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The Honorable Pedro A. Cortes
Secretary of the Commonwealth
c/o Mr. Albert H. Mansfield
Mr. Louis Lawrence Boyle
302 North Office Building
Harrisburg, PA 17120

Re: Center for Individual Freedom

Dear Messrs. Mansfield and Boyle:

On behalf of the Center for Individual Freedom ("CFIF"), we write in response to your November 1, 2007, letter to "explain … how [our] ads comply with the Pennsylvania Election Code." We have only one ad running in Pennsylvania, and its script is attached. The simple answer is that Pennsylvania's election law regulates independent speech only if it uses explicit words such as "vote for" or "elect" to expressly advocate the election or defeat of a candidate. And our ad does not employ such explicit and express language.

In this letter we first summarize the law. It is addressed more fully in the attached memorandum from the federal lawsuit brought by CFIF just months ago, in which you initially were a defendant but obtained dismissal because you believed the Attorney General was the proper party to litigate the meaning of Pennsylvania law. We then apply the law to the CFIF ad.

The Express Advocacy Standard Is Extremely Precise And Demanding

As your November 1 letter states, the Pennsylvania law regulates speech "for the purpose of influencing the outcome of an election." Because speech of that general nature lies at the core of the First Amendment, the U.S. Supreme Court repeatedly has held that such a standard is fatally vague and void unless it is given a precise and objective bright-line construction. The recent lawsuit brought by CFIF was resolved when the U.S. District Court, with the concurrence of Pennsylvania's Attorney General, entered a judgment declaring that:

> [T]o provide clear guidance to speakers … P.S. § 3241(d)(1) defining "expenditure" as any spending "for the purpose of influencing the outcome of an election," are properly construed as applying only to

> spending for "express advocacy" as that term is defined in *Buckley*.

The judgment specifically cites to *Buckley v. Valeo,* 424 U.S. 1, 43-44 & n. 52 (1976). There the Supreme Court held that, to assure that speakers feel no need to hedge and trim or steer clear of uncertainty, the term "expenditure" applied only to ads that used "explicit words" that "in express terms advocate the election or defeat" of a candidate, such as "vote for," "elect," and the like.

Buckley made crystal clear that this bright-line test meant only and exactly what it said, and was not to be understood to draw some vague distinction between ads that discuss "issues" and others. To the contrary, it held (at 45) that:

> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.

In 2003 Congress concluded that some express advocacy was affecting elections, but it recognized its First Amendment obligation to provide an alternative objective bright-line standard. Thus, Congress enacted the "electioneering communication" standard that defined regulated speech in detailed and precise terms. In *McConnell v. FEC,* 540 U.S. 93, 193-94 (2003), the U.S. Supreme Court held that standard was facially consistent with the First Amendment. In doing so, however, it pointed out that the standard's detailed and objective provisions provided the same degree of precision and clarity as the "express advocacy" standard. *Id.* at 194.

Although *McConnell* thus approved a statutory alternative bright line, it in no way diluted the stringent demands of the express advocacy standard that still applies to other political speech. To the contrary, *McConnell* stressed that the new legislation had been enacted because the express advocacy standard allowed ads that "do not urge the viewer to vote for or against a candidate in so many words [but are] clearly intended to influence the election." *Id.* As an example of the type of ad that was not express advocacy and, hence, could only be reached by new legislation providing an alternative bright-line standard, *McConnell* quoted (at 194 n.78) the following ad that was run during the 1996 Montana congressional race in which Bill Yellowtail was a candidate:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order … but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Your letter's reference to *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), is perplexing. That case did not raise any First Amendment issue of vagueness. Instead, it raised the substantive question of whether the new electioneering communication standard that was held facially constitutional in *McConnell* could be applied to ads that fell within the bright-line test but still did not present risks justifying regulation. The Court held on substantive grounds that the new standard could be constitutionally applied to ads like the Yellowtail ad that were not express advocacy but that raised similar concerns. But it did not hold or even suggest that, where the express advocacy test was the primary standard governing coverage, it somehow was being loosened. To the contrary, although the Court made an effort to describe its substantive holding in clear terms, it stressed that no issue of facial vagueness was presented since the "as applied" holding only operated "if the speech meets the brightline requirements of [the electioneering communication provision] in the first place." 127 S. Ct. at n.7.

The immediate question is not whether Pennsylvania's legislature could, in the future, enact an alternative bright-line standard comparable to the electioneering communication standard that Congress crafted in 2003. Instead, since the legislature has not done so, the only question is the meaning of the express advocacy standard established in *Buckley* and held to define present Pennsylvania law by the Stipulated Judgment.

The CFIF Ad

The CFIF ad does not mention an election, nor does it refer to anyone as a candidate. Instead, it focuses on the importance of assuring that criminals are locked up and kept off the street. The ad demonstrates that a respected Pennsylvania judge supports being tough on crime, and elements of Pennsylvania law enforcement, the legal community, and the press have responded favorably.

Some viewers may know that Judge Lally-Green is a candidate. And some may regard the information in the ad as relevant to their voting choice. Those who favor judges whose policies are approved by law enforcement and the legal community may be more inclined to support her. Those who prefer judges whose policies put them in tension with law enforcement and the legal community may be inclined to oppose her. But the CFIF ad contains no words telling anyone to vote for or against anyone.

Your assertion that the ad asks viewers to "thank Judge Lally-Green by voting for her" is inaccurate. Far from calling for any vote, the ad asks viewers to log onto a web site to thank Judge Lally-Green for her policies. As you will see if you visit that site, it provides a petition that viewers are asked to sign. CFIF intends to send that petition with its signatures to the Judge, hoping to encourage her to continue to pursue her tough-on-crime policies.

When *Buckley* specified "explicit words" of "express advocacy" such as "vote for," it was speaking deliberately. Its purpose was to eliminate any room for debate as to what an ad might imply or what viewers might infer. If Pennsylvania's legislature wants to change its law by enacting a new bright-line standard, it may make that attempt, bearing in mind the substantive "as applied" limits set in the recent *Wisconsin Right to Life* case. But Pennsylvania may not water down the express advocacy test, looking for implications instead of express and explicit language.

Sincerely,

Thomas W. Kirby

Enclosures