CHAPTER SEVEN

CAMPAIGN ADVERTISING AND ISSUE ADVOCACY

The Supreme Court's decision in *McConnell v. FEC* swept away constraints that many lower courts had wrongly imposed on the regulation of campaign advertising.[1] Prior to *McConnell*, courts interpreting *Buckley* held that such regulation was constitutionally permissible only with respect to ads that expressly advocated the election or defeat of a clearly identified candidate. Most courts further concluded that, under *Buckley*, such "express advocacy" required the use of so-called "magic words" – terms such as "vote for" or "vote against" or their synonyms. Ads without magic words were treated as "issue advocacy" exempt from regulation, regardless of their intent or effect. Because it was child's play to create campaign ads without magic words, the misinterpretation of *Buckley* opened a giant "issue advocacy" loophole in federal campaign finance law. *McConnell* closed that loophole by making it clear "that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled."[2]

McConnell thus opens the door to more meaningful regulation of campaign advertising. The decision specifically upheld the definition of a newly coined term, an "electioneering communication," which identifies a type of advertising that may be regulated under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In addition, it is still possible to regulate ads that do contain magic words. And in some jurisdictions, a contextual definition of ads that may be regulated, or a "reasonable person" standard for such ads, may also be enforceable.

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[1] 124 S. Ct. 619, 686-706 (2003).

[2] *Id.* at 695.

All three tests for the regulation of campaign advertising – BCRA's definition, the "magic words" test, and the "reasonable person" or contextual test – are discussed in this Chapter. Chapter Eight discusses reporting and disclosure requirements applicable to campaign ads, including "electioneering communications" as defined in BCRA. Limits on corporate and union independent expenditures, including on electioneering communications, are addressed in Chapter Six.

I. "Electioneering Communications" Under BCRA: The Time-Frame Test

BCRA coined a new term – "electioneering communications" – for a category of campaign advertising that would be subject to regulation. As defined in BCRA, an "electioneering communication" is any "broadcast, cable, or satellite communication" that

(1) refers to a clearly identified candidate for Federal office;

(2) is made within–

(aa) 60 days before a general, special, or runoff elections for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(3) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.[3]

A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent."[4]

In other words, there are four key elements of BCRA's definition:

1. the *media* that are regulated (broadcast, cable, and satellite communications);

2. the *reference to a clearly identified candidate*;

[3] 2 U.S.C.A. § 434(f)(3)(A)(i) (Supp. 2003).

[4] *Id.* § 434(f)(3)(C).

3. the *time period* during which ads are regulated;

4. *targeting* to the jurisdiction of intended representation.

The Supreme Court upheld this definition against claims that it was vague, noting that its components "are both easily understood and objectively determinable."[5] *McConnell*, 124 S. Ct. at 689. State or local laws modeled on BCRA will also have to be drafted to ensure that they are not vague. Meeting this constitutional test does not require that the state or local law use exactly the same terms as BCRA does. Laws that include easily understood and objectively determinable variations of these four components should have no trouble surviving a vagueness challenge.

TIPS

TIP: Be sure that each component of an "electioneering communications" definition is easily understood and objectively determinable. It should be clear whether or not any particular ad is governed by the definition. It may be necessary to provide subsidiary definitions for some of the terms used in the basic definition, as BCRA does for the phrase "targeted to the relevant electorate."

TIP: The facts about campaign advertising in a state or locality should support the need for regulation. In *McConnell*, there was an extensive factual record as well as expert testimony to show that the vast majority of broadcast, cable, and satellite ads referring to a candidate, and targeted at the relevant electorate within the statutory time period, were aired for an electioneering purpose. State or local laws modeled on BCRA should be supported by evidence that advertising in the state or locality in question is similar in relevant respects to that in federal campaigns, and departures from the terms of BCRA – in the media or time period covered, for instance – should also have evidentiary support.

[5]The Court addressed overbreadth claims against BCRA in the context of challenges to bans on corporate and union expenditures on electioneering communications, which are discussed in Chapter Six.

