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HOUSE OF REPRESENTATIVES
COMMITTEE ON
RULES, ETHICS & ELECTIONS
ANALYSIS

BILL #: HJR 709

RELATING TO: Political Advertising

SPONSOR(S): Representative(s) Byrd, Bense & Others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) RULES, ETHICS & ELECTIONS (PRC) YEAS 10 NAYS 2
(2) PROCEDURAL & REDISTRICTING COUNCIL
(3)
(4)
(5)

I. SUMMARY:

HJR 709 creates a definition for "political advertisement" and "campaign-related advertisement" in the Florida Constitution. Specifically, the joint resolution does the following:

- Creates Art. VI, s. 8(a), of the Florida Constitution providing that political advertising and campaign-related advertising shall be required to be reported or otherwise disclosed as provided by general law;
- Defines the term "political advertisement" in Art. VI, s. 8(b)(1), of the Florida Constitution, to conform to the definition currently found in the Florida Election Code; and,
- Defines the term "campaign-related advertisement" in Art. VI, s. 8(b)(2), of the Florida Constitution.

Substantially similar provisions relating to political advertising passed the House in the 2001 Legislative Session as statutory revisions in section 7 of CS/CS/HB 273, but died in Senate Appropriations.

These amendments to the Florida Constitution will be submitted to the electorate at the November 2002 general election.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

The joint resolution imposes reporting and disclosure requirements on "campaign-related advertisements" which are not currently regulated under state law.

B. PRESENT SITUATION:

Political Advertisements

Political advertisements are currently defined in s. 106.011(17), F.S. (2001), and regulated under ch. 106, F.S., of the Florida Election Code.

With few exceptions, "political advertisements" must include a "paid for by" disclaimer that identifies the entity responsible for the particular advertisement.[1] "Political advertisement" is defined in s. 106.011(17), F.S., in pertinent part, as:

> A paid expression in any communications media . . . whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which shall support or oppose any candidate, elected public official, or issue.

Absent any filing requirements for organizations that publish political advertisements, the name included in the disclaimer alone may not adequately identify the entity or person(s) responsible for the advertisement.

Advertisements that discuss non-referendum issues of public interest and which may include references to or likenesses of candidates are not regulated under Florida law, regardless of the actual impact on the election or defeat of a candidate. As such, these advertisements are not required to include the phrase "paid political advertisement," or similar expression, nor must the advertisements identify the sponsoring individual or group with a "paid for by" disclaimer. Because such advertisements are not considered to be a contribution or expenditure under the Florida Election Code, there is no limit to the amount of funds that can be spent in coordination with, or independent of, any candidate.

[1] See generally, ss. 106.071 and 106.143, F.S. (2001); and *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998).

C. EFFECT OF PROPOSED CHANGES:

Political Advertisements

HJR 709 creates a definition of "political advertisement" in the Florida Constitution that conforms to the definition that currently exists in s. 106.011(17), F.S. Political advertisements will continue to be subject to the reporting and disclosure requirements as provided by general law.

Campaign-Related Advertisements

HJR 709 creates a definition of "campaign-related advertisement" in Art. VI, s. 8(b)(2), of the Florida Constitution. The bill defines "campaign-related advertisement" as:

> A paid expression in any communications medium, or by means other than the spoken word in direct conversation, which does not specifically support or oppose any candidate, or issue, but which does substantially mention or show a clearly identifiable candidate for election or reelection, is distributed at any point during the period following the last day of qualifying for that candidacy through the ensuing general election, and is distributed within the geographic location represented by the office sought by the candidate mentioned or shown and which, when examined by a reasonable person, would be understood as, and is therefore presumed to be, a communication made for the purpose of influencing the results of an election on that candidacy during that period, and for which aggregate expenditures on like advertisements exceed $1,000 in 2002 dollars. However, "campaign-related advertisement" does not include editorial endorsements by any newspaper, radio or television station, or other recognized news medium.

The bill provides that the financing of any campaign-related advertisement must be reported or otherwise disclosed, as provided by general law.

Ballot Title and Summary

The title and substance of the proposed Constitutional amendment shall appear on the November 2002 general election ballot as follows:

POLITICAL ADVERTISEMENTS

Provides that political advertisements, including campaign-related advertisements, shall be subject to reporting or disclosure as provided by general law.

[NOTE: The authority of a state to regulate individuals or groups engaged in issue advocacy, including the publication of "campaign-related advertisements," raises several constitutional issues, as discussed in the COMMENTS section, below].

D. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

There have been a series of significant federal cases on the regulation of issue advocacy groups. In 1974 the Federal Election Campaign Act of 1974 (the "Act") sought to regulate federal campaigns by placing limitations and disclosure requirements on campaign contributions and expenditures. Challenges to the constitutionality of various provisions of the Act were considered by the United

States Supreme Court in *Buckley v. Valeo.*[2] In reviewing the Act, the Court held unconstitutional a number of statutory limits, but upheld limitations on contributions. In its analysis, the Court used the long established practice of applying a "strict scrutiny" standard to balance First Amendment rights and governmental interests. This standard dictates that any encroachment on constitutionally protected freedoms must be *narrowly tailored* to advance a demonstrated *compelling state interest*.[3] This line of authority holds that the only compelling interest sufficient to justify infringement on First Amendment rights is the prevention of corruption or the appearance of corruption.

