

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
NO. 02-5529

HOBART WARD ANDERSON, et al.  
*Plaintiffs-Appellants*

v.

LLOYD E. SPEAR, et al.  
*Defendants-Appellees*

\* \* \* \* \*

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF KENTUCKY  
AT ASHLAND  
CIVIL ACTION NO. 99-189

\* \* \* \* \*

PETITION FOR REHEARING WITH  
SUGGESTION FOR REHEARING EN BANC

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The Attorney General of the Commonwealth of Kentucky files this petition for rehearing, with suggestion for rehearing en banc, in his capacity as counsel for the Kentucky Board of Elections regarding “Argument I” below; he files in his own capacity as Kentucky’s chief law enforcement officer regarding “Arguments II and III” below.<sup>1</sup> The petition should be granted for the following reasons:

I.

THE PANEL DECISION IN THIS FIRST AMENDMENT APPEAL REGARDING KENTUCKY’S BAN ON ELECTIONEERING WITHIN 500 FEET OF A POLLING PLACE CONFLICTS WITH THE UNITED STATES SUPREME COURT DECISIONS OF *BURSON V. FREEMAN*, 504 U.S. 191 (1992) AND *MCCONNELL V. FEDERAL ELECTION COMMISSION*, 124 S.CT. 619 (2003).

The three-judge panel, reversing the district court below, concluded that the Commonwealth of Kentucky did not meet its modified burden of proof, in defending its statutory ban on electioneering within 500 feet of a polling place. See, KRS § 117.235(3). Under its modified burden, the state must demonstrate that its response is “reasonable and does not *significantly impinge* on constitutionally protected rights.” (Slip Opinion at p. 7, emphasis in original quoting, *Burson v. Freeman*, *supra*, at 209).

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<sup>1</sup>The Kentucky Registry of Election Finance defended the campaign finance statutes in the district court and before this court, but has indicated it will not further participate in this appeal. The Attorney General has elected to step in now and defend those statutes.

Although the panel noted it must recognize the deference due states to enact laws designed to prevent voter intimidation and voter fraud, compelling state interests of the highest order, the panel erroneously concluded the restriction on “electioneering” captured more protected speech than necessary to promote the state’s interests. The panel accepted the Appellants’ novel argument that “electioneering bans” in the buffer zones around polling places can only be applied to “express advocacy” but not to “issue advocacy,” without such laws running afoul of the First Amendment. (Slip Opinion, pp. 19-24). The panel also accepted the Appellants’ argument that Kentucky had not justified the need for the larger geographic electioneering ban than the 100 foot ban imposed by Tennessee, which the Supreme Court upheld in *Burson v. Freeman, supra*. (Slip Opinion, pp. 6-19).

A.

The panel’s opinion is the first published decision where any court anywhere has held a state must distinguish between “express advocacy” and “issue advocacy” in the context of their longstanding buffer zones on “electioneering” near a polling place. Kentucky, and most states, ban “electioneering” near the polling place as a means to prevent voter intimidation and vote buying. Kentucky has a long tawdry history of vote-buyers perverting elections, which was amply demonstrated by a year-long series of investigative reports by the Louisville COURIER-JOURNAL newspaper, an Attorney General election fraud task-force, and the Kentucky

General Assembly. (J.A., pp. 597-98, 606-623).<sup>2</sup>

In *Burson*, the Supreme Court examined the history of buying and selling votes in American elections and the types of voter intimidation that led to election law reforms such as the secret ballot; and laws precluding people other than election officials and voters from congregating around the polls. *See, Burson* 504 U.S. at 199-206. The Court took notice that all 50 states had addressed this problem by creating restricted zones around voting areas. The Court said, “We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.” *Id.*, at 206. “No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.” *Brown v. Hartlage*, 456 U.S. 45, 54 (1982). In *Burson*, the Supreme Court upheld Tennessee’s 100 foot electioneering ban, a smaller geographic ban, and the issue/express advocacy distinction was not argued. The challengers of Tennessee’s 100 foot ban on electioneering argued the statute was “*underinclusive*” because it

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<sup>2</sup>Mr. Anderson, a write-in candidate for governor, wanted his campaign workers to be able to stand at the polls and give out instructions. Counsel for Kentucky’s Board of Elections informed Anderson that he could not pass out instructions on how to cast a write-in ballot. [Slip Opinion, p. 19]. Trained county election officials are on hand at all Kentucky polls to assist voters with this type of question. Such officials are not precluded by the electioneering ban from giving non-partisan assistance to voters.

did not ban other types of speech such as commercial solicitation or exit polling.  
504 U.S. at 207.