TIP: BCRA contains some exceptions from its definition of an "electioneering communication," which should also be included in state and local versions. Specifically, BCRA exempts most news stories, commentary, and editorials; communications that are already regulated as expenditures or independent expenditures; certain candidate debates; and most other communications for which the FEC creates an exception.

TIP: Cautious drafters of state or local campaign finance laws modeled on BCRA may want to exempt from their definition of electioneering communications additional categories of ads that do not appear to constitute electioneering. For example, an ad that does nothing more than support or criticize a pending bill known by its sponsors' names – *e.g.*, the McCain-Feingold bill – might be excluded from the definition of "electioneering communications" even if the sponsors happen to be running for office and the ad is run in their districts during the short period before an election. An exemption of this sort should be considered only if there is evidence of substantial numbers of such ads in the jurisdiction.

TIP: There may be other clear tests for ads with an electioneering purpose. Advertisers will look for ways to circumvent BCRA and any new laws that follow its model, just as they circumvented the magic words test. Watch the electioneering ads for candidates in your jurisdiction. If the vast majority of those ads share a characteristic other than the four used in BCRA's definition of electioneering communications, that characteristic may be an element of another appropriate test.

LEGAL ANALYSIS

FECA attempted to regulate political expenditures by private parties. One section of FECA imposed a $1,000 limit on expenditures "relative to a clearly identified candidate." 18 U.S.C. § 608(e)(1) (quoted in *Buckley*, 424 U.S. at 193). Another section of FECA imposed reporting requirements for persons who make independent expenditures of over $100 "for the purpose of

influencing" a federal election. 2 U.S.C. §§ 431(e), 434(e) (quoted in *Buckley*, 424 U.S. at 145, 159). The Court in *Buckley* concluded that these regulations presented potential problems of both vagueness and overbreadth.

Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague campaign finance provision might "chill" some political speakers who have no electioneering purpose but are afraid that the provision nevertheless governs their speech. The Court in *Buckley* found that the provisions of FECA that applied to expenditures "relative to a clearly identified candidate" and "for the purpose of . . . influencing" an election were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech. *See* 424 U.S. at 40-44, 78-80.

The overbreadth doctrine in First Amendment jurisprudence is concerned with regulation that may be precise but covers a substantial amount of constitutionally protected speech. In *Buckley*, the Court worried that a regulation governing any expenditure made "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could have substantial application to protected speech. *See id.*

In order to avoid these vagueness and overbreadth problems, the *Buckley* Court held that the government's regulatory power under FECA would be construed to reach only funds used for communications that "include explicit words of advocacy of the election or defeat" of a clearly identified candidate. *Id.* at 43. In a footnote, the Court explained that its construction of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,'

'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Those examples eventually gave rise to the "magic words" test for advertising that could constitutionally be subject to campaign finance restrictions.

What the Supreme Court made clear in *McConnell* is that the narrowing construction of FECA "was the product of statutory interpretation rather than a constitutional command." 124 S. Ct. at 688. Although FECA was constitutionally infirm, Congress could cure that infirmity with a new law that was neither vague nor overbroad, even if the new law did not "toe the same express advocacy line" as that defined in *Buckley*. *Id.* That is precisely what Congress did with BCRA.

Congress cured FECA's vagueness problem by setting forth a new "bright-line" test for electioneering communications in BCRA. The four components of that test raised none of the concerns that drove the Court to create the express advocacy standard for FECA. Moreover, the *McConnell* Court rejected the idea "that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy." *Id.* at 688-89. The constitutional objections that led the *Buckley* Court to limit FECA's reach to express advocacy was "simply inapposite" in the case of BCRA. *Id.* at 689.

Before *McConnell*, five courts considered — and invalidated — state laws or regulations using BCRA's approach to campaign advertising.[6] In *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000), the Second Circuit struck down a provision requiring reporting of expenditures of $500 or more for mass media activities that include the name or likeness of a candidate and occur within 30 days of an election. The court noted that the provision would, for example, impermissibly regulate an advertisement about a bill that was known by the name of a sponsor who happened to be running for reelection. *Id.* The court in *West Virginians for Life v.*

[6]Connecticut's campaign finance law has defined "expenditure" with a time-frame test since 1999, C.G.S.A. § 9-333c(a)(2), and the provision has never been challenged.

