COLORADO SUPREME COURT 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT APR 19 2011 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Colorado Court of Appeals Case No. 08CA2689 Opinion by Judge Gabriel Judges Casebolt and Booras Concur Office of Administrative Courts Judge Robert N. Spencer Case No. OS 2008-0028	
Petitioner: COLORADO ETHICS WATCH v. **Respondents:** SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC; and OFFICE OF ADMINISTRATIVE COURTS	**▲COURT USE ONLY▲**
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BRIEF OF AMICUS CURIAE COLORADO BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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Pursuant to C.A.R. 29, *amicus curiae*, the Colorado Bar Association ("CBA") through its undersigned counsel, respectfully files this Brief in Support of Respondents.

ISSUE PRESENTED

Whether the Colorado Court of Appeals properly interpreted and applied "for the purpose of expressly advocating the election and defeat of a candidate" as it appears in the definition of "expenditure" in Article XXVIII, Section 2(8)(a) of the Colorado Constitution.

STATEMENT OF IDENTITY OF AMICUS CURIAE

The CBA is a Colorado non-profit, non-partisan, 501c(6) organization established in 1897. It is a voluntary membership organization, which has approximately 18,000 members, including attorney and non-attorney members. The CBA's primary purposes are the education of lawyers and improvement of the Colorado legal system. The CBA website provides links to information about licensing and regulation of attorneys.

The CBA website also provides links to information about the evaluation of judges through state website links. The CBA is actively involved in developing and improving the judicial selection and retention system in Colorado. In addition to providing the public with information about the judicial selection and retention process, during judicial retention elections the CBA has encouraged voters not to

skip the judicial retention election and has provided links to its members and the public to the official statutorily-created Colorado Office of Judicial Performance Evaluation website. The CBA also has historically distributed copies of the Judicial Performance Evaluations to libraries throughout the State. The CBA has never supported or opposed candidates at any level of government. The CBA has never engaged in electioneering communications.

The participation by this amicus curiae is important because this lawsuit presents important issues related to the ability of the CBA and other groups to further the public understanding of the Colorado judicial system and encourage the public to vote in judicial retention elections. The CBA's expertise on these issues will assist the Court's understanding of the legal history of campaign finance and the consequences of Petitioner's attempts to fundamentally alter the definition of express advocacy in a manner that may have unintended and dramatic consequences.

STATEMENT OF THE CASE

The CBA adopts the Respondents' Statement of the Case.

ARGUMENT

I. The Colorado Court of Appeals Properly Applied the Definition of Express Advocacy as it is Defined under Federal and State Law

CBA's primary interest in the pending case involves the definition of express advocacy, including how that term is interpreted and applied under the

definition of "expenditure" in Article XXVIII, Section 2(8)(a) of the Colorado Constitution.

Express advocacy is a key element required to determine, among other things, whether an organization constitutes a political committee or has engaged in electioneering communication. If an organization does not engage in express advocacy that vocalizes explicit support for or opposition to a candidate, then the organization is not a political committee. *See* Colo. Const. art. XXVIII, § 2(12)(a) (defining political committee); *see also Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976). Likewise, if an organization's advocacy does not constitute express advocacy in support or opposition to a candidate, then the organization has not participated in express advocacy or electioneering communication. *See* Colo. Const. art. XXVIII, § 2(7)(a) (defining electioneering communication); *see also Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("WRTL").

Petitioner seeks to overturn the Court of Appeals decision below by arguing that the definition of express advocacy should encompass all "nonissue" speech, which could result in all speech referencing candidates constituting express advocacy, or that the definition should include all communications that are the functional equivalent of express advocacy. *See* Pet. Opening Br. at 21-22. This overly broad interpretation is inconsistent with the well-established existing

definition of express advocacy. As the Court of Appeals correctly held below, the United States Supreme Court in *Buckley* and the Colorado Court of Appeals in *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001), both sought a narrow construction of express advocacy.

