

IN THE INDIANA SUPREME COURT

Case No. 94 S 00-0303-CQ-00094

BRIAN MAJORS et al.,)	On Question Certified By The United
)	States Court Of Appeals For The Seventh
Appellants,)	Circuit
)	
v.)	Case No. 02-2204
)	
MARSHA ABELL et al.,)	Hon. William J. Bauer, Senior United
)	States Circuit Judge, and Hon. Richard J.
Appellees.)	Posner and Hon. Frank H. Easterbrook,
)	United States Circuit Judges

BRIEF OF COMMON CAUSE/INDIANA
AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

This case comes to the Court in an odd posture. The defendants (the “Government”) say the statute in question does not mean what it says, and therefore the plaintiffs are free from the statute’s constraints. The plaintiffs, who one might expect to welcome this concession, insist that the statute does apply to them, but they claim it is unconstitutional. Whatever the parties’ tactical interests may be, neither side is defending the validity of the statute as the legislature wrote it. Common Cause/Indiana (“CC/IN”), as *amicus curiae*, files this brief to fill that void and defend the legislature’s work.

CC/IN is a not-for-profit citizens’ organization working for open, honest, and accountable government and has been organized in Indiana since 1974. CC/IN is concerned about the escalating cost of political campaigns and the increasingly important role that money plays in Indiana elections, leading to the appearance of impropriety and subsequent public cynicism and non-participation in the electoral process. The current staff of CC/IN has been intimately involved in the public policy discussion on campaign finance issues at the Indiana General Assembly since 1995. CC/IN testified in support of the disclosure laws crafted during the 1997 legislative session, including Ind. Code § 3-9-3-2.5, the statute at issue in the present case.

QUESTION CERTIFIED BY THE SEVENTH CIRCUIT

Is the term “persons” in Ind. Code §§ 3-9-3-2.5(b)(1),(d) limited to candidates, authorized political committees or subcommittees of candidates, and the agents of such committees or subcommittees, or does it have a broader scope, and, if so, how much broader?

STATEMENT OF THE CASE

Though the Seventh Circuit posed its question in abstract terms, this Court's answer will be interpreted in light of the particular parties and claims in the case. Who those parties are and what claims they are making are at best hazy on the current record.

Therefore, although an *amicus curiae* is not required to provide a statement of the case, CC/IN believes it would assist the Court to have a brief summary of the context in which the statute must be construed.

There appear to be two groups of plaintiffs, although the available record is not clear on this point. First are individuals who have run for office in Indiana and may run again (the "Candidate Plaintiffs"). *See* App. A25-A26 (Am. Cplt. ¶¶ 19, 22-23). The Candidate Plaintiffs complain that they cannot advertise in support of their own candidacies without including a statement that the advertisement is paid for by the candidate, as required by Indiana Code § 3-9-3-2.5 ("Section 2.5"). *See id.* The remaining plaintiffs are individuals and groups, mostly in New York and Texas, who disseminate political speech on the Internet and are concerned that Section 2.5 might be applied to their activities because their speech can be accessed from computers in Indiana (the "Internet Plaintiffs"). *See* App. A25-A27 (Am. Cplt. ¶¶ 21,24-27). For instance, Internet Plaintiff Bruce Martin has been a candidate for office in New York and fears he may have violated Section 2.5 by using the Internet to advocate his own election. *See* App. A26-A27 (Am. Cplt. ¶ 25).

The Internet Plaintiffs' First Amendment and Commerce Clause claims were dismissed as moot by the federal District Court because the Internet Plaintiffs and the Government agreed that Section 2.5 "does not apply to the internet." App. A18. The court also dismissed the Candidate Plaintiffs' First Amendment claims on standing and mootness grounds: plaintiffs who had never been threatened with prosecution under Section 2.5 lacked

standing; and the remaining Candidate Plaintiffs, who had been subjected to Section 2.5 by election officials in 1998, had not run again in the 2000 election cycle, making their claims moot. App. A12-A13. The District Court declined to exercise supplemental jurisdiction over claims under the Indiana Constitution. App. A19.