In saving various provisions of the Act from an overbreadth problem, the Court interpreted the term "expenditure" to encompass "only funds used for communications that *expressly advocate the election or defeat of a clearly identified candidate*."[4] (emphasis added). As previously stated, express advocacy was limited to communications containing express words of advocacy of election or defeat such as "vote for," "elect," "support," "vote against," and other identical synonyms.[5] By adopting this bright line limitation, the *Buckley* Court effectively segregated political advocacy into two categories: "express" and "issue" advocacy. Advocacy using the "magic words" expressed in *Buckley* and later affirmed in *Federal Election Comm'n. v. Massachusetts Citizens for Life, Inc.*[6] can be regulated. Conversely, advocacy falling outside these parameters cannot.[7]

Although most courts have directly followed this strict definition, a few courts, most notably the Ninth Circuit in *Federal Election Comm'n v. Furgatch*[8], have attempted to broaden this strict interpretation. The *Furgatch* Court held that "speech need not include any of the words listed in *Buckley* to be express advocacy ... but when read as a whole, and with limited reference to external events, be susceptible of *no other reasonable interpretation* but as an exhortation to vote for or against a specific candidate."[9] (emphasis added). *Furgatch* held that an advertisement could expressly advocate in the absence of the "magic" words if the content and context of the advertisement unmistakably advocate in support or opposition to a candidate, and no alternative reading could be suggested. Other cases support this view. The Oregon State Court of Appeals

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[2] 96 S.Ct. 612 (1976).

[3] *Williams v. Rhodes*, 393 U.S., at 31, and *NAACP v. Button*, 371 U.S. 415, 438.

[4] *Buckley*, 96 S.Ct. at 663.

[5] *Id.* at 646 n. 52.

[6] 107 S.Ct. 616 (1986).

[7] See, *West Virginians for Life, Inc. v. Smith*, 960 F.Supp. 1036, 1039 (S.D.W.Va. 1996) (it is clear from *Buckley* and its progeny that the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which cannot); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F.Supp. 2d 740, 743 (E.D. Mich. 1998) (government can regulate express advocacy but issue advocacy cannot be prohibited or regulated, citing *Buckley* and *MCFL*); *Maine Right to Life Committee, Inc. v. Federal Elections Commission*, 914 F.Supp. 8 (D. Maine 1996) , *affirmed.*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997) (*Buckley* adopted a bright line test that expenditures must in express terms advocate the election or defeat of a candidate in order to be subject to limitation); *Citizens for Responsible Government v. Davidson*, Nos. 99-1414, 99-1431, 99-1434 & 99-1435 (10th Cir. December 26, 2000)(applied a bright line view of what constitutes "express advocacy"); *Perry v. Bartlett*, No. 99-1955(L) (4th Cir. October 3, 2000)(North Carolina statute requiring the disclosure of sponsors of political advertisements that "intended" to advocate the election or defeat of a candidate was unconstitutionally overbroad).

[8] 807 F.2d 857 (9th Cir. 1987) *cert. denied*, 108 S.Ct. 151.

[9] *Id.* at 864.

has held that an advertisement with no "magic words" nonetheless contained express advocacy and therefore could be regulated under Oregon state law.[10] Similarly, in *Chamber of Commerce v. Moore*, an unreported case from the Southern District of Mississippi, the United States District Court concluded, "a finding of any use of 'magic words' becomes unnecessary when an advertisement clearly champions the election of a particular candidate." The case is currently pending on appeal in the Fifth Circuit Court of Appeals.[11]

Critics of the judicial authority emanating from *Buckley* point out that advertisements which include the name or likeness of a candidate but do not expressly advocate the election or defeat of a candidate by using *express words of advocacy* are a loophole increasingly being used by political parties and other groups to circumvent either contribution limits and/or disclosure requirements. The *Buckley* decision, and the prevailing opinion of most federal courts, however, suggest that issue advocacy advertisements which do not expressly advocate the election or defeat of a candidate using *express words of advocacy* may be beyond state regulation.

HJR 709 in defining "campaign-related" advertisements includes a number of components designed to address a constitutional overbreadth challenge, including: (1) a "delimited time period" approach – regulating campaign-related advertisements that are published during the time period between the last day of qualifying and the ensuing general election, (2) a geographical threshold – regulating campaign-related advertisements distributed within the geographical location represented by the office sought by the candidate mentioned or shown in the advertisement, (3) a "reasonable person" approach - referencing the perceptions of a reasonable person, (4) a legal presumption that can be rebutted, instead of a hard and fast rule, and (5) a monetary threshold – regulating only aggregate expenditures that exceed $1,000 in 2002 dollars.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON RULES, ETHICS & ELECTIONS:

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[10] *Crumpton v. Keisling*, 1999 WL 308739 (Or. App., May 5, 1999); see also, *State of Wisconsin v. Wisconsin Manufacturers & Commerce*, Case No. 98-0596 (Supreme Court of Wisconsin, July 7, 1999) (deferred ruling on express advocacy, but suggested a middle course between "magic words" and "context factors" tests).

[11] Docket No. 00-60779.