By contrast, Anderson argued, and the panel agreed, that Kentucky's statute was "*overinclusive*" because it did not make a distinction between issue advocacy and express advocacy. The district court below said this aspect of Anderson's challenge "appears wholly novel." *Anderson v. Spear*, 198 F.Supp. 644, 651 (E.D.Ky. 2002). The district court rejected Anderson's overbreadth argument concluding the *Burson* Court simply found it inapplicable. "In other words, *Buckley's* express/issue advocacy terminology lacks currency outside the campaign finance context." *Id.*, at 652. The panel concluded, however, that Kentucky's definition of electioneering was vague and, "because the State has failed to provide any evidentiary support for regulating both express and issue advocacy" around the polling place, it found it "should apply a limiting construction." (Slip Opinion, p. 22). The panel declared, "Because Kentucky has failed to demonstrate that issue here, we apply a narrowing construction to the term 'electioneering,' and find that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." (Slip Opinion, p. 23).

The panel's uncritical acceptance of Anderson's novel injection of the issue advocacy/express advocacy distinction in electioneering cases stands in stark contrast to the United States Supreme Court's recent decision in *McConnell v.*

*Federal Elections Comm'n*, 124 S.Ct. 619 (2003). In *McConnell*, a case challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (which placed restrictions on “soft money” in federal elections), eight of the nine justices rejected any constitutional significance between “express advocacy” (advertisements which use the “magic words” such as “Vote for Anderson”) and “issue advocacy” (advertisements designed to influence voters without the “magic words,” such as “Call Hoby Anderson and tell him to back family values” etc.).

The eight justices in *McConnell* said:

[T]he concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities. . . . Our decisions in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] and *MCFL*<sup>3</sup> were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions relating to campaign-related speech. Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.”

*McConnell*, 124 S.Ct. at 688-69.

The *McConnell* Court went on to illustrate why the academic “magic words” distinction in *Buckley* had proven unworkable in practice. The Congressional record showed “*Buckley*’s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption. . . .” 124 S.Ct. at 689. Not only could

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<sup>3</sup> *Federal Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

advertisers easily evade the line by eschewing the use of magic words, they would seldom use such words even if permitted. *Id.* at 689, n. 77, 78. If the presence or absence of such “magic words” cannot be meaningfully distinguished in electioneering advertising, the unprecedented injection of this word play into “electioneering-free zone statutes” would be far worse to the cause of free and fair elections. The reason vote buyers and sellers want to congregate near a polling place is not for issue advocacy, it is to buy and sell votes. The closer a vote buyer is to the polling place, the easier it is to receive signals that the purchased vote has been cast. Also, as *McConnell* illustrates, it is not easy to distinguish the different types of advocacy. The concept proved unworkable in the context of election advertising. And it is even more problematic in electioneering zone cases because state and local election officials will be forced to make quick decisions that would baffle a jurist or any First Amendment scholar.

In the recent *McConnell* case, the Supreme Court said “the quantum of empirical evidence needed to justify heightened judicial scrutiny of legislative judgments varies with the novelty or plausibility of the justification raised.” *McConnell*, 124 S.Ct. 628. Sadly, the specter of vote buying is neither novel nor implausible in Kentucky. As the Supreme Court recognized in *Burson*, before bans on electioneering were enacted in the United States, “approaching the polling place . . . was akin to entering an open auction place.” *Id.*, at 202. “Many labor men were

afraid to vote and remained away from the polls. Others who voted against their employers' wishes frequently lost their jobs.” *Id.*, at 201 n. 7. Upholding Tennessee’s ban, the Supreme Court recognized “voter intimidation and election fraud are successful precisely because they are difficult to detect.” *Id.*, at 208. Thus, “[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right.” *Id.*, at 211.

As shown below, in the discussion about the need for a 500 foot ban, there is more than ample evidence in the record that vote buying and intimidation are still real problems in Kentucky. Principles of comity and federalism suggest that the panel should have respected and upheld Kentucky’s legislative justifications, just as the Supreme Court has held courts should show proper deference to Congress’ ability to weigh constitutional interests in areas where it enjoys particular expertise. *McConnell*, 124 S.Ct. at 628.

## B.

Although the panel recognized “the State does provide ample evidence of Kentucky’s history of election fraud and corrupt election practices, glaringly thin is its evidence as to why the legislature, the [Attorney General’s] Task Force, or the Commission ultimately arrived at a distance of 500 feet.” (Slip Opinion, p. 10). The panel struck down the law concluding that the buffer zone was overbroad,

significantly impinges on protected speech and was primarily designed to prevent voters from having contact with any speech whatsoever prior to voting. (Slip Opinion, p. 19).

