

**In the
Supreme Court of Texas**

IN RE WILLIAM O. HAMMOND, ET AL.,

Relators,

**Brief of *Amici Curiae*
Chamber of Commerce of the United States,
National Association of Manufacturers, Association of Commerce and Industry –
New Mexico, California Manufacturers & Technology Association, Illinois
Manufacturers' Association, Louisiana Association of Business and Industry,
Nebraska Chamber of Commerce and Industry, North Carolina Citizens for
Business and Industry, Ohio State Chamber of Commerce, South Carolina
Chamber of Commerce, Texans for Lawsuit Reform, Utah Manufacturers
Association, and Virginia Chamber of Commerce*
in Support of Relators**

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Harlingen Area Chamber of Commerce
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INTEREST OF *AMICI CURIAE*¹

The Chamber of Commerce of the United States (“Chamber”), founded in 1912, is the world’s largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. A central function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of state and federal governments. In so doing, the Chamber regularly files briefs *amicus curiae* in numerous cases vital to the business community, including cases pertaining to political speech. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999). The Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); *see also Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir.), *cert. denied*, 537 U.S. 1018 (2002).

The issues at stake in this case directly concern the Chamber and its members. The Chamber is committed to ensuring the robust competition in the marketplace for ideas that results when voters are given access to relevant information about candidates. Ordering independent political speakers to disclose information about their speech without first confirming that the speech constituted express advocacy impermissibly threatens the free speech and associational rights of pro-business voices in Texas.

¹ The Chamber of Commerce of the United States is paying for the preparation of this *amicus curiae* brief.

The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. NAM has an interest in the fair regulation of political speech and has participated in litigation concerning this issue.

STATEMENT OF THE CASE²

Relators the Texas Association of Business (TAB), TAB President William Hammond, and the Texas Association of Business and Chambers of Commerce Political Action Committee (BACPAC) are subject to orders requiring them to disclose information about political mailings produced by TAB and BACPAC. In a petition filed with this Court on January 27, 2004, Relators have requested mandamus relief from these orders. The Chamber files this brief in support of Relators’ petition.

ISSUE PRESENTED

Did the trial court err by ordering Relators to disclose information about TAB’s political mailings – including the names of those who solicited or expended funds for this political speech – without first finding that those mailings contained express words of electoral advocacy?

² As non-parties, the record in this case is not readily available to *amici*. Therefore, *amici* refer the Court to Relators’ Appendix for appropriate citations to the record.

STATEMENT OF FACTS

During the 2002 state election cycle, Relators TAB and BACPAC, independently of any candidates,³ provided voters with information on candidates for the Texas House of Representatives and the Texas Senate through direct mailings. An unsuccessful candidate for the Texas House, James Sylvester (“Plaintiff”), sued Relators alleging that these mailings violated various provisions of the Texas Election Code.

In connection with this suit, Plaintiff served Relators with discovery requests for a wide variety of information about TAB’s and BACPAC’s mailings. Relators objected to these questions about their independent political activities, citing the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. Judge Dietz granted Plaintiff’s motion to compel and ordered Relators to answer the questions. As to Relators TAB and Hammond,⁴ Judge Dietz issued this order without first determining whether the State of Texas had authority to regulate the speech at issue – *i.e.*, without first determining whether TAB’s political speech contained express words of electoral advocacy.

³ Plaintiff contends that Relators’ expenditures were not independent, but rather were coordinated with candidates and/or political committees. As a result, he argues, discovery is proper regardless of whether Relators engaged in express advocacy. *See* Plaintiff’s Merits Br. at 10-23. This argument fails, however, because Plaintiff offered no evidence of coordination and the record shows that no coordination occurred. *See* Relators’ Merits Br. at 37 n.6.

⁴ Relators concede that BACPAC is subject to state regulation because, unlike TAB and Hammond, BACPAC engaged in express advocacy. *See* Relators’ Merits Br. at 11-12. Therefore, the arguments developed in this brief apply primarily to TAB and Hammond. To the extent that Plaintiff seeks discovery of information about BACPAC’s members and donors, however, *amici* agree with Relators’ position that compelled disclosure of that information would violate BACPAC’s freedom of association. *See id.* at 39-40.