The Seventh Circuit did not discuss the Internet Plaintiffs at all. It did find, however, that the case was not moot, at least as to Candidate Plaintiff Brian Majors. *See Majors v. Abell*, 317 F.3d 719, 722-23 (7th Cir. 2003). It also held that while Majors had no protected interest in anonymity, “for there are no anonymous candidates,” he had standing “if his supporters are deterred by loss of *their* anonymity from supporting him by paid advertisements.” *Id.* at 722 (emphasis in original). The question on the merits, therefore, was whether Indiana could constitutionally require a candidate’s supporters who pay for express advocacy¹ to disclose their identities—even though the complaint does not allege that anyone other than the Candidate Plaintiffs themselves ever attempted or desired to engage in express advocacy on behalf of the Candidate Plaintiffs.

The Government contended that Section 2.5 does not apply to independent supporters at all because the statute regulates the conduct only of candidates, candidates’ committees, and agents of such committees. Such a narrow construction of the statute would avoid the constitutional question altogether. The plaintiffs rejected that construction and argued that Section 2.5 applied to anyone engaging in express advocacy. The Seventh

¹ “Express advocacy is political speech that uses express or explicit terms advocating the election or defeat of clearly identified candidates for public office.” *Nat’l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 688 n.3 (8th Cir. 2003). *See also Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 139 (Ind. 1999) (“BAPAC”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam)).

Circuit noted that “[t]he statutory language supports the broad interpretation” advocated by the plaintiffs, but it also believed that Section 2.5 read literally “may be unconstitutional.” *Id.* at 724. Giving this Court a chance to decide whether to avoid the constitutional issue by departing from the statute’s text, the Seventh Circuit certified the question whether Section 2.5 is as narrow in scope as the Government contends despite the apparent breadth of its language. *See id.* at 724-25.

SUMMARY OF ARGUMENT

Interpretation can go only so far in avoiding constitutional questions. In any event, giving Section 2.5 its natural, plain-language reading would not render the statute unconstitutional.

The Government argues that Section 2.5 applies only to candidates and their committees, a reading that not only conflicts with clear statutory text but would wipe out three-quarters of Section 2.5’s operative provisions. Section 2.5 applies “whenever a person” engages in express advocacy or solicits a political contribution, and it specifies four different disclosures that must be made in each of four distinct factual contexts. Three of those four contexts can occur *only* when someone other than a candidate or candidate’s committee makes the communication. For example, an advertisement that is not authorized by a candidate or candidate’s committee must disclose that it has not been so authorized and must further identify the person who paid for the advertisement. By definition, this requirement could never be triggered if Section 2.5 applied only to candidates and their committees. The Government’s limiting construction also contradicts the public position of the Election Division, whose informational brochure on the subject says the disclosure requirements apply to “all individuals and political organizations.” There is no way to avoid plaintiffs’ constitutional challenge to the Section 2.5 without gutting the law in order to save it.

But there is no need to save Section 2.5 in the first place: the statute is constitutional as the legislature wrote it. The federal government and many other states enforce disclosure provisions similar to Section 2.5. By our count, two state supreme courts and two federal circuit courts have upheld similar provisions in recent years, and only one circuit has come to a different result. Plaintiffs rely on the federal Supreme Court’s holding that states cannot ban anonymous advocacy by individual pamphleteers in referendum campaigns. The four courts previously mentioned, however, found that candidate elections are different for disclosure purposes, notably because expenditures on a candidate’s behalf by undisclosed interests would raise a fear of corruption should the candidate be elected, a concern not implicated in a referendum campaign. The Supreme Court itself has found the distinction between the two types of campaign to be dispositive in other constitutional contexts, and it should be dispositive in this situation as well.

Finally, because the Court has been asked to construe Section 2.5 in the abstract, it is important to bear in mind the possible settings in which the statute could arise in future cases, and to avoid unintentionally prejudging issues that would be better decided on a concrete record in an appropriate case. This concern is particularly acute with respect to Section 2.5’s application to the Internet, an issue that lurks in this case but that is not mentioned in the certified question and on which there is no record to assist the Court.

ARGUMENT

I.

Section 2.5 Applies To All “Persons”

Statutes are not infinitely malleable. As we explain below, Section 2.5 is constitutional as written; but even if it were not, the Court could not construe away its clear

application to *all* persons engaging in express advocacy and solicitation. The Court could indulge a “reasonable” alternative construction to save the constitutionality of the statute, *see BAPAC*, 714 N.E.2d at 141, but

it is equally true that usage and practical interpretation of a statute cannot control the interpretation of the constitutionality unless the language of the statute is obscure and doubtful. Further, if a statute is not ambiguous or uncertain in its meaning, then it is not open to construction, but we must take the statute as it is enacted.

