funds "for the purpose of influencing the results of an election."

What the *Crotty* decision does address is groups who exclusively run certain types of *advertisements* or make certain types of *expenditures*. Under *Crotty*, a group running uncoordinated ads would only be required to register as a political committee if its "major purpose" is to engage in "'express advocacy,' as that term is defined in *Buckley v. Valeo* ..." *Crotty*, at 11-12 & fn. 5, 8; see also *Buckley v. Valeo*, 96 S.Ct. 612, 646-47 & fn. 52 (1976) (discussing express advocacy standard).

Staff recommends that the first sentence of section 106.011, F.S., be amended to read:

> **106.011 Definitions.--** As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:
>
> (1) "Political committee" means a combination of two or more individuals, or a person other than an individual, which contributes more than $500 in the aggregate during a calendar year to any candidate or political party ~~the primary or incidental purpose of which is to support or oppose any candidate, issue, or political party,~~ or which accepts contributions ~~or makes expenditures~~ during a calendar year in an aggregate amount in excess of $500; "political committee" also means a combination of two or more individuals, or a person other than an individual, which expressly advocates the election or defeat of a candidate or issue and makes expenditures of more than $500 in the aggregate during a calendar year; political committee also means the

> sponsor of a proposed constitutional amendment by initiative which intends to seek the signatures of registered electors.

This approach separates out the contribution side of the equation from the expenditure side, and expressly maintains the registration requirement for groups receiving or making *contributions*. It incorporates the "express advocacy" requirement into the expenditure side. But, this approach avoids using the term "major purpose," which is vague and would create confusion. Instead, the proposed statute inherently defines "major purpose" to mean any group making aggregate expenditures in excess of $500 per calendar year.

If the Legislature were to adopt the foregoing definition, it may also wish to adopt a statutory definition for the term "express advocacy." Failure to do so would abdicate the responsibility for defining the term to the judicial branch. Since there are numerous policy considerations at issue, it would be best for the Legislature to indicate its intent. See *State of Wisconsin v. Wisconsin Manufacturers & Commerce*, Case No. 98-0596, at ¶ 33 (7/7/99) (Supreme Court of Wisconsin) (creation of express advocacy standard is properly the role of the Legislature or Wisconsin Board of Elections, not the judicial branch).

Crotty virtually mandates that any definition of "express advocacy" incorporate the use of *express words* of advocacy. This bright-line test has been adopted by the majority of the federal courts interpreting the "express advocacy" standard articulated in *Buckley*. Any attempt by the Florida Legislature to define "express advocacy" without the use of express words of advocacy would be pushing the constitutional envelope.

The problem with the "bright-line" test is that it contains a built-in loophole: you can support or attack any candidate as long as your ad stops short of saying "vote for," vote against," or something similar. If the Legislature wishes to more strictly regulate issue advocacy groups, the best course may be to adopt the "totality of the circumstances" test[6] outlined in *Furgatch v. Federal Elec. Comm'n*, 807 F.2d 857 (9th Cir. 1987), *cert. denied,* 484 U.S. 850 (1987). Although clearly the minority view, *Furgatch* held that an ad can expressly advocate in the absence of "magic" words if the content and context of the ad unmistakably advocate in support or opposition to a candidate, and no alternative

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[6] The *Furgatch* test has three main prongs: (1) speech is express if its message is unmistakable and unambiguous, suggesting only one plausible meaning; (2) speech is advocacy if it presents a clear plea for action, thereby excluding speech which is merely informative; and, (3) it must be clear what action is advocated. *Furgatch*, 807 F.2d at 864. If any other reasonable alternative reading of the speech can be suggested, it is not express advocacy. *Id*.

reading could be suggested.[7] Recently, the Oregon Court of Appeals, applying *Furgatch,* held that an ad with no "magic words" nonetheless contained express advocacy and could be regulated under Oregon state law. *State v. Keisling*, 1999 WL 308739 (Or. App. 5/12/99); see also, *State of Wisconsin v. Wisconsin Manufacturers & Commerce*, Case No. 98-0596, at ¶ 27 (7/7/99) (Supreme Court of Wisconsin) (*Furgatch* approach provides an "attractive alternative" to the "bright-line" test).

Adopting the *Furgatch* model would at least provide the State with some persuasive precedent to cite in defense of the statute:

> **106.011 Definitions.--** As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:
>
> (18) "Expressly advocates" means to sponsor or fund, in whole or in part, a paid expression in any communications media prescribed in subsection (13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display, or by any means other than the spoken word in direct conversation, which, when read as a whole and with limited reference to external events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a clearly-identified candidate or issue, because it:
>
> (a) contains a message which is unmistakable, unambiguous, and suggestive of only one plausible meaning;
>
> (b) presents a clear plea for action; and
>
> (c) makes clear what action is advocated.
>
> The absence of express words of advocacy creates a rebuttable presumption that the paid expression does not expressly advocate for or against a clearly-identified candidate or issue.

Nonetheless, committee staff continues to have serious reservations about the constitutionality of any standard which seeks to define "express advocacy" without requiring the use of *express words* of advocacy.

Candidate Contributions to Charities

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[7] The *Crotty* court rejected a similar test, holding that "express advocacy" does not include communications that merely leave an "unmistakable impression" of supporting or opposing a specified candidate in the absence of *express words* of advocacy. *Crotty*, No.98-770-CIV-ORL-19A, at fn.8.