SUMMARY OF THE ARGUMENT

Compelled disclosure strikes at “the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding.” *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). In *Buckley v. Valeo*, the U.S. Supreme Court held that vague or overbroad campaign finance laws must be interpreted narrowly in order to preserve them against invalidation on First Amendment grounds. *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976). Such laws can constitutionally regulate only a narrow category of speech that employs explicit words such as “vote for” or “support” to expressly advocate the election or defeat of clearly identified candidates. *Id.* at 43-44, 79-80. Any imprecise attempt by state or federal governments to reach beyond express advocacy to regulate less pointed discussions of issues and candidates is prohibited. *Id.* at 42. In this area of exceptional First Amendment sensitivity, laws must provide objective, bright-line guidance as to what is permitted and what is forbidden. *Id.* at 41 & n.48.

These holdings were expressly reaffirmed in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”) and were not altered in *McConnell v. FEC*, 124 S. Ct. 619 (2003). In addition, *Buckley* and *MCFL* have been uniformly understood by the federal courts of appeals to set First Amendment standards that limit federal and state campaign finance law and regulation.

These standards apply with equal force to the State of Texas’s broadly-written election laws, as this Court has recognized. Consequently, Plaintiff’s demands for

information about Relators’ independent political speech can justify compelled disclosure only if the speech contains express words of electoral advocacy. That determination must be made as a threshold matter in order to preserve First Amendment rights.

ARGUMENT

While compelled disclosure of First Amendment activity is not absolutely forbidden, “[i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press [and] freedom of political association” *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring). Thus, “before a state or federal body can compel disclosure of information which would trespass upon first amendment freedoms, a ‘subordinating interest of the state’ must be proffered, and it must be ‘compelling.’” *Machinists Non-Partisan Political League*, 655 F.2d at 389 (emphasis added) (collecting authority). In other words, a state must affirmatively establish its authority to regulate the speakers and speech before attempting to compel disclosure.

I. A State’s Authority To Regulate Political Speech Under A Vague Or Overbroad Law Turns On The Presence Of Express Advocacy.

The balancing of state interests in disclosure against encroachments on First Amendment liberties is a well-worn path. The U.S. Supreme Court has recognized only one government interest sufficient to justify the mandatory disclosure of independent groups’ political activities – the prevention of corruption and the appearance of corruption. *Buckley*, 424 U.S. at 26-27, 78-81. Under a broadly-written campaign

finance law, however, First Amendment concerns dictate that even this compelling interest can justify disclosure only when a speaker engages in express advocacy. *Id.* at 80. The Court warned that if regulation of political speech were not circumscribed to keep the discussion of candidates distinct from express calls for electoral action, general political discourse would be chilled and First Amendment rights would be violated. *Id.* at 43-45. Therefore, a state cannot constitutionally regulate independent political speakers under a broadly-written law unless their speech contains express words of advocacy.

A. *Buckley v. Valeo*

This “express advocacy” requirement was first enunciated in *Buckley v. Valeo*, which addressed the constitutionality of the Federal Election Campaign Act of 1971. In particular, *Buckley* considered provisions limiting “any expenditure . . . relative to a clearly identified candidate” and requiring disclosures concerning “expenditures” made “for the purpose of . . . influencing the nomination or election of candidates.”⁵ *Id.* at 41-42, 77. The Court explained that, in evaluating such statutes, the dominant concern must be protecting the First Amendment’s guarantee of “uninhibited, robust, and wide-open” debate that “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Id.* at 14-15.

Following long-settled principles, *Buckley* held that statutes in this area must employ the “precision of regulation that must be the touchstone in an area so closely

⁵ For brevity and clarity, quotations from *Buckley* herein omit internal citations, quotation marks, and similar punctuation. All emphasis added.

touching our most precious freedoms.” *Id.* at 41. It insisted that “narrow specificity” is critical so that speakers will not “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Id.* at 41 n.48. In short, the Court was clear that free speech is the basic rule and campaign regulation is the loophole that must be narrowly and precisely defined.

Buckley held that, to satisfy the First Amendment, vague statutory phrases such as “relative to a candidate” and “for the purposes of influencing” an election must be given an extremely narrow and precise meaning. The Court discussed whether it would be permissible to construe such phrases to mean speech merely “advocating the election or defeat of” a candidate. *Id.* at 42. It concluded that such an “advocating” standard would be too broad and imprecise because “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,” and because it is impossible to be sure what messages others may infer. *Id.* at 42, 44. Such an imprecise standard would chill fully protected speech. *Id.* at 41 n.48.