Ind. Dep’t of Revenue Inheritance Tax Div. v. Callaway’s Estate, 232 Ind. 1, 6, 110 N.E.2d 903, 905 (Ind. 1953). *See also BAPAC*, 714 N.E.2d at 139 (“If a statute is unambiguous, then courts must apply the plain language despite perhaps strong policy or constitutional reasons to construe the statute in some other way.”) (quotation and alteration omitted). Section 2.5 plainly applies to more than candidates and their committees and committee agents. The statute is triggered “whenever a person” engages in express advocacy or solicitation. Ind. Code § 3-9-3-2.5(b).² “Person,” in turn, “means an individual or an organization.” Ind. Code § 3-5-2-36. Limiting Section 2.5 to candidates and their committees and committee agents would ignore this text, not construe it.

Further, such a limitation would eviscerate Section 2.5. The statute’s heart is its requirement to include one of the following four disclosures on the face of an advertisement:

² Section 2.5(b) reads in full:

(b) This section applies whenever a person:

(1) makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate; or

(2) solicits a contribution;

through a newspaper, a magazine, an outdoor advertising facility, a poster, a yard sign, a direct mailing, or any other type of general public political advertising.

- (1) If express advocacy is paid for and authorized by a candidate, candidate's committee, or agent, it must so state;
- (2) If it is paid for by "other persons" but authorized by the candidate, committee, or agent, it must so state;
- (3) If it is not authorized by the candidate, committee or agent, it must so state and must identify the "person" who paid for it; and
- (4) A solicitation on behalf of a political committee "that is not a candidate's committee" must disclose the "person" who paid for it.

IC § 3-9-3-2.5(g).³ In three of the four scenarios defined in the statute, an advertisement must disclose that it was paid for by a "person" other than a candidate, a candidate's

³ Subsection (g) reads in full:

(g) Except as provided in subsection (h), a communication described in subsection (b) must satisfy one (1) of the following:

(1) If the communication is paid for and authorized by:

- (A) a candidate;
- (B) an authorized political committee of a candidate; or
- (C) the committee's agents;

the communication must clearly state that the communication has been paid for by the authorized political committee.

(2) If the communication is paid for by other persons but authorized by:

- (A) a candidate;
- (B) an authorized political committee of a candidate; or
- (C) the committee's agents;

the communication must clearly state that the communication is paid for by the other persons and authorized by the authorized political committee.

(3) If the communication is not authorized by:

- (A) a candidate;
- (B) an authorized political committee of a candidate; or
- (C) the committee's agents;

the communication must clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(cont'd)

committee, or an agent of a candidate's committee. If "person" included *only* candidates and their committees and committee agents, it would be literally impossible for three-quarters of the statute's operative clauses ever to apply, an obviously impermissible result. *See Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002) ("Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute."); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning*, 746 N.E.2d 941, 948 (Ind. 2001) ("we presume that the legislature did not enact a useless provision") (quotation omitted).⁴

In defining the required disclosures, Section 2.5 tracks Section 318 of the Federal Election Campaign Act ("FECA"). When the Indiana legislature adopted Section 2.5 in 1997, FECA provided in relevant part:

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting

(cont'd)

(4) If the communication is a solicitation directed to the general public on behalf of a political committee that is not a candidate's committee, the solicitation must clearly state the full name of the person who paid for the communication.

⁴ Subsection (g) is not the only part of the statute that would be rendered meaningless by an construing "person" to mean only candidates and their committees and agents. For example, the statute expressly exempts certain solicitations by a corporate political action committee ("PAC") of the corporation's employees, stockholders, and executives, and there is a similar exception for union PACs that solicit political contributions from union members. IC § 3-9-3-2.5(a)(7-8). If corporate and union PACs were not "persons" whose solicitations would otherwise trigger the statute, the exceptions would have no effect. Similarly, there is a partial exemption for three kinds of communications made by party committees. Such communications must disclose on their face who paid for them but do not have to state whether they are authorized by any candidate or candidate's committee. IC § 3-9-3-2.5(h). Again, if express advocacy by party committees were not already covered by subsection (b)(1), there would be no need for the exemption in subsection (h).