The *Crotty* court narrowed the scope of a Florida law prohibiting a candidate from making contributions to religious, charitable and other organizations established primarily for the public good. § 106.08(5), F.S. (1997). It limited the reach of the Florida statute to contributions made by a candidate *in exchange for political support* of the organization.

Staff recommends that section 106.08(5), Florida Statutes, be narrowly amended to reflect this judicially-created *quid pro quo* requirement:

106.08 Contributions; limitations on.--

(5) A person may not make any contribution through or in the name of another, directly or indirectly, in any election. ~~Candidates, political~~ committees~~,~~ and political parties may not solicit contributions from or make contributions to any religious, charitable, civic, or other causes or organizations established primarily for the public good. Candidates may not solicit contributions from or, in exchange for political support, make contributions to any religious, charitable, civic, or other causes or organizations established primarily for the public good. However, it is not a violation of this subsection for a candidate, political committee, or political party executive committee to make gifts of money in lieu of flowers in memory of a deceased person or for a candidate to continue membership in, or make regular donations from personal or business funds to, religious, political party, civic, or charitable groups of which the candidate is a member or to which the candidate has been a regular donor for more than 6 months. A candidate may purchase, with campaign funds, tickets, admission to events, or advertisements from religious, civic, political party, or charitable groups.

***Doe v. Mortham*, 708 So.2d 929 (Fla. 1998)**
(SEE APPENDIX "B")

Issues: Anonymous Political Advertising; Sponsorship Identification Disclaimers

Florida Statutes Affected: 106.071, 106.143, 106.144, F.S.

Impact: Affirmed the constitutionality of Florida's political advertising disclaimer laws, while carving out a narrow exemption for *individuals* acting *independently* using only *their own modest resources*.

Discussion:

One of the most important Florida election cases in recent years is *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998). In *Doe*, the Florida Supreme Court was faced with a facial overbreadth challenge to the constitutionality of three

separate sections of Florida Statutes, two requiring sponsors of campaign ads to identify themselves in the ad and the other requiring the filing of a detailed statement by groups endorsing candidates or issues. The court upheld the facial constitutionality of the State's laws while creating a narrow, as-applied exemption to the sponsorship identification requirement for personal pamphleteering by an *individual* who acts *independently* and who funds the political messages exclusively with his or her *own modest resources*.

The *Doe* plaintiffs were individuals in Palm Beach County who wished to engage in anonymous political advocacy. *Doe v. Mortham*, No. 96-630, Complaint for Declaratory Judgment (Fla. 2nd Judicial Circuit, 1996). The plaintiffs sought to make independent expenditures supporting and opposing candidates and referendums during the 1996 election cycle, either individually, in association with each other, or in association with other individuals or groups. They planned to publish their ads in several different communications mediums, including billboards, direct mail, radio, television, newspapers and periodicals. The specific independent expenditures were to exceed $100 in the aggregate for each individual election.

The plaintiffs challenged the statutes under the First Amendment overbreadth doctrine. A statute is overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also it sweeps within its coverage speech or conduct which is protected by the guarantees of free speech and association. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The overbreadth of a statute must not only be real, but also *substantial*, when judged in relation to the statute's plainly legitimate sweep. *Doe*, 708 at 931 (Fla. 1998), quoting, *Broadrick v. United States*, 93 S.Ct. 2908, 2915-18 (1973). However, application of the First Amendment overbreadth doctrine is "strong medicine." *Doe*, 708 So.2d at 931. A court will only use it to invalidate a statute if it cannot place a limiting construction on the challenged statute.

The plaintiffs' challenge relied heavily on the holding in *McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511 (1995). In *McIntyre*, the United States Supreme Court struck down an Ohio statute prohibiting all forms of anonymous political advertising. The *McIntyre* Court held that the Ohio statute violated First Amendment free speech guarantees because it was not *narrowly tailored* to effectuate the legitimate state interest in preventing fraud and libel in the election process.[8] *Id.* at 1520-21, 1524.

In *McIntyre*, a private citizen, Ms. Margaret McIntyre, composed and printed

[8] The Court also concluded that Ohio's asserted state interest in providing the electorate with relevant information about the source of the message was not sufficiently compelling to justify the intrusion upon First Amendment rights.

leaflets on her home computer opposing a proposed school tax. She distributed the leaflets at a public meeting to discuss a referendum on the proposed levy. Some of the leaflets did not identify Ms. McIntyre as the author, stating only that the views expressed were those of "CONCERNED PARENTS AND TAX PAYERS." She paid a professional printer to make additional copies of the leaflets, and received some help from her son and a friend. Otherwise, Ms. McIntyre acted independently. After a complaint was filed by a school official, the Ohio Elections Commission found that Ms. McIntyre violated Ohio's ban on anonymous political advertising and assessed a $100 fine.
In a 7-2 decision[9], the Supreme Court struck down the Ohio statute as violating Ms. McIntyre's First Amendment right to free speech. After determining that anonymity in political discussion is part of the core protections provided by the First Amendment, the Court applied the strict scrutiny test to the Ohio statute at issue. *Id.* at 1519. Under strict scrutiny, a law burdening core political speech will be upheld only if it is *narrowly tailored* to effectuate a *compelling* or overriding state interest. The Court held that the statute was not narrowly tailored to promote the state's interest in preventing fraud and libel for several reasons,[10] including the fact that it applied not only to candidates and their organized supporters but also to *"individuals acting independently and using only their own modest resources"* (emphasis added). *Id.* at 1521.