Accordingly, *Buckley* narrowed the “advocating” standard to a smaller subset of speech that uses “explicit words of advocacy” to “in express terms advocate the election or defeat” of a clearly identified candidate. *Id.* at 43-44. It gave examples of the necessary explicit words, such as “vote for,” “elect,” “defeat,” or “reject.” *Id.* at 44 n.52. The Court held that “only” a standard requiring such “explicit words” and “express terms” advocating election or defeat could provide the bright-line guidance to speakers that the First Amendment requires. *Id.* at 43-44.

The *Buckley* Court knew and intended that the “express advocacy” standard would not reach a great deal of speech that was intended to and did advocate the election or defeat of candidates. The Court said that it did not “naively underestimate the ingenuity and resourcefulness” of persons and groups seeking to support candidates, but held that:

So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. [This is] necessary to avoid unconstitutional vagueness

Id. at 45.

The *Buckley* standard often is referred to by the shorthand phrase “express advocacy,” but the distinctive and critical aspect of the test is that there be “explicit words” and “express terms” that advocate election or defeat. Advocacy that does not use such explicit words and express terms cannot be regulated under a broadly-written campaign finance law. Thus, it is error to ask what overall message an ad conveys, or what intent it reflects.

B. *MCFL*

MCFL was decided a decade after *Buckley*. It concerned a statute forbidding corporate expenditures “in connection with” an election – precisely the same language as the Texas statute at issue here. *MCFL*, 479 U.S. at 248-50. The Supreme Court expressly reaffirmed *Buckley*’s holding that this overbroad statutory language must be narrowly construed to require “explicit words” that “expressly advocate” the election or defeat of a candidate. *Id.* *MCFL* found the standard satisfied because the ad said, “vote for ‘pro-life’ candidates” and then identified certain candidates as being “pro-life.” *Id.* at

249-50. Because the necessary explicit and express words of advocacy were used, the fact that the advocacy was marginally less direct did not matter. *Id.*

C. *McConnell v. FEC*

Last year, in *McConnell v. FEC*, the U.S. Supreme Court upheld a new federal campaign finance statute that reached beyond express advocacy to regulate a precisely-defined category of independent “electioneering communications.” *McConnell*, 124 S. Ct. at 686-89. Yet the Court did not question the *Buckley/MCFL* rule that constitutional problems of vagueness and overbreadth can “be avoided *only* by reading” broadly-written campaign finance laws as limited to express advocacy. *Id.* at 687 (internal quotation marks omitted, emphasis added). Instead, it merely recognized that *Buckley* and *MCFL* did not suggest “that a statute that was *neither vague nor overbroad* would be required to toe the express advocacy line.” *Id.* at 688 (emphasis added). Because the definition of “electioneering communications” contained four specific requirements that were “both easily understood and objectively determinable,” the Court held that it did not violate the First Amendment. *Id.* at 689.

Thus, *McConnell* did not render *Buckley* “meaningless,” as Plaintiff claims. Plaintiff’s Merits Br. at 25. On the contrary, *McConnell* recognized that *Buckley* continues to play an important role. Given that legislatures and courts have relied on the boundaries of authority drawn by *Buckley* and its progeny, “[c]onsiderations of *stare decisis*, buttressed by the respect the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to” the *Buckley* analysis. *McConnell*, 124 S.Ct. at 657.

In a recent decision, the U.S. Court of Appeals for the Sixth Circuit confirmed that *Buckley*'s express advocacy limitation continues to apply to broadly-written campaign finance laws after *McConnell*. *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004). The case concerned a general regulation of "electioneering" near polling places that had been applied to prohibit distribution of instructions on how to cast write-in votes. The court held that the statute was vague and applied *Buckley*, narrowly construing the term "electioneering" to reach only express advocacy. *Id.* at 663-66. The court also analyzed *McConnell* and concluded that although it rejected the idea of a rigid First Amendment barrier between express and issue advocacy, "it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." *Id.* at 664-65.

Every federal court of appeals to consider *Buckley* and *MCFL* has held that broadly-written statutes and regulations like those in Texas must be construed to require explicit words of express advocacy.⁶ Overall messages, clear implications, or even an

⁶ See *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). See also *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980).

(cont'd)

admitted subjective intent to affect an election do not impact a state's ability to regulate independent political speech.