station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

FECA § 318, *codified at* 2 U.S.C. § 441d(a) (1994) (emphasis added).⁵ Federal courts repeatedly applied FECA § 318 to persons and organizations that were not affiliated with any candidate, long before Indiana enacted Section 2.5. *See generally, e.g., Galliano v. U.S. Postal Serv.*, 836 F.2d 1362 (D.C. Cir. 1988) (R.B. Ginsburg, J.); *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). As this Court has recognized, when the legislature borrows language from FECA, it presumably intends to incorporate the federal courts' interpretations of FECA as well. *BAPAC*, 714 N.E.2d at 140. Many other states have adopted similar disclaimer or disclosure provisions. *See, e.g.,* Ariz. Rev. Stat. §§ 16-901, 16-912, 16-912.01; Cal Gov't Code §§ 82031, 85500; Conn. Gen. Stat. § 9-333w; Del. Code Ann. tit. 15, §§ 8002, 8031; Fla. Stat. § 106.071(1); Me. Rev. Stat. Ann. tit. 21-A, § 1014; N.H. Rev. Stat. Ann. §§ 664:2, 664:6; Or. Rev. Stat. § 260.005; Pa. Stat. Ann. tit. 25,

⁵ Section 318 of FECA was amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311. The amendment did not alter the basic structure of Section 318 and is not relevant to this case.

§§ 3246,3258; Tenn. Code Ann. § 2-19-120; Utah Code Ann. § 20A-11-901; W. Va. Code § 3-8-2.

The Election Division, which administers Indiana’s campaign finance laws,⁶ gives Section 2.5 the same breadth that the federal courts have given FECA § 318. “An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). The Election Division embraces a plain-meaning construction of “person”:

All persons must print a disclaimer on literature and other material if the material clearly identifies a candidate and expressly advocates the election or defeat of a clearly identified candidate. This requirement applies to *all individuals and political organizations*, whether or not the organization is required to file campaign finance reports.

Indiana Election Division, *Political Signs And “Disclaimer” Requirements For Political Literature And Advertisements* (May 2002), <http://www.state.in.us/sos/pdfs/Disclaim.pdf> (emphasis added). The brochure gives examples of appropriate disclaimer text, including “Paid for by John Doe, Mary Parker and Bill Jones, and not authorized by a candidate or candidate’s committee.” *Id.* The Election Division’s example is consistent with Section 2.5(g)(3), but it is flatly inconsistent with limiting the statute to expenditures made by a candidate, candidate’s committee, or committee’s agent. At the very least, the Election

⁶ The Indiana Election Commission must administer the election laws and “carry out IC 3-9 (campaign finance).” Ind. Code § 3-6-4.1-14(a)(1),(2)(B). The Election Division is directed to “assist the commission . . . in the administration of” the election laws. Ind. Code § 3-6-4.2-2(b). Among its functions are investigating violations of IC 3-9 and enforcing the campaign finance laws, *see* Ind. Code §§ 3-6-4.1-24, 3-6-4.2-13, 3-9-4-13, 3-9-4-14(a)(2), and collecting and making publicly available financial data that campaigns, PACs, and others are required to submit, *see* Ind. Code §§ 3-9-4-4 through 3-9-4-7.

Division's ongoing public interpretation of the statute undercuts any deference that might be due the contrary interpretation advanced by the Government in this litigation. *See Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1998) (finding agency's historical behavior "more persuasive" than its litigation position).

There is, in short, no way to make sense of Section 2.5, or indeed to give most of the statute any effect at all, by applying it only to a candidate, a candidate's committee, or an agent of a committee. That is not how the Election Division has interpreted Section 2.5, it is not what the statute's federal analog has always applied to, and, most important, it is not what the legislature wrote.

II.

Section 2.5 Is Constitutional

Plaintiffs contend Section 2.5 runs afoul of federal Supreme Court precedent protecting small-scale anonymous circulation of advocacy regarding ballot initiatives. The clear majority of subsequent case law, however, has upheld similar disclosure requirements in the context of *candidate* elections, and longstanding constitutional doctrine supports the distinction. The U.S. Supreme Court itself upheld disclosure requirements with respect to express advocacy in candidate elections in *Buckley v. Valeo*, 424 U.S. 1, 80-83 (1976) (per curiam). It invalidated a similar requirement only when considering an individual distributing home-made handbills opposing a referendum in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995). Almost every state supreme court and federal appellate court to consider the matter since *McIntyre* has upheld disclosure provisions as

applied to candidate elections.⁷ Accordingly, construing Section 2.5 according to its plain language would not invalidate the statute.