In *Buckley*, the United States Supreme Court held that express advocacy occurs only when certain specific words are used, such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' . . . 'vote against,' 'defeat,' [and] 'reject.'" 424 U.S. at 44 n. 52. No case has directly overruled this narrow definition of express advocacy. Colorado appellate courts have defined express advocacy similarly. In *League of Women Voters*, the Colorado Court of Appeals interpreted the Fair Campaign Practices Act to mean that expenditures used for communications may be regulated **only if** the "actual words" of a political advertisement "expressly advocate" the election or defeat **of an identified candidate**. 23 P.3d at 1277 (emphasis added). Therefore, the narrow two-part standard adopted by the Court of Appeals requiring (1) the use of the *Buckley* magic words or substantially similar or synonymous words and (2) an express exhortations that the reader, viewer, or listener take action to elect or defeat a candidate is consistent with previous federal and state court definitions of express advocacy.

II. Petitioner's Definition of Express Advocacy is Unprecedented and Would Cause Unintended Consequences Impermissibly Chilling Core Political Speech and Association

Petitioner's definition of express advocacy is not only unprecedented, it would also have adverse unintended consequences. Such a broad definition raises issues of vagueness and whether courts can adequately apply uniform standards when confronted with campaign finance and electioneering issues. The *Buckley* Court explicitly defined express advocacy narrowly to avoid these vagueness concerns. 424 U.S. at 44 n. 52; *see WRTL*, 551 U.S. at 486-487 (Scalia, J., concurring).

More importantly, adopting the proposed definition will necessarily chill core political speech. As the Colorado Court of Appeals stated in *League of Women Voters*, "a narrow or strict interpretation of *Buckley* is appealing . . . [because] it affords the greatest First Amendment protection for the most cherished form of free speech, political speech" and the "debate on public issues should be uninhibited, robust, and wide-open." 23 P.3d at 1276 (internal quotation and citations omitted).

By advocating for a test that does not require "magic words" or an express exhortation to vote for or against specific candidates, Petitioner urges this Court to transform the definition from what the speaker actually says to what the speaker intends. In campaign finance cases, the United States Supreme Court has

repeatedly held that "an intent-based test would chill core political speech." *WRTL*, 551 U.S. at 469-470; *see also Buckley*, 424 U.S. at 43-44. What the speaker intended is irrelevant to what the public content included. The Court has rejected a test "turning on the speaker's intent to affect an election" because an "intent-based standard blankets with uncertainty whatever may be said and offers no security for free discussion." *WRTL*, 551 U.S. at 467-68 (internal quotations and citation omitted). Such a test "would open the door to a trial on every ad . . . on the theory that that speaker actually intended to affect an election" *Id.* at 468-69. Furthermore, "[a] test focused on the speaker's intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." *Id.* at 468.

In addition, a test based on the speaker's intent has other extraordinary adverse ramifications in the context of actual campaign finance litigation. As the Court in *WRTL* noted, this type of test could lead to extensive discovery to determine the speaker's intent and "would invite costly, fact-dependent litigation." 551 U.S. at 468. Under the standard Petitioner urges the Court to adopt, organizations, such as the CBA, would be required to produce unfettered access to all types of internal and external communications, financial records, and internal corporate governance information in order for a court to determine the speaker's intent. For example, communications between staff that are not even decision

makers, or the CBA's communications with any of its 18,000 members of its organization or a family member could be relevant under the Petitioner's proposed definition. Organizations' internal and external communications can never have an impact on the question of whether express advocacy occurred. Indeed, the Court recognized that such discovery and litigation into the speaker's intent "constitutes a severe burden on political speech" and dissuades public discourse on issues relating to campaigns and elections. *Id.* To that end, the Court has recognized that cases involving potential electioneering communication and express advocacy "**must entail minimal if any discovery**, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* at 451 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). The Court has also recently warned that communications behind closed doors must be protected in order to save campaign finance regulations from being viewed as *per se* prior restraints on speech. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 895-896 (2010).

A broad definition of express advocacy not only puts organizations at risk of litigation, but also potentially subjects them to campaign finance penalties for simply engaging in voter education or get-out-the-vote efforts. Many organizations, like the CBA, engage in both activities. The CBA's efforts have encouraged the public to vote. State voter data indisputably demonstrates that a

significant portion of Colorado voters skip voting on judges. Colorado voting statistics show that the typical roll-off from other statewide candidate elections to judicial retention elections is approximately 25%.[1]