Smith, 960 F. Supp. 1036, 1039-41 (S.D. W. Va. 1996), invalidated a law presuming an electioneering purpose when a voter guide, scorecard, or other written analysis of a candidate's position was disseminated within 60 days of an election. In addition, two district courts in Michigan have enjoined a regulation that barred corporations and unions from using general treasury funds to pay for communications containing the name or likeness of a candidate within 45 days of an election. *See Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998). *McConnell* establishes that these cases contain flawed First Amendment analyses.

Only one decision anticipated the reasoning in *McConnell*: *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002). Wisconsin law provided that a communication "that is made during the period beginning on the 60th day preceding a[n] . . . election and ending on the date of that election and that includes a reference to . . . a clearly identified candidate" was one made for a "political purpose." The *Ponto* court rejected a vagueness challenge to this definition, noting that "the state legislature's approach appears to draw a line even brighter than the one established in *Buckley*." *Id.* at 1086. The court held that an overbreadth challenge required examination of a factual record, stating:

> Without considering any evidence of the state's experience in conducting elections and the character of ads featuring candidates in the 60 days before an election, I cannot conclude as a matter of law that the state's regulatory scheme would reach a substantial number of communications so attenuated from elections as to render all regulation constitutionally impermissible.

Id. at 1088. The court therefore refused to hold the definition unconstitutional. Unfortunately, the court did find another provision of the same statute unconstitutional, and a *non*-severability clause included in the statute brought down the law in its entirety.

II. Magic Words

It is important to understand what role magic words now play in campaign finance law. *McConnell* says that, with an appropriate alternative definition of the advertising subject to regulation, it is permissible to regulate campaign ads that do not use magic words. But it is also still permissible to regulate ads that *do* use magic words. The magic words test can supplement a test modeled on BCRA (or a contextual definition, discussed in section III below).

TIPS

TIP: Define advertising subject to regulation to include BOTH electioneering communications modeled on BCRA's definition AND ads using magic words. As in BCRA, these complementary tests for regulated advertising can be introduced in separate definitions of "independent expenditures" and "electioneering communications." By including both tests, a state or locality can regulate ads with magic words year-round, while capturing ads without magic words in the more limited periods before elections.

TIP: Be very careful when using FECA's original provisions as models for new laws. *Buckley* found that language in FECA pertaining to independent expenditures was vague and overbroad. The Court sought to cure these problems by creating the now-discredited "magic words" test. BCRA solves the problem that FECA originally created. Some state laws that contained language modeled on FECA were also struck down. Reformers should learn from Congress's mistake in FECA, not repeat it.

LEGAL ANALYSIS

Before the Supreme Court decided *McConnell*, most courts treated challenges to campaign finance restrictions on advertising as a disputes about how to differentiate between "issue advocacy" and "express advocacy." Although the federal courts of appeals disagreed about the meaning of

"express advocacy," the vast majority refused to go beyond the "magic words" approach. The First, Fourth, Fifth, and Eighth Circuits explicitly adopted the magic words test, *see Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (invalidating federal regulation defining express advocacy to include more than magic words); *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2000) (finding magic word requirement in attempt to regulate judicial electioneering ads under Mississippi law); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (granting preliminary injunction against definition of "express advocacy" in state law that went beyond magic words); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (per curiam) (invalidating federal regulation), while the Second and Tenth Circuits invalidated state laws seeking to regulate speech other than express advocacy, but without ruling that express advocacy requires magic words, *see Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193-94 (10th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000). Only the Ninth Circuit expressly rejected the magic words test for express advocacy. *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

In sum, Justice Thomas only slightly overstated the impact of *McConnell* when he wrote: "The Court, . . . by concluding that the 'express advocacy' limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one)." 124 S. Ct. at 737 n.11 (Thomas, J. dissenting). States throughout the country are now free to regulate campaign advertising that does not contain magic words, as long as the test used to identify which ads fall within the scope of state campaign finance provisions is neither vague nor overbroad.[7]