The plaintiffs in *Doe* challenged three separate sections of Florida law. Two of the challenged sections require sponsors to identify themselves on political advertise- ments[11] and independent expenditures.[12] The remaining statute

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[9] Justice Clarence Thomas' concurrence is based exclusively on a strict interpretation of the original intent of the framers of the constitution and, as such, rejects the rationale used by the majority. The decision is more properly viewed as a 6 member majority opinion, with 2 dissents and 1 concurrence.

[10] Some reasons given by the Court were: the prohibition embraced statements that were not even arguably false or misleading; Ohio had other statutes which more directly addressed concerns over fraud in the electoral process; it applied not only to candidates but also to ballot issues, which present neither a substantial risk of libel nor the appearance of *quid pro quo* corruption; it applied not only on the eve of an election but months prior; it applied regardless of the strength of the author's interest in remaining anonymous. *Id.* at 1521-22.

[11] § 106.143, F.S. (1997). Section 106.011(17), Florida Statutes, defines the term "political advertisement" to mean:

> [A] paid expression in any communications media ... or by

requires groups which run political ads endorsing candidates or referendum issues to file a statement with the Division of Elections disclosing certain information about the group and the manner in which the candidate or issue was selected for endorsement.[13]

The Florida Supreme Court determined that the statutes could be read not to apply to a person in Ms. McIntyre's position --- that is, to personal pamphleteering of *individuals* who *act independently* and expend only their own *modest resources*.[14] So read, the court found that the disclaimer statutes at issue *were not overbroad*, and that "any alleged infirmity left uncured by our construction ... is insubstantial and can be dealt with on an 'as applied' basis." *Doe*, 708 So.2d at 931-32.

Borrowing from *McIntyre*, the *Doe* court specifically held that section

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> means other than the spoken word in direct conversation, which shall support or oppose any candidate , elected public official, or issue.

[12] § 106.071, F.S. (1997). Section 106.011(5)(a), Florida Statutes, defines "independent expenditure" to mean:

> [A]n expenditure ... for the purpose of advocating the election or defeat of a candidate or ... issue, which ... is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.

[13] § 106.144, F.S. (1997). The decision in *Doe* did not impact this section. The *Doe* decision modified only sections of the law dealing with political advertisements and independent expenditures by *individuals*; section 106.144, F.S., by its express terms, applies only to endorsements by *groups* and *organizations*.

[14] The *Doe* court also rejected a vagueness challenge to the statutes. A statute will be held *void for vagueness* if it fails to clearly define the conduct prohibited, such that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385 (1926). However, the court did find vague the phrase "with respect to any candidate or issue" in the section of Florida Statutes requiring persons sponsoring independent expenditure ads exceeding $100 to file periodic reports identifying the expenditures (section 106.071, F.S.). The court cured this vagueness problem by requiring the reporting of only those independent expenditures exceeding $100 which "*expressly advocate* the election or defeat of a clearly identified candidate or referendum issue." *Doe*, 708 So.2d at 933.

106.143(1)(b), F.S., requiring sponsors of *political advertisements* to identify themselves, does not apply to:

> ... the *personal pamphleteering* of *individuals* acting *independently* and using only *their own modest resources*. As for section 106.071(1), only to the extent that the last sentence in this section requires identification of *independent advertisements* made by individuals does it run afoul of the First Amendment. ... The generic requirement in both sections 106.071 and 106.143 that all communications be marked with the phrase "paid political advertisement" in no way violates the anonymity concerns underlying *McIntyre*.

Doe, 708 So.2d at 934-35. The court struck and re-wrote the last sentence of section 106.071, F.S., as applied to individuals, eliminating the sponsorship references: "Any political advertisement paid for by an independent expenditure shall prominently state 'Paid political advertisement.'" *Id*. at 934-35 & fn. 17. The Division of Elections subsequently issued an advisory opinion interpreting *Doe*. Division of Elections Opinion 98-04 (April 2, 1998) (*hereinafter*, DE 98-04). The Division stated:

> In our opinion, the court's holding in *Doe* is simple and straightforward. ... The common theme in this analysis is that the court was concerned with individuals like Margaret McIntyre who use their "own modest resources" to make political statements and was attempting to give a saving construction to the statutes at issue here.
> ...
> In view of the foregoing, we do not believe that the decision affects candidates, political committees, political parties, corporations, or other groups or entities that spend large amounts of money on political advertising. As a result, we believe that sections 106.143(1) and 106.071(1), Florida Statutes, still require the full political disclaimer, unless the person responsible for the advertisement is a private individual who has made only modest expenditures *of less than $100 in the aggregate*.

(emphasis added). DE 98-04, at p. 1-2. Committee staff agrees with and adopts the foregoing reasoning, except for the last clause defining "modest resources" to mean aggregate expenditures of less than $100 (see *infra* following paragraphs, discussing *Smithers*).

In *Smithers v. Florida Elections Commission*, No. 96-5705 (Fla. 2nd Cir., July 17, 1998) (Summary Judgment), *appeal pending*, No. 98-3095 (Fla. 1st DCA), Judge Kevin Davey of Florida's Second Judicial Circuit Court was presented with the issue left open in *Doe* and *McIntyre*--- what constitutes "modest resources"? The specific question in *Smithers* was whether the sponsorship identification disclaimer requirements of section 106.143(1), Florida Statutes, applied to an individual acting independently who spent between $100 and $500 to anonymously publish and distribute bumper stickers calling for the defeat of his local state representative. Judge Davey concluded that the disclaimer

requirement did not apply:[15]

> The political speech questioned by defendants in this proceeding may be summarized as the actions of a single individual conducting a private protest against an elected public official with an *insignificant expenditure of personal funds*.