II. The *Buckley/MCFL* Rule Applies In Texas.

The Texas Election Code specifies that, for spending on speech to constitute a regulated "political expenditure," the speech must be made "in connection with a campaign for elective office." TEX. ELEC. CODE ANN. § 251.001(7), (10) (Vernon Supp. 2004); *see also* TEX. ELEC. CODE ANN. § 253.094 (Vernon 2003). As noted above, the U.S. Supreme Court has previously interpreted this exact same language in the federal election statute and held that the First Amendment requires that the vague phrase "in connection with" be narrowly construed to preserve the statute's constitutionality. *MCFL*, 479 U.S. at 248-50. That narrowing construction permits regulation of independent political speakers, including compelled disclosure of their activities, only if they expressly advocate the election or defeat of a clearly identified candidate. *Id.*

The holdings of *Buckley* and *MCFL* were derived from generally applicable First Amendment principles and not from anything peculiar to the federal election statute. Thus, other similar phrases in state election laws either have been found unconstitutional because they are not limited to express advocacy or have been construed to require

In an opinion that overlooked the just-decided *MCFL* holding, the Ninth Circuit suggested a slightly relaxed understanding of express advocacy. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Plaintiff advocates a similarly relaxed standard here. *Cf.* Mandamus Resp. at 8. However, the Ninth Circuit has now held that even *Furgatch* must be construed to require "explicit words" of advocacy. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003).

express advocacy. *See, e.g., N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999) (“support or oppose any candidate or political party or to influence . . . the result of an election”); *Va. Soc’y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 269 (4th Cir. 1998) (“for the purpose of influencing the outcome of any election”) (citation omitted); *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction regarding the phrase “support or oppose any candidate”).

A. This Court has relied on the *Buckley/MCFL* rule.

In *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), this Court narrowly construed Texas’s broadly-written statute to reach only express advocacy. The Court examined *Buckley* and concluded that “the Texas Election Code is vulnerable to the same constitutional attacks that *Buckley*’s narrowing construction avoided.” *Id.* at 51. Specifically, it held that the statutory phrase “an expenditure made by any person in connection with a campaign for elective office”⁷ is vague. For example, the phrase necessarily takes on different meanings depending on whether the spender is a candidate, a political committee, or an independent speaker such as an individual. *Id.* “More problematical, it could be read to include general issue advocacy or the general discussion of candidates.” *Id.*

The Court concluded, however, that the statutory phrase “does not compel an impermissibly broad construction.” *Id.* Instead, relying on *MCFL* and a Texas Ethics Commission opinion, it interpreted the vague definition to reach “only those expenditures

⁷ TEX. ELEC. CODE ANN. § 251.001(7) (Vernon Supp. 2004).

that ‘expressly advocate’ the election or defeat of an identified candidate.” *Id.*⁸ That interpretation controls this case. Therefore, the trial court erred by ordering Relators to disclose information about TAB’s political mailings without first finding that those mailings contained express words of electoral advocacy.

Plaintiff argues that in light of *McConnell*, this Court’s decision in *Osterberg* is wrong and should be overruled in favor of a more liberal interpretation. Yet he admits that a limiting interpretation of some kind is necessary in order to save Texas’s vague statute from being held unconstitutional. *See* Plaintiff’s Merits Br. at 26; Mandamus Resp. at 9. When faced with a vague statute, it is *Buckley* – not *McConnell* – that tells courts how the statute must be limited in order to preserve it. *See, e.g., Anderson*, 356 F.3d at 663-66. Under *Buckley*, as both this Court and the U.S. Supreme Court in *MCFL* have held, an express advocacy limitation is the only viable narrowing construction of this statute that is consistent with the requirements of the First Amendment.

McConnell does not address how narrowly a vague statute should be interpreted and does not overrule *MCFL*. While *McConnell* may permit the Texas Legislature to regulate some speech beyond express advocacy by enacting bright-line rules that are easily understood and objectively determinable, the vague statutory definition of

⁸ The now-discredited broader theory of express advocacy, articulated in *FEC v. Furgatch* (*see supra* note 5), was offered for the proposition that express advocacy can be negated when the speech contains “contradictory pleas for action.” *Osterberg*, 12 S.W.3d at 52. This Court rejected that *Furgatch*-based argument and relied instead on the part of *MCFL* finding that contradictory language in the brochure “‘cannot negate’ the fact that the communication’s essential nature was express advocacy.” *Id.* (quoting *MCFL*, 479 U.S. at 249).