The record before the Court amply demonstrates why Kentucky enacted the ban. Vote buying was rampant and open in some Kentucky counties before the law was enacted. Thousands of Kentuckians sold their votes to the highest bidders. [J.A., pp. 606-607]. One Perry County vote buyer admitted buying votes on behalf of candidates for governor, judgeship, school board and other offices. He told a reporter, “You don’t give nobody money unless you watch ‘em. I go to the house, line ‘em up. On election day I vote ‘em.” [J.A., pp. 621]. In at least one case vote buying and election fraud took place on such a massive scale that an election was invalidated. *Jernigan v. Curtis* 622 S.W.2d 686 (Ky.App. 1981). Making vote buying a felony deters some fraud but it has not eliminated the problem. *See, U.S. v. Slone*, 43 Fed.Appx. 738, 2002 WL 486389 (6th Cir. 2002, unpublished). This is a perennial problem that is hard to root out. The 500 foot distance was selected because the greater distance it is from the polls, the more difficult it is for vote buyers to collude with corrupt precinct officials at polling places. [J.A. 226-27]. The greater the distance, the harder it is to do signals such as hand signals, nods of head and winks. [Ely Dep., J.A. p. 288-89]. A newspaper report illustrates how “floaters” milled around polling places, waiting until the price of votes went up,

while a vote buyer watched through the window of the voting place, handing out fistfuls of cash to voters who voted for a given candidate. Election fraud was common. “Honest people [were] afraid to come to the polls.” [J.A. 601].

The panel’s insistence that Kentucky prove its 500 foot ban was the precise distance necessary to prevent vote buying, signaling, and voter intimidation stands in sharp contrast to the methodology the Supreme Court employed in *Burson*, where the plurality rejected the need for a “litmus paper test.” The Court said it is “difficult for the States to put on witnesses who can testify as to what would happen without [such laws and] . . . it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud.” *Burson*, 504 U.S. at 208. Tennessee enlarged its ban from 50 feet to 100 feet. Justice Blackmun did not require the state to justify why 100 feet was the precise distance needed, concluding, “we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a matter of ‘constitutional dimension’ . . . .

Reducing the boundary [line] is a difference only in degree, not a less restrictive alternative in kind.” *Burson*, 504 U.S. at 210.

The only other federal appellate court after *Burson* that has considered an equal or greater campaign free zone declared Louisiana’s 600 foot ban was neither excessive nor substantially overbroad. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994). Recognizing that the state was not

required to prove that the 600- foot zone was perfectly tailored, the Fifth Circuit upheld a longer ban than Kentucky's ban. *Burson* reaffirmed that states have a compelling interest in protecting the right to vote--"a right at the heart of our democracy." 504 U.S. at 197. Kentucky did not go *too far* in protecting that right.

## II.

THE PANEL DECISION IN THIS FIRST AMENDMENT APPEAL REGARDING KENTUCKY'S BAN ON POST-ELECTION CONTRIBUTIONS CONFLICTS WITH THE UNITED STATES SUPREME COURT DECISIONS OF *MCCONNELL V. FEDERAL ELECTION COMMISSION*, 124 S.CT. 619 (2003) AND *NIXON V. SHRINK MISSOURI GOVERNMENT PAC*, 528 U.S. 377 (2000).

KRS 121.150(16) prohibits a candidate for office or his agents from soliciting or accepting contributions for his or her campaign after the date of the general election. The statute was enacted after millionaire candidates such as Wallace Wilkinson loaned themselves millions of dollars to run for governor or lieutenant governor, and then solicited contributions to repay the loans from road contractors and other persons who do business with the state. The campaign debts were soon repaid by businessmen who wanted to retain or gain favor with the successful candidate. The state justified the law as avoiding the appearance of *quid pro quo* corruption. The district court found this was a compelling justification and also noted that post-election contribution bans can be justified because they allow the public to be informed *before* an election of the identities of persons contributing to

the campaign of a particular candidate. Permitting post election contributions keeps the voters in the dark about who financed the candidate's campaign. *Anderson v. Spear*, 189 F.Supp.2d 644, 653-54 n. 654 (E.D.Ky. 2002). The district court upheld the law. *Id.*

The panel reversed. It recognized there was "little doubt" Kentucky had met its burden of demonstrating a sufficiently important interest. However, it concluded the statute was not closely drawn, and impinged on associational rights even where there is little risk of corruption following an election. (Panel Opinion, pp. 31-33). The panel suggested the appearance of corruption is low when post-election contributions are made to "*losing* candidates." (Panel Opinion, p. 32, emphasis in original). Moreover, according to the panel, such appearance is also "substantially mitigated" by Kentucky's \$1,000 contribution limitation. (Panel Opinion, 31-32).