(emphasis added).
The circuit court holding is in direct conflict with the Division of Elections' opinion which held that "modest resources" meant aggregate expenditures of less than $100. *See* DE 98-04, at p.2. The Division reasoned that because *Doe* validated the *reporting requirement* for independent expenditures exceeding $100 and modified the *sponsorship disclaimer requirements*, that "it can be inferred that the court may consider an expenditure of less than $100 in the aggregate as 'modest resources.'" DE 98-04, at p.2.

Committee staff agrees with the circuit court. The Division's opinion, rendered prior to *Smithers*, rests on the presumption that reporting requirements and sponsorship identification requirements are essentially the same, and that limitations permissible on one can simply be applied with equal force to the other. However, this rationale appears to have been rebuffed in *McIntyre*, where the Court rejected a similar argument that upholding federal reporting requirements for independent expenditures exceeding $100 justified the sponsorship identification requirement:

> Though mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document -- particularly a leaflet -- is often a personally crafted statement of political viewpoint. ... As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information.

McIntyre, 115 S.Ct. at 1523. The fact that disclaimer requirements are more intrusive than reporting requirements suggests that the $100 *reporting* threshold

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[15] In addition to holding that the sponsorship identification provisions did not apply to the plaintiff (section 106.143(1)(b), F.S.), the court also held that the generic requirement to include the phrase "Paid political advertisement" was also inapplicable. This holding directly conflicts with the *Doe* decision. However, committee staff acknowledges that mandating the phrase "paid political advertisement" on an ad without requiring identification of the sponsor serves little, if any, practical purpose.

upheld in *Doe* may be too intrusive with regard to compelled disclosure on political ads and independent expenditures by individuals. Staff believes the $500 minimum threshold alluded to by the circuit court provides a more-defensible definition of "modest resources," because it parallels the $500 threshold for registration as a political committee under Florida law. *See* § 106.011(1), F.S. (1997) (containing $500 aggregate threshold for registering as a political committee).

Recommendations for Legislation:

Staff recommends the following changes to sections 106.071(1) and 106.143, Florida Statutes, to incorporate the holdings in *Doe* and *Smithers*:

106.071 Independent expenditures; reports; disclaimers.--

(1) Each person who makes an independent expenditure which expressly advocates the election or defeat of a candidate or issue ~~with respect to any candidate or issue~~, and which expenditure, in the aggregate, is in the amount of $100 or more, shall file periodic reports of such expenditures in the same manner, at the same time, and with the same officer as a political committee supporting or opposing such candidate or issue. The report shall contain the full name and address of each person to whom and for whom such expenditure has been made; the amount, date, and purpose of such expenditure; a description of the services or goods obtained by each such expenditure; and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made. Any political advertisement paid for by an independent expenditure, other than an independent expenditure by an individual which, in the aggregate, is in the amount of $500 or less, shall prominently state "Paid political advertisement paid for by (Name of person or committee paying for advertisement) independently of any (candidate or committee)," and shall contain the name and address of the person paying for the political advertisement.

106.143 Political advertisements circulated prior to election; requirements.--

(1) Any political advertisement and any campaign literature, published, displayed, or circulated prior to, or on the day of, any election shall:

(a) Be marked "paid political advertisement" or with the abbreviation "pd. pol. adv."

(b) Identify the persons or organizations sponsoring the advertisement.

(c)1.a. State whether the advertisement and the cost of production is paid for or provided in kind by or at the expense of the entity publishing, displaying, broadcasting, or circulating the political advertisement; or

b. State who provided or paid for the advertisement and cost of production, if different from the source of sponsorship.

2. This paragraph shall not apply if the source of the sponsorship is patently clear from the content or format of the political advertisement or campaign literature.

This subsection does not apply to campaign messages used by a candidate and the candidate's supporters if those messages are designed to be worn by a person; this subsection also does not apply to political advertisements and campaign literature which, in the aggregate, are in the amount of $500 or less, and which are sponsored and paid for by an individual acting independent of any candidate, political committee, committee of continuous existence, political party, corporation, partnership, or other combination of individuals having collective capacity.

Since proposed section 106.071 incorporates the term "express advocacy," the Legislature may choose to adopt a statutory definition which parallels the decision in *Furgatch v. Federal Elec. Comm'n*. See *supra* note 7 and accompanying text (discussing *Furgatch* "totality of the circumstances" test for express advocacy).

The staff's approach eliminates the requirement that an individual who does not meet the $500 threshold include the "paid political advertisement" disclaimer. We cannot see how this requirement serves any practical purpose absent corresponding sponsorship information.

MINOR/OTHER CASES INTERPRETING FLORIDA LAW ADVERSELY

Duke v. Smith, 13 F.3d 388 (11th Cir. 1994) (SEE APPENDIX "C")

Issue: Presidential Preference Primary Candidates; Ballot Access

Florida Statutes Affected: 103.101, F.S.

Impact: Invalidated Florida's process for reconsidering the placement of the names of presidential candidates on the presidential preference primary ballot.

Discussion:

Duke v. Smith, 13 F.3d 388 (11th Cir. 1994), involved a challenge by David Duke and others to Florida's process for reconsidering the placement of presidential candidates' names on the presidential preference primary ballot for the 1992 election cycle. The Federal Circuit Court of Appeals for the Eleventh Circuit held that Florida's reconsideration process constituted state action which lacked adequate standards, and was unconstitutionally vague. As such, it "permits and encourages an arbitrary and discriminatory enforcement of the law" in violation of the First and Fourteenth Amendment.[16]

Section 103.101, Florida Statutes, governs access to Florida's presidential preference primary ballot. It requires each major political party to submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot by December 31 of the year preceding the presidential primary.[17] Any candidate's name not appearing on the lists submitted to the Secretary may request in writing that the selection committee place his or her name on the ballot. The statute provides:

> If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot.