Buckley upheld a provision of FECA that required independent persons and entities engaging in express advocacy to disclose their sources of funding. *See* 424 U.S. at 80-83 (noting disclosure “further[ed] First Amendment values by opening the basic processes of our federal election system to public view”). At the time, FECA mandated disclosure to the Federal Elections Commission, rather than requiring a disclaimer in the advertisements themselves. Section 2.5, which makes funding information available to voters when they view an advertisement, serves even more strongly the “informational interest” *Buckley* cited. *See id.* at 81. Indeed, because the informational interest belongs to voters, *id.*, Section 2.5 is more tightly linked to the constitutional and democratic interests at stake.

When the Supreme Court struck down a disclosure provision in *McIntyre*, it expressly relied on the distinction between the referendum in that case and the candidate elections covered by FECA and *Buckley*. *McIntyre*, 514 U.S. at 356. The *McIntyre* Court noted the “compelling state interest in avoiding the corruption that might result from campaign expenditures” in candidate elections. *Id.* Independent expenditures in support of candidates can create political debts that affect elected officials’ behavior, or that are at least perceived by the public as having a corrupting influence. In a referendum, there is no individual from whom the anonymous advertiser can expect “special treatment after the candidate is in office.” *Id.* Thus, whatever interests states have in regulating referendum and

⁷ The Supreme Court has since made it apparent in *dictum* that the question remains open whether states can require disclosure even in initiative or referendum campaigns on facts different from the lone-pamphleteer setting of *McIntyre*. *See Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, ___, 122 S. Ct. 2080, 2090 (2002).

initiative campaigns, deterring corruption of elected officials is not as clearly at stake as it is with candidate elections. In elections for political office, however, disclosure requirements are needed to ensure that “[c]urriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by . . . the public for just this sort of abuse.” *Id.*

Although the Seventh Circuit suggested that the distinction between candidate elections and ballot measures “might be thought fragile,” *Majors*, 317 F.3d at 724, the Supreme Court has relied on precisely that distinction. For example, the Court invalidated a statute that prohibited corporate express advocacy about ballot initiatives or referenda in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), but it later upheld an outright ban on corporate express advocacy on behalf of candidates in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660-61 (1990). *Bellotti* acknowledged the different concerns presented by initiatives and candidate elections; the Court cautioned that its “consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” 435 U.S. at 787 n.26.

It should therefore come as no surprise that state supreme courts have upheld disclosure requirements similar to Indiana’s since *McIntyre*. See *Seymour v. Elections Enforcement Comm’n*, 762 A.2d 880, 892-94 (Conn. 2000); *Doe v. Mortham*, 708 So. 2d 929, 931-32, 934-35 (Fla. 1998). The Connecticut Supreme Court distinguished *McIntyre* by noting the important differences between candidate elections and referenda, including increased concerns about corruption or the appearance of corruption. *Seymour*, 762 A.2d at 892. It also recognized that the source of a candidate’s support or opposition was valuable information for a voter as to the policies the candidate would pursue if elected, and that the

requirement of disclosure also served the “informational interest” identified in *Buckley*. *Id.* at 888. The Florida Supreme Court interpreted *McIntyre* as requiring a carve-out applying to individuals involved in very small-scale activities like printing a few fliers on home computers; invalidating the Florida disclaimer law only as applied to individuals using such “modest” means, it otherwise upheld the provision. *Doe*, 708 So. 2d at 934-35. Most of the federal courts of appeals that have considered the issue since *McIntyre* have also upheld disclaimer provisions. *Federal Election Comm’n v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001) (upholding FECA § 318); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997) (upholding Kentucky’s disclaimer requirement); *see also Federal Election Comm’n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 298 (2d Cir. 1995) (upholding FECA § 318 as applied to solicitations). *But see Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000) (invalidating Colorado’s disclaimer provision and finding that the distinction between disclosures to administrative agencies and disclaimers on the face of an advertisement is more salient than the distinction between referenda and candidate elections).

Section 2.5 is constitutional as written. The radical narrowing advocated by the Government is unnecessary.

III.