[7]The importance of avoiding vagueness and overbreadth, especially in jurisdictions hostile to campaign finance law, cannot be overstated. Only five weeks after the decision in *McConnell*, the Sixth Circuit revived the magic words test and applied it to a ban on electioneering within 500 feet

III. The "Reasonable Person" Test and Other Contextual Approaches

The "reasonable person" approach was first suggested by the Ninth Circuit in *Furgatch*, 807 F.2d 857, as an alternative to the magic words test for express advocacy. That case involved a newspaper advertisement criticizing the Carter presidential re-election campaign for allegedly using underhanded tactics, stating: "It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT." *Id.* at 858. Noting that a "magic words" definition of "express advocacy" could be easily evaded, the court adopted a contextual test under which a message is deemed to be express advocacy "when read as a whole, and with limited reference to external events, [it could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. *Furgatch* identified three components of its test:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy" . . . when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. Thus, just as context plays a role in areas of law such as "subversive speech, 'fighting words,' libel, and speech in the workplace and in public fora," so would context be considered when considering whether speech expressly advocates the election or defeat of a candidate. *Id.* at 863. The Ninth Circuit held that the anti-Carter advertisement was express advocacy.

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of a polling place. *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004) (justifying a limiting construction on the grounds that "Kentucky's statute is vague and because the State has failed to provide any evidentiary support for regulating both express and issue advocacy").

It is important to remember that even the *Furgatch* Court assumed that only express advocacy could be regulated by campaign finance laws. The Ninth Circuit simply concluded that express advocacy was possible without using magic words. After *McConnell*, it is clear that campaign advertising can be regulated even if it contains no express advocacy – as long as the test for regulated advertising is neither vague nor overbroad.

TIPS

TIP: Consider using a reasonable person or contextual definition only as a supplement to the BCRA model and magic words test, and be sure to include a clause allowing the severability of any clause found unconstitutional. Reasonable person tests remain highly vulnerable to vagueness challenges.

TIP: Draft a rule implementing a "reasonable person" approach in as narrow a manner as possible. There is a significant difference between: (1) regulating an advertisement that a reasonable person could interpret as containing an electioneering message, and (2) regulating an advertisement that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that could arguably be electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Limiting the regulatory reach of the statute with the second approach will make constitutional challenges more difficult.

TIP: Consider limiting your regulation to advertisements that appear in certain specified media, such as broadcast television or radio. Obviously you do not want to enact a statute that, on its face, regulates a letter ("any communication") that a person may write to his mother, urging her to vote against the incumbent. You should determine the particular abuses that are prevalent in your

locality and tailor your legislation accordingly. If the abuses occur mainly in television and radio ads, then you may not be concerned about, for example, billboard or newspaper advertising.

TIP: Consider adopting a dollar threshold for activities that will be covered by your regulation. A dollar threshold is useful for ensuring that the law does not inhibit *de minimis* electoral communications or small and unsophisticated groups that do not engage in significant amounts of electioneering.

TIP: A reasonable person or contextual approach may stand a better chance of surviving a constitutional challenge if there are no criminal penalties for violating regulations that apply to express advocacy. Courts may relax their scrutiny to some extent if a statute imposes only civil penalties.

LEGAL ANALYSIS

Following the decision in *Furgatch*, the FEC codified the Ninth Circuit's approach in a definition of "express advocacy" under FECA. *See* 11 CFR § 100.22.[8] Under the regulation,

[8]11 CFR § 100.22 states:

> *Expressly advocating* means any communication that -- (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!" or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because --

"express advocacy" is defined to include not only those communications that contain "magic words," but also communications that "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s)." *Id.* The regulation further states that, under its approach, the electoral portion of the communication must be "unmistakable, unambiguous, and suggestive of only one meaning." *Id.*

The FEC's regulatory definition of "express advocacy" incorporates a "reasonable person" standard that applies in only a very narrow set of circumstances. If "magic words" are not used, the advertisement is "express advocacy" only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ as to its meaning. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of "magic words." Despite its narrow reach, this regulation was immediately challenged as an unconstitutional encroachment on free speech, and it was found unconstitutional by both the First and Fourth Circuits.[9] *See Virginia Soc'y for Human Life*, 263 F.3d at 392; *Maine Right to Life Comm.*, 98 F.3d at 1-2. Under *McConnell*, these cases are no longer good law.

> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

[9]The Eighth Circuit also rejected Iowa's reasonable person approach to express advocacy in favor of the formalistic magic words test. *See Iowa Right to Life*, 187 F.3d at 969-70 (preliminarily enjoining reasonable person test employed in Iowa reporting requirements). But this case is no longer good law after *McConnell*.

One other federal court recognized that *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), supported a "more context-sensitive approach to 'express advocacy.'" *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999). After considering the competing concerns militating in favor of the magic words test and the FEC regulation, the court proposed the following standards:

> First, the communication must in effect contain an explicit directive. . . . That effect is determined first and foremost by the words used. . . . For a communication to contain, in effect, an explicit directive it must use an active verb (or its functional equivalent, *e.g.*, "Smith for Congress," or, perhaps, an unequivocal symbol).
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> Second, that verb or its immediate equivalent — considered in the context of the entire communication, including its temporal proximity to the election — must unmistakably exhort the reader/viewer/listener to take electoral action to support the election or defeat of a clearly identified candidate. . . . [E]xpress advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.
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> Finally, application of the "express advocacy" standard is . . . a pure question of law. . . . [A] communication can be held to contain express advocacy only if no reasonable person could understand the speech in question — and in particular the verbs in question — [except] to, in effect, contain an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate.

Id. at 61-62. The court recognized that this standard was still "susceptible of circumvention by all manner of linguistic artifice," *id.* at 65, but it nevertheless constitutes an improvement over the magic words test.

Several state courts have looked favorably upon the approach first developed in *Furgatch*. Four of them are in the Ninth Circuit: Oregon, Washington, Arizona, and California. The Oregon Court of Appeals used *Furgatch* as the basis of a contextual definition of "expenditures" subject to Oregon's reporting requirements, while avoiding the "reasonable person" standard. *See State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10-11 (Or. App. 1999), *review denied*, 994 P.2d 132 (Ore. 2000). Under the *Crumpton* test, reporting is required for expenditures:

> if the expenditure is for a publication that is in support of or opposition to a candidate under the following criteria: (1) the message, in its context, clearly and unambiguously urges the election or defeat of one or more identifiable candidates for a covered office; (2) the message, as a whole, seeks action rather than simply giving information; and (3) it is clear what action the message advocates.

Id. at 11. The *Crumpton* court explained that it could adopt an approach that was "somewhat less restrictive" than the *Furgatch* test because the Oregon statute (unlike federal law) did not impose criminal penalties for violation of reporting requirements. *Id.* at 10-11 (adopting the emphasis on context found in *Furgatch* but excluding reference to the "reasonable person").

Courts in the other three Ninth Circuit states agreed that express advocacy of an election outcome did not require magic words – as long as an ad unambiguously urged an electoral outcome – but rejected the appeal to contextual factors external to the language of the advertisement. In *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808, 821, 823-24 (Wash. 2000), the second of two advertisements under consideration began with strong criticism of gubernatorial candidate Gary Locke and concluded: "And now he wants to be our governor? Gary Locke: another extreme liberal we can't afford." Although the ad avoided use of "magic words," the Washington Supreme Court unhesitatingly described it as express advocacy, explaining:

> With this language the second advertisement is susceptible to no other reasonable interpretation than as an exhortation to vote for or against a candidate. . . . This language in the second ad is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat candidate Gary Locke. . . . Reasonable minds could not differ as to whether the second ad calls for a vote against Locke.

Id. at 823-24.

The Arizona Supreme Court adopted the same approach, rejecting the magic words test in strong terms: "[S]uch a narrow construction of the statute leave room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words,

albeit that the message and purpose of the communication may be unequivocal." *Kromko v. City of Tucson*, 47 P.3d 1137, 1140 (Ariz. 2002) (discussing the test in the context of advertising about ballot propositions). But the Court rejected the legitimacy of appealing to "factors surrounding the communication . . . independent of the communication itself." *Id.* at 1141.