§ 103.101(2)(c), F.S. (1997).

The State defended the statute by arguing that the selection committee's actions in the reconsideration process did not constitute "state action," and therefore did not implicate constitutional guarantees. The *Duke* court disagreed:

> The net result of both statutes (Georgia's and Florida's) is that the bipartisan state-created Committees are inextricably intertwined with the process of placing candidates names on the ballot, and the state-created procedures, not the autonomous political parties, make the <u>final</u> determination as to who will appear

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[16] The First and Fourteenth Amendment rights at issue were: 1) the voters' right to vote for the candidate of their choice; 2) David Duke's right not to be eliminated from the reconsideration process because of his political beliefs and expressions (free speech and association); and, 3) the candidates' rights to have their reconsideration petitions judged by articulated standards (procedural due process). *Duke*, 13 F.3d at 394.

[17] The Secretary submits the names of presidential candidates to a Presidential Candidate Selection Committee, composed of the Secretary of State, high-ranking state legislators, and the chair of each political party. The selection committee then may delete certain candidates from the ballot if every member of the candidate's political party agrees. Otherwise, the names on the lists appear on the presidential preference primary ballot.

> on the ballot in each primary.
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> * * *
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> [B]ecause the Florida legislature has given the Committee (Presidential Candidate Selection Committee) the power to 'declare [during the reconsideration process] who is fit to run, and who, by extension is fit to govern,' ... we ... hold that the procedures outlined in Sec. 103.101(2)(c) constitute state action.

Duke, 13 F.3d at 393-94.

The State had previously conceded to the court that the reconsideration procedure in section 103.101(2)(c), F.S., would be unconstitutional if the court found that the selection committee's actions constituted "state action." *Id*. at fn.12. Nonetheless, the court made a point of concluding that the unbridled discretion vested in the selection committee by the statute violated Duke's right: not to be eliminated from the reconsideration process because of his political beliefs and expressions (free speech); and, to have his reconsideration petition judged by articulated standards (procedural due process). *Id*. at 394-95. Interestingly, the *Duke* case was not the first time a court was faced with a constitutional challenge to Florida's reconsideration process. In *Quinn v. Stone*, 259 So.2d 492 (Fla. 1972), the Florida Supreme Court upheld the constitutionality of the reconsideration process governing the placement of candidates' names on Florida's 1972 presidential preference primary. The *Quinn* court held that the statute did not violate the equal protection, free speech, or privacy provisions of the U.S. or Florida Constitutions.

Two crucial differences between the Florida statute governing the 1972 ballot and the statute held unconstitutional in *Duke* were: the earlier statute limited ballot position to those candidates "who are generally advocated or recognized in news media throughout the United States or in the state (of Florida)"; and, the earlier statute provided that if *any member* of the selection committee of the same political party as the candidate petitioning for reconsideration requested that the candidate's name be placed on the ballot, the Secretary of State would be directed to place the candidate's name on the ballot. The *Quinn* court was concerned that without these reasonable controls the ballot could become lengthy and confusing, adversely impacting informed voting choices, discouraging voter participation, and complicating the ballot tallying process.

Recommendations for Legislation:

There are two possible courses of action: remove the reconsideration process altogether; or, amend the statute to resemble the one approved by the Florida Supreme Court in 1972.

According to the Division of Elections staff, the reconsideration process has ***never*** resulted in the placement of an additional presidential candidate's name on the presidential preference primary ballot. The reconsideration process is time-consuming and expensive. Neither the Division nor committee staff were able to independently develop adequate standards to recommend to the Legislature for governing the reconsideration process, as the process necessarily implicates substantial political policies and considerations. The Division staff recommends that section 103.101, Florida Statutes, be amended to eliminate the reconsideration process altogether.

Another alternative would be to adopt statutory language similar to the statute approved by the Florida Supreme Court in *Quinn*:

> **103.101 Presidential preference primary.--**
>
> (2)
>
> (c) If a presidential candidate who is generally advocated or recognized in the news media throughout the United States or in the state makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to consider the request ~~reconsider placing the candidate's name on the ballot~~. If a majority of the selection committee members of the same political party as the candidate requests that such candidate's name be placed on the ballot, the committee shall direct the department of state to place the candidate's name on the ballot. The department of state shall immediately notify such candidate of the selection committee's decision.

***Vicory v. Democratic State Exec. Comm.*, No. 90-3595 (2nd Cir., Jan 16, 1991) (SEE APPENDIX "D")**

Issue: Political Party Endorsements of Primary Candidates
Florida Statutes Affected: 103.121, F.S.
Impact: Prohibition against primary endorsements violates right of association guaranteed by the First Amendment.

Discussion:

In *Vicory*, Florida's Second Judicial Circuit Court invalidated a Florida law which required the state executive committee of a political party to forfeit all party assessments if it endorsed, certified, screened, or otherwise recommended one or more primary candidates for nomination. § 103.121(5)(b), F.S. (1997). The court held that the law unconstitutionally infringed on the parties' First Amendment right of association, which encompassed its right to select a "standard bearer who best represents the party's ideologies and preferences."