The Court Should Await A Case That Properly Presents The Issue Before Deciding Whether Modest Carve-Outs From Section 2.5’s Coverage Are Required

The abstractness of the certified question is dangerous: it asks generally how Section 2.5 should be interpreted, without reference to any particular set of facts. A multitude of scenarios could implicate the statute—different kinds of organizations and individuals, engaging in communications with differing content, via different media, under

different circumstances—and CC/IN is concerned that the Court’s answer to the certified question could be read to reach contexts that the Court does not intend to address and indeed may not even have considered. Accordingly, we briefly set forth some considerations that may help avoid particular pitfalls that are already apparent.

First, there may be a future question about whether the “lone pamphleteer” is covered by Section 2.5. The Florida Supreme Court in *Doe* upheld a statute requiring political advertisers to “[i]dentify the persons or organizations sponsoring the advertisement” against a facial challenge to its constitutionality. *See* 708 So. 2d at 930 n.3 (quoting Fla. Stat. § 106.143(1)(b)). To avoid a constitutional question, however, it interpreted the term “political advertisement” not to include “the personal pamphleteering of ‘individuals acting independently and using only their own modest resources.’” *Id.* at 934 (quoting *McIntyre*, 514 U.S. at 351). Thus, the Florida court recognized that a generally constitutional disclosure statute might be unconstitutional as applied to a small number of cases. It is conceivable that in an appropriate case, this Court would also conclude that individuals operating on a small scale should be excluded from Section 2.5’s coverage. This, however, is not an appropriate case, and the Court should defer any effort to identify or define exceptions to Section 2.5’s breadth.

The only party in this case whom the Seventh Circuit found had standing to sue is Brian Majors, a Candidate Plaintiff. And while the federal court did say that Majors could raise the First Amendment claims of his supporters, the complaint fails to identify a single individual who has anonymously advocated, or who has even wanted to advocate, Majors’s election other than Majors himself. The Seventh Circuit’s opinion does not discuss, even hypothetically, any particular set of facts in which Section 2.5 might or might not apply

to independent express advocacy. Nor does the Appendix contain any instances of independent supporters' engaging in or being deterred from anonymous express advocacy. On this record, the Court should not attempt to decide in the abstract whether some individuals operating on a small scale might fall outside Section 2.5, let alone try to define with any precision the scope of such an exemption. Rather, as the Supreme Court has said, the legitimate interests of particular persons or groups in retaining anonymity is more appropriately protected through their ability to bring as-applied challenges. *See Buckley*, 424 U.S. at 82 n.109.⁸

For similar reasons, the Court should make clear that it is not reaching any general conclusions about whether and how Section 2.5 applies to communications on the Internet. The District Court noted the parties' agreement that the statute "does not apply to the internet." App. 18. Stated that broadly, the proposition must be incorrect. Surely, if an Indiana citizen paid to establish a website advocating the election or defeat of a clearly identified candidate for Indiana public office, that communication would be subject to Section 2.5. On the other hand, it seems equally clear that the statute does not apply to Internet Plaintiff Bruce Martin, a candidate for office in New York who advocated his own election on the Internet, even if computers in Indiana could be used to read the materials he posted. Innumerable scenarios could be imagined in which the Internet was somehow involved in express advocacy or solicitation. Without any evidentiary record or specific claim to adjudicate, it would not make sense to try to formulate a general rule about how Section 2.5 affects Internet communications. However, because the Internet Plaintiffs are apparently still in the case and it is possible that their claims will be revived at some point in

⁸ *McIntyre* was such an as-applied challenge. *See McIntyre*, 514 U.S. at 339, 351-52, 354.

the federal proceedings, the Court should consider an explicit statement that it does not intend its opinion to imply anything about whether Section 2.5 “applies to the Internet.”

CONCLUSION

For the foregoing reasons, CC/IN respectfully requests that the Court answer the certified question as follows:

Having considered whether the statute would be unconstitutional if construed according to its plain language and having concluded that it would not, the Court finds that the term “persons” in Ind. Code §§ 3-9-3-2.5(b)(1),(d) is not limited to candidates, authorized political committees or subcommittees of candidates, and the agents of such committees or subcommittees, but includes any individual or organization, possibly subject to circumscribed exceptions not implicated on this record.

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7000 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 22nd day of April, 2003, I caused a true and accurate copy of the Brief of Common Cause/Indiana as *Amicus Curiae* Supporting Neither Party to be deposited in the United States Mail, postage prepaid, and addressed to each of the following:

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