It is well documented that voter turnout is typically low in judicial elections, including judicial retention elections. *See* Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. Pa. L. Rev. 181, 196 (2004) (Judicial elections "have been traditionally low-salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout.). Also, many legal scholars have found that judicial performance evaluations have beneficial results in educating the electorate. *See* David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 Denv. U. L. Rev. 115, 127 (2008) ("A key aspect of increasing turnout and the effectiveness of judicial elections is providing voters with sufficient amounts of relevant information to use in casting their votes. Research has found that low levels of turnout in judicial elections are due largely to the fact that voters know little, if anything, about the names appearing on their

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[1] The Colorado Secretary of State lists all the relevant voter data for all elections occurring in Colorado. *See, e.g.*, The Colorado Cumulative Report, http://www.sos.state.co.us/pubs/electionresults2010/general/ColoradoReport.html (last visited Jan. 30, 2011); The Official Publication of the Abstract of Votes Cast for the 2008 Primary and 2008 General Election; http://www.sos.state.co.us/pubs/elections/ElectionArchives/2008/2008_Abstract.pdf (last visited Jan. 30, 2011); The Official Publication of the Abstract of Votes Cast for the 2005 Coordinated, 2006 Primary, and 2006 General Election; http://www.sos.state.co.us/pubs/elections/ElectionArchives/2006/2005-2006_complete_abstract.pdf (last visited Jan. 30, 2011); The Official Publication of the Abstract of Votes Cast for the 2003 Coordinated, 2004 Primary, and 2004 General Election; http://www.sos.state.co.us/pubs/elections/ElectionArchives/2004/Abstract2003-2004.pdf (last visited Jan. 30, 2011).

ballots."); *see also* Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 Mo. L. Rev. 635, 663 (2009) (Judicial elections "have been characterized as low-information contests leading to low voter turnout and voter roll-off problems. Conversely, the information provided by Judicial Performance Evaluations is not only helpful to those seeking relevant information about judicial candidates, but the information also stands in stark contrast to the information provided by judicial campaign activity.").

The CBA has also provided the public with information about the Colorado Constitutional and statutory provisions that govern the selection and evaluation of judges in Colorado. This has included directing the public to the statutorily-created Colorado Office of Judicial Performance Evaluation ("JPE") website so that they can learn more about the judicial selection and retention process in Colorado and review the JPE's statutorily-required judicial retention recommendations.

Taken to its logical extreme, Petitioner's unprecedented definition of express advocacy may result in organizations, such as the CBA, becoming political committees or engaging in electioneering communication by simply encouraging the public to vote while contemporaneously referring the public to a state-sponsored website that contains evaluation information (*e.g.*, "retain", "do not

retain" or "no opinion") in accordance with Colorado statutes. In fact, the latter activity of merely providing information regarding the judicial performance evaluations of all judicial retention candidates may even suffice under the proposed new standard. Simply directing voters to a state website, which contains, among other things, judicial performance evaluations and recommendations could make an organization a political committee.

Under Petitioner's broad definition of express advocacy, non-partisan, non-profit groups, such as the CBA, who engage in voter education or get-out-the-vote efforts will be transformed into political committees and face excessive financial penalties for failure to register as such. The uncertainly and risk caused by Petitioner's proposed definition would cause organizations, such as the CBA, to become reluctant to provide voter education or get-out-the-vote efforts because these efforts would be more likely to fall within the ambit of express advocacy and thereby cause potential campaign finance violations.

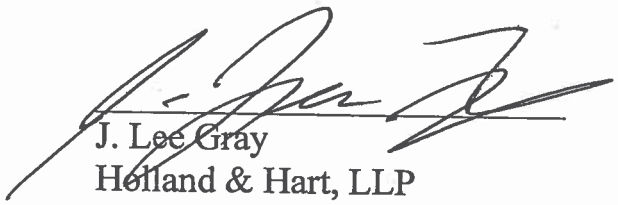
The purpose of campaign finance reform in Colorado was to impose various requirements and restrictions on persons or organizations making expenditures for the purpose of electing or defeating candidates for public office. The federal and Colorado definition of express advocacy accomplishes this result. Broadening the definition of express advocacy only creates uncertainly, unintended consequences

and, ultimately, results in suppressing core political speech and rights of association.

CONCLUSION

Based on the foregoing reasons, *amicus curiae* CBA respectfully requests this Court affirm the decision of the Colorado Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2011, I served a copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO BAR ASSOCIATION IN SUPPORT OF RESPONDENT** via United States mail, first class mail, postage prepaid, addressed as follows:

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