Relying on a U.S. Supreme Court's decision (*Eu v. San Francisco County Democratic Central Comm.*, 109 S.Ct. 1013 (1989)), the circuit court held that the State's right to preserve the fairness and integrity of the electoral process was not sufficiently compelling to justify the statute's impairment of the parties' constitutional rights.

Recommendations for Legislation:

Repeal section 103.121(5), Florida Statutes, prohibiting state and county executive committees of political parties from endorsing primary candidates for nomination.

***Concerned Democrats of Florida v. Reno*, 458 F.Supp 60 (S.D. Fla. 1978)**
(SEE APPENDIX "E")
***Seminole Co. Repub. Exec. Comm. v. Butterworth*, No. 98-350-CA-16-K (18th Cir., 1/21/99), *appeal pending*, No. 99-446 (Fla 5th DCA 1999)**
(SEE APPENDIX "F")
***Hillsborough Co. Repub. Exec. Comm. v. Butterworth*, No. 98-2855 (13th Cir., 6/29/98)**
***Martin Co. Repub. Exec. Comm. v. Butterworth*, No. 98-441-CA (19th Cir., 6/23/98)**
***Pinellas Co. Repub. Exec. Comm. v. Butterworth*, No. 98-1570-CI-07 (6th Cir. 6/9/98)**

Issue: Political Party Endorsements of Judicial Candidates
Florida Statutes Affected: 105.09, F.S.
Impact: **Conflict exists in Florida's circuit courts concerning the constitutionality of the statute prohibiting political parties from endorsing judicial candidates.**
Case Status: ***Seminole Co. Repub. Exec. Comm. v. Butterworth* is currently on appeal to Florida's Fifth District Court of Appeal.**

Discussion:

There is an ongoing debate in the Florida circuit courts concerning the constitutionality of a provision in Florida law prohibiting a political party or partisan political organization from endorsing judicial candidates. § 105.09, F.S. (1997).

In 1978, the U.S. District Court for the Southern District of Florida held that the law was not the "least intrusive alternative" available to further the state's compelling interest in maintaining the integrity and impartiality of the judiciary. The court in *Concerned Democrats of Florida v. Reno*, 458 F.Supp 60 (S.D. Fla.

1978), felt that the State had already achieved its goal of keeping judicial elections non-partisan with two other statutes it had on the books --- one which restricted the partisan activities of judges and judicial candidates[18] and another which kept the elections themselves non-partisan.[19] *Concerned Democrats*, 458 F.Supp. at 65. Relying on the decision in *Concerned Democrats*, several Florida circuit courts also declared the statute unconstitutional. *Hillsborough Co. Repub. Exec. Comm. v. Butterworth*, No. 98-2855 (13th Cir., 6/29/98); *Martin Co. Repub. Exec. Comm. v. Butterworth*, No. 98-441-CA (19th Cir., 6/23/98); *Pinellas Co. Repub. Exec. Comm. v. Butterworth*, No. 98-1570-CI-07 (6th Cir. 6/9/98).

Significantly, the Florida Attorney General refused to defend the statute in the Florida circuit court cases, given the holding in *Concerned Democrats*. Therefore, the Florida circuit court decisions declaring the law unconstitutional appear to have arisen out of a stipulated set of facts and law without the issues having been fully litigated in an adversary proceeding. *Seminole Co. Repub. Exec. Comm. v. Butterworth*, No. 98-350-CA-16-K, at p.2 (18th Cir., 1/21/99) (Final Judgment).

In 1999, Florida's Eighteenth Circuit Court went the other way and found the statute constitutional. *Seminole Co. Repub. Exec. Comm.*, No. 98-350-CA-16-K, at ¶7. The Eighteenth Circuit had the benefit of a contested hearing because intervening parties in the case forced the issue. The court held that the prohibition against political parties endorsing judicial candidates *was* narrowly tailored to further the State's compelling interest in maintaining the integrity and impartiality of the State's judiciary. Directly contradicting *Concerned Democrats*, the circuit court held that the prohibition against political party endorsements was meant to work *in conjunction with* the partisanship restrictions on judges and judicial candidates in section 105.071, F.S. The case is currently on appeal to Florida's Fifth District Court of Appeal.

Recommendations for Legislation:

No recommended legislative action at this time; monitor outcome of *Seminole Co.* appeal.

MAJOR CASES FROM OTHER JURISDICTIONS WITH POTENTIAL TO IMPACT FLORIDA LAW

Federal Elec. Comm'n v. Colorado Republican Federal Campaign Comm., 41 F.Supp.2d 1197 (D.Colo. 1999)

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[18] § 105.071, F.S. (1978).

[19] § 105.021, F.S. (1978).

(SEE APPENDIX "G")

Issue: Campaign Finance; Coordinated Expenditures by Political Parties
Florida Statutes Potentially Affected: 106.08(2), F.S.
Case Summary: Any limit on coordinated expenditures by a political party is UNCONSTITUTIONAL

Potential Impact: Could render unconstitutional or wholly undermine Florida's $50,000 aggregate limit on contributions from political parties to candidates.

Case Status: On appeal to the U.S. Court of Appeals for the 10th Circuit.