In California, two state appellate courts split on the constitutionality of the *Furgatch* approach. One court accepted the approach adopted in Washington, recognizing that express advocacy may be based on communications that "taken as a whole unambiguously urged" a favorable or negative vote. *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Cal. Ct. App. 2002) (considering ads in the context of a ballot measure campaign). Another court held that the First Amendment required the magic words test. *Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 551 (Cal. Ct. App. 2002). *McConnell* makes it clear that *Schroeder* had the better reasoning.

The Wisconsin Supreme Court also observed that *Furgatch* provided "an attractive alternative" to the magic words approach and left open the question whether context could be considered in deciding whether a communication was express advocacy. *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 733 (Wis. 1999). Wisconsin later opted for a BCRA-type approach, which was brought down by a non-severability clause, when another provision in the statute was found unconstitutional. *See supra* Section II.

The key to a sustainable *Furgatch*-type approach to the regulation of electioneering ads is a standard that is clear and unambiguous. BCRA introduced a version of the "reasonable person" standard as a fallback definition of an "electioneering communication" to be employed if the principal definition were invalidated. Because the Supreme Court upheld the principal definition, it did not reach the constitutional challenges to the backup definition, which limited an "electioneering

communication" to " any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is suggestive of no plausible meaning other than as an exhortation to vote for or against a specific candidate." But the three-judge District Court that decided *McConnell* in May 2003 did consider a First Amendment challenge to the backup definition. One judge upheld the backup definition; another found the entire definition unconstitutionally vague; and the third found vagueness only in the final clause (which narrowed the definition to any communication "suggestive of no plausible meaning other than as an exhortation to vote for or against a specific candidate"). The conflict among the judges and between this decision and the five state court decisions means that the jury is still out as to whether new state and local laws using some version of a reasonable person test for advertising subject to regulation will survive vagueness challenges.

IV. The Future of the "Issue Advocacy" Loophole

The distinction between "issue advocacy" and "express advocacy" arose in the context of constitutional challenges to regulations of independent expenditures. Prior to the decision in *McConnell*, the distinction had also begun to infect decisions on an array of other regulatory measures. For example, two groups engaged in so-called issue advocacy under the magic words test successfully challenged the applicability to them of North Carolina's definition of "political committee," thereby escaping compliance with all campaign finance provisions governing such committees – including administrative, organizational, and reporting requirements. *See North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003), *vacated*, 124 S. Ct. 2065 (2004); *Community Alliance for a Responsible Environment v. Leake*, No. 5:00-CV-554-BO(3), slip op. at 8, 12-17 (E.D.N.C. Feb. 22, 2001) (unpublished opinion on file with the Brennan Center). A similar

challenge to Florida's definition of "political committee" resulted in a narrowing construction, limiting the term's reach to groups whose major purpose was to engage in express advocacy under the magic words test. *See Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *2-*4 (M.D. Fla. Sept. 30, 1998) (unpublished opinion), *aff'd sub nom. Florida Right to Life, Inc. v. Lamar*, 238 F.3d 1288, 1289 (11th Cir. 2001); *see also Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999) (narrowing construing definition of "political action committee" to reach only organizations that make contributions or expenditures for express advocacy). These decisions are now open to question; the Supreme Court vacated the *Leake* decision and remanded it to the Fourth Circuit for further consideration in the light of *McConnell*.

Some states have already responded to the *McConnell* decision with BCRA-type bills or administrative rules designed to compel additional disclosure of election-period advertising in some or all state campaigns. Since the decision, such measures have been introduced in Florida, Michigan, Mississippi, Ohio, Washington, and Wisconsin; only Florida's has passed as of this writing. This option is open in all states.

Even before the decision, Arizona, Connecticut, Hawaii, and Illinois enacted BCRA-type provisions, which have not been challenged in court. In 2002, Colorado passed a BCRA-type measure via initiative. That law is now being challenged. *Colo. Right to Life Comm. v. Davidson*, Civ. No. 03-WM-1454 (PAC) (D. Colo. filed July 31, 2003). Motions that will decide the case are pending before the Court.