The panel's conclusion was flawed for three reasons. First, campaign contributions have been recognized to have an ephemeral free speech or free association quality as giving money shows a general expression of support for a candidate and his views. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386-87 (2002). After an election however, as Justice Stevens noted (when speaking of contribution limits generally), "money is property; it is not speech." *Nixon, supra*, 528 U.S. 377, 398 (Stevens, J., concurring). Post-election contributions have, at best, only marginal First Amendment implications, whereas they work actual

corruption in government and a corresponding suspicion among the electorate.

Moreover, these dynamics do not necessarily change for *losing* candidates. Losing candidates often hold or seek other public offices and can be expected to exert great pressure on business people and regulated industries. For example, if a state or federal congressman or senator runs for governor and loses the general election, he still has ample political power to subtly extort money from businesses and special interest groups to pay back his individual loans to his losing campaign. Third, the post-election campaign ban avoids the problem about keeping voters in the dark about who supports a given candidate. Finally, the panel's belief that the \$1000 contribution limit minimizes the appearance of corruption ignores the ability of post-election contributors to bundle these contributions in the names of partners, employees, and minor children. If wealthy individuals want to lend money to their campaigns that is their choice. But, after the election, they should not be permitted to "shake down" business people and others who are subject to state regulation to retire their campaign debt to themselves.

### III.

THE PANEL DECISION IN THIS FIRST AMENDMENT APPEAL  
REGARDING KENTUCKY'S BAN ON CASH CONTRIBUTIONS  
CONFLICTS WITH THE DECISION OF THIS COURT IN *FRANKS*

*V. CITY OF AKRON*, 290 F.3d 813 (6th Cir. 2002).

Kentucky's ban on cash contributions for governor, KRS 121A.050(2) serves two compelling state interests. First, illegal cash contributions in Kentucky have historically been laundered to pay for many types of illegal acts such as political operatives handing out fistfuls of cash to vote buyers. Before the law was enacted, former Letcher Circuit Court Judge F. Byrd Hogg was quoted as saying, "You cannot win an election without money for bought votes, and cash is all they use." [J.A., pp. 655]. Second, requiring a contributor to pay with a check leaves a paper trail and is essentially a reporting requirement.

This Court upheld a ban of cash contributions greater than \$25.00 in *Franks v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003). The panel distinguished *Franks*, opining "[w]hile this may at first glance appear to be a difference in degree and not in kind, it is clear that Kentucky's regulation cannot survive exacting scrutiny because it is not 'closely drawn' to avoid unnecessary abridgment of associational freedoms." (Slip Opinion, pp. 33-34). The panel concluded the ban on all cash contributions effectively foreclosed speech by a large body of individuals who will be chilled from making *de minimis* contributions. (Slip Opinion, p. 35). But this reasoning directly conflicts with the reasoning of the prior *Franks* opinion, where this Court said, the ban on cash contributions below \$25 "clearly does not unduly burden a contributor because it does not affect the

amount that one may contribute; it simply affects the manner in which one may contribute.” *Franks*, at 818. Judge Merritt, writing for the Court, continued:

A candidate's ancillary right to associate also does not suffer because a contributor pays by check, credit card, or money order rather than with cash. The provision serves the significant governmental interest of accountability by forcing contributions to be traceable. As a result, it makes corruption more difficult to hide in the face of a campaign audit. It is clearly valid under the First Amendment.

*Id.*, at 818-819. Nothing in the record suggests the no cash contribution law is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."

*Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. at 397. Judge Merritt’s observations about the potential for cash being used to corrupt elections has certainly been historically true in Kentucky. Mr. Anderson has not shown this leaves him without a voice. This Court should grant a petition for rehearing en banc to reconcile these opinions. The panel’s first instinct was correct. Kentucky’s cash contribution ban *is only* “a difference of degree and not in kind.”

## CONCLUSION

The panel decision contradicts the reasoning and methodology of several Supreme Court decisions and a Sixth Circuit decision—as set forth above. While free speech and association are undoubtedly important constitutional rights,

Kentucky's interests in conducting free and fair elections are also compelling. Achieving a proper balance is a matter of exceptional importance not only for Kentuckians, but also because of the precedential impact of the decision which is marked for publication. For all these reason, this case is especially deserving of rehearing by the panel or for rehearing en banc.

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## CERTIFICATE OF SERVICE

I hereby certify that one original and twenty-five copies of the Petition for Rehearing and Suggestion for Rehearing En Banc and slip opinion were delivered to the Clerk of this Court by hand delivery, and that two copies were mailed by first class mail, postage prepaid, to the following, this 30th day of January 2004:

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