Discussion:

In *Federal Elec. Comm'n v. Colorado Republican Federal Campaign Comm.*, 41 F.Supp. 2d 1197 (D.Colo. 1999) ("*Colorado Republican II*"), the Federal District Court for the District of Colorado held that expenditures by a political party made in coordination with its candidates *cannot be limited*.[20] The court framed the issue in *Colorado Republican II* as whether "limits on coordinated party expenditures minimally restrict parties in engaging in protected First Amendment freedoms (free speech and association) and serve a compelling Government interest." *Id*. at 1208-09. Applying this strict scrutiny test, the court found that the FEC was "unable to produce admissible evidence which convinces the court that party expenditures must be limited to prevent (*quid pro quo*) corruption," or that "unlimited coordinated party expenditures cause the 'appearance of corruption.'" *Id*. at 1212-13. A recurring theme in the court's reasoning was its belief that political parties serve a unique and important role in the democratic process, and that limiting coordinated expenditures has a "stifling effect on the ability of the party to do what it exists to do":

> Political parties, and the central activities in which they engage, are a paradigm of the right to freedom of association as guaranteed by the First Amendment.
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> * * *
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> ...[A] political party functions to promote political ideas and policy objectives over time and through elected officials. Given the purpose of the political parties in our electoral system, a political party's decision to support a candidate

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[20] The U.S. Supreme Court decision in *Colorado Republican Fed. Campaign Comm. v. Federal Elec. Comm.*, 116 S.Ct. 2309 (1996) ("*Colorado Republican I*") left open the issue of the constitutionality of limiting coordinated party expenditures. Following *Colorado Republican I*, political parties may engage in *unlimited independent expenditures* on behalf of candidates. *Colorado Republican II*, at 1200.

> who adheres to the parties' beliefs is not corruption. Conversely, a party's refusal to provide a candidate with electoral funds because the candidate's views are at odds with party positions is not an attempt at improper influence. ... The court regards those as instances of the party and the candidate exercising their First Amendment rights.

Id. at 1209, 1212.

The holding in *Colorado Republican II* is only persuasive precedent; it is not binding on any Florida court. The case is currently on appeal to the U.S. Court of Appeals for the 10th Circuit, and has the potential, like its predecessor, to reach the U.S. Supreme Court. This process often takes several years. Should the U.S. Supreme Court decide to hear the case and agree that limits on coordinated party expenditures violate the first amendment, however, its decision *would* be binding on Florida state courts. Such a decision would jeopardize Florida's law limiting political parties to aggregate contributions of $50,000 per candidate, since a coordinated expenditure qualifies as a *contribution* under Florida law. §§ 106.011(3), 106.08(2), F.S. (1997).

Recommendations for Legislation:

No changes recommended at this time; continue to monitor developments.

***Buckley v. ACLF*, 119 S.Ct. 636 (1999)**
(SEE APPENDIX "H")

Issue: Initiatives; Paid Petition Circulators
Florida Statutes Potentially Affected: 100.371, F.S.

Case Summary: **Invalidated Colorado's requirement that initiative petition circulators wear identification badges displaying their names.**

Potential Impact: **Endangers Florida's requirement that petition forms distributed by paid petition circulators include the name and address of the circulators on each form.**

Discussion:

Buckley v. American Constitutional Law Foundation, Inc., 119 S.Ct. 636 (1999), destined to become confused with the landmark campaign finance case of *Buckley v. Valeo*, 96 S.Ct. 612 (1976), addressed Colorado's initiative petition requirements. The particular holding which is of interest to Florida is the U.S. Supreme Court's determination that requiring petition circulators to wear name badges violates their First Amendment right to engage in anonymous political

speech. *Buckley v. ACLF*, 119 S.Ct. at 645-46. The Court concluded that requiring name identification without sufficiently compelling reasons at a time when reaction to the circulator's message "may be most intense, emotional, and unreasoned" discouraged participation in the petition circulation process. *Id*.

Florida has a similar requirement. In 1997, the Legislature amended section 100.371, F.S., to require each paid petition circulator to include his or her name and address on each initiative petition form for which he or she is "gathering" signatures.[21] Ch. 97-13, § 22, at 111, Laws of Fla. (codified at section 100.371, F.S. (Supp. 1998)). Arguably, this contemporaneous identification requirement presents the same First Amendment concerns as the name badges in *Buckley v. ACLF*. The Florida requirement could be read to compel paid petition circulators to speak and identify themselves at a time when reaction to the their message "may be most intense, emotional, and unreasoned," thereby discouraging participation in the petition circulation process.

Recommendations for Legislation:

Clarify section 100.371(2)(c), F.S. (Supp. 1998) to require paid petition circulators to include their name and address on petition forms "prior to submitting the petition form to the initiative sponsor." This will allow petition circulators to fill in their names and address on the forms *after* anonymously gathering the signatures, thereby alleviating the Court's concerns in *Buckley v. ACLF*.

[21] However, because enactment of the amendment to section 100.371, F.S., was made contingent upon approval of a constitutional amendment authorizing certain signature verification periods and the random sampling of petition signatures, the entire section has yet to go into effect. Ch. 97-13, § 56, at 136, Laws of Fla.

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

Based on the foregoing cases and analysis, staff recommends consideration of the following changes to specific subsections of Florida Statutes:

Based on Crotty

- Repeal s. 106.085, F.S., relating to advance notice of independent expenditures.

- Repeal s. 106.144, F.S., relating to advance notice of endorsements.

- **106.011 Definitions.--** As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:

(1) "Political committee" means a combination of two or more individuals, or a person other than an individual, which contributes more than $500 in the aggregate during a calendar year to any candidate or political party ~~the primary or incidental purpose of which is to support or oppose any candidate, issue, or political party~~, or which accepts contributions ~~or makes expenditures~~ during a calendar year in an aggregate amount in excess of $500; "political committee" also means a combination of two or more individuals, or a person other than an individual, which expressly advocates the election or defeat of a candidate or issue and makes expenditures of more than $500 in the aggregate during a calendar year; political committee also means the sponsor of a proposed constitutional amendment by initiative which intends to seek the signatures of registered electors. Organizations which are certified by the Department of State as committees of continuous existence pursuant to s. 106.04, national political parties, and the state and county executive committees of political parties regulated by chapter 103 shall not be considered political committees for purposes of this chapter. Corporations regulated by chapter 607 or chapter 617 or other business entities formed for purposes other than to support or oppose issues or candidates are not political committees if their political activities are limited to contributions to candidates, political parties, or political committees or expenditures in support of or opposition to an issue from corporate or business funds and if no contributions are received by such corporations or business entities.

- If the Legislature wants to adopt a more aggressive stance toward regulating issue advocacy:

106.011 Definitions.-- As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:

(18) "Expressly advocates" means to sponsor or fund, in whole or in part, a paid expression in any communications media prescribed in subsection (13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display, or by any means other than the spoken word in direct conversation, which, when read as a whole and with limited reference to external events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a clearly-identified candidate or issue, because it:

(a) contains a message which is unmistakable, unambiguous, and suggestive of only one plausible meaning;

(b) presents a clear plea for action; and

(c) makes clear what action is advocated.

The absence of express words of advocacy creates a rebuttable presumption that the paid expression does not expressly advocate for or against a clearly-identified candidate or issue.

- **106.08 Contributions; limitations on.--**

(5) A person may not make any contribution through or in the name of another, directly or indirectly, in any election. ~~Candidates,~~ Political ~~political~~ committees~~,~~ and political parties may not solicit contributions from or make contributions to any religious, charitable, civic, or other causes or organizations established primarily for the public good. Candidates may not solicit contributions from or, in exchange for political support, make contributions to any religious, charitable, civic, or other causes or organizations established primarily for the public good. However, it is not a violation of this subsection for a candidate, political committee, or political party executive committee to make gifts of money in lieu of flowers in memory of a deceased person or for a candidate to continue membership in, or make regular donations from personal or business funds to, religious, political party, civic, or charitable groups of which the candidate is a member or to which the candidate has been a regular donor for more than 6 months. A candidate may purchase, with campaign funds, tickets, admission to events, or advertisements from religious, civic, political party, or charitable groups.

Based on Doe

- **106.071 Independent expenditures; reports; disclaimers.--**

(1) Each person who makes an independent expenditure which expressly advocates the election or defeat of a candidate or issue ~~with respect to any candidate or issue~~, and which expenditure, in the aggregate, is in the amount of $100 or more, shall file periodic reports of such expenditures in the same manner, at the same time, and with the same officer as a political committee

supporting or opposing such candidate or issue. The report shall contain the full name and address of each person to whom and for whom such expenditure has been made; the amount, date, and purpose of such expenditure; a description of the services or goods obtained by each such expenditure; and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made. Any political advertisement paid for by an independent expenditure, other than an independent expenditure by an individual which, in the aggregate, is in the amount of $500 or less, shall prominently state "Paid political advertisement paid for by (Name of person or committee paying for advertisement) independently of any (candidate or committee)," and shall contain the name and address of the person paying for the political advertisement.

- **106.143 Political advertisements circulated prior to election; requirements.--**

(1) Any political advertisement and any campaign literature, published, displayed, or circulated prior to, or on the day of, any election shall:

(a) Be marked "paid political advertisement" or with the abbreviation "pd. pol. adv."

(b) Identify the persons or organizations sponsoring the advertisement.

(c)1.a. State whether the advertisement and the cost of production is paid for or provided in kind by or at the expense of the entity publishing, displaying, broadcasting, or circulating the political advertisement; or

b. State who provided or paid for the advertisement and cost of production, if different from the source of sponsorship.

2. This paragraph shall not apply if the source of the sponsorship is patently clear from the content or format of the political advertisement or campaign literature.

This subsection does not apply to campaign messages used by a candidate and the candidate's supporters if those messages are designed to be worn by a person; this subsection also does not apply to political advertisements and campaign literature which, in the aggregate, are in the amount of $500 or less, and which are sponsored and paid for by an individual acting independent of any candidate, political committee, committee of continuous existence, political party, corporation, partnership, or other combination of individuals having collective capacity.

Based on Duke

- Repeal s. 103.101(2)(b) and (c) F.S., relating to the reconsideration process for placing candidates' names on the presidential preference primary ballot.

OR,

- **103.101 Presidential preference primary.--**

(2)

(c) If a presidential candidate who is generally advocated or recognized in the news media throughout the United States or in the state makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to consider the request ~~reconsider placing the candidate's name on the ballot~~. If a majority of the selection committee members of the same political party as the candidate requests that such candidate's name be placed on the ballot, the committee shall direct the department of state to place the candidate's name on the ballot. The department of state shall immediately notify such candidate of the selection committee's decision.

Based on Vicory

- Repeal section 103.121(5), Florida Statutes, prohibiting state and county executive committees of political parties from endorsing primary candidates for nomination.

Based on Buckley v. ACLF

- **100.371 Initiatives; procedure for placement on ballot.--**

(2)

(c) Prior to submitting petition forms to the sponsor of a proposed initiative amendment, each ~~Each~~ paid petition circulator must place his or her name and address on each petition form for which he or she has gathered ~~is gathering~~ signatures ~~on behalf of the sponsor of the proposed initiative amendment~~. The sponsor of a proposed initiative amendment is responsible for ensuring that the name and address of the paid petition circulator appear on the petition form prior to its submission to the supervisor for verification.

Appendices