“political expenditure” provides no such bright-line guidance. The Legislature has not chosen to rewrite that definition, and it is not this Court’s function to do so.

Yet Plaintiff asks this Court to do just that. He suggests that the Court amend the Legislature’s definition of “political expenditure” by borrowing language from a different section of the Texas statute addressing “political advertising” and from the federal statute discussed in *McConnell*. See Plaintiff’s Merits Br. at 27-29; Mandamus Resp. at 8-9. This approach is flawed for several reasons. First, the plain text of the statute purports to regulate expenditures “*in connection with a campaign for elective office.*” TEX. ELEC. CODE ANN. § 251.001(7) (Vernon Supp. 2004) (emphasis added). Nothing about this text suggests that the Legislature actually intended to regulate expenditures “*supporting or opposing a candidate for elective office,*” as Plaintiff argues.

In addition, nothing in the statute – particularly as interpreted by *Osterberg* in 2000 and by *MCFL* in 1986 – would have given Relators bright-line guidance back in 2002 that all expenditures “supporting or opposing a candidate” were regulated. See *Buckley*, 424 U.S. at 41 & n.48 (requiring government to regulate “with narrow specificity” in order to provide “fair warning” to those exercising precious First Amendment freedoms). Because Plaintiff’s interpretation is contrary to both *Osterberg* and *MCFL*, it should be rejected.

Finally, Plaintiff’s proposed regulation of independent expenditures “supporting or opposing a candidate” is itself unconstitutionally vague and overbroad, as several courts of appeals have held. *E.g.*, *Lamar*, 238 F.3d at 1289 (phrase “support or oppose any candidate” unconstitutionally overbroad); *Bartlett*, 168 F.3d at 712; *Faucher v. FEC*, 928

F.2d 468, 470 (1st Cir. 1991). *McConnell* does not alter this conclusion. Cf. Plaintiff’s Merits Br. at 27-29; Mandamus Resp. at 8-9. While *McConnell* upheld funding restrictions on political party advertising that promotes or attacks a candidate, this analysis does not support similarly broad regulation of independent political speech by TAB. Cf. *McConnell*, 124 S. Ct. at 675 n.64 (“[A]ctions taken by political parties are presumed to be in connection with election campaigns.” (emphasis added)). As this Court and the U.S. Supreme Court have held, independent speech can be regulated under a broadly-written statute only if it contains explicit words of express advocacy.

B. The Fifth Circuit applies the *Buckley/MCFL* rule.

Recently, the Fifth Circuit confirmed that the “express advocacy” standard applies to advertisements like those at issue when the sponsors of the advertisements are faced with possible disclosure. *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir.), *cert. denied*, 537 U.S. 1018 (2002). In *Moore*, the state of Mississippi asserted that television advertisements sponsored by the Chamber were subject to the disclosure requirements of a state statute despite the fact that the advertisements did not contain *Buckley*’s express words of electoral advocacy. In response, the Chamber sought a declaratory judgment that the state had no authority to regulate this particular political speech because it lacked those words of express advocacy. Eschewing the bright-line rule of *Buckley* and *MCFL*, the district court erroneously concluded that the advertisements fell within the ambit of state regulation because no “reasonable viewer” would construe the advertisements as anything other than a directive to vote for the identified candidates. *Id.* at 191. The Fifth Circuit panel unanimously reversed.

In reviewing the district court’s ruling, the Fifth Circuit held that the Supreme Court’s decisions in *Buckley* and *MCFL*, as well as later decisions by the courts of appeals, require “words that *explicitly* advocate the election or defeat of a particular candidate.” *Id.* The Fifth Circuit held that the district court’s approach violated *Buckley*’s express holding and defeated “*Buckley*’s emphasis on (1) the need for a bright-line rule demarcating the government’s authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy.” *Id.* at 193.

The district court’s standard was found to introduce “two elements not present in the limited inquiry endorsed by the other circuits: (1) ‘limited reference’ to the context of the communication and (2) reference to whether ‘reasonable minds’ could differ about the meaning of the communication.” *Id.* at 194. Agreeing with the other circuits, the Fifth Circuit held that this approach “is too vague and reaches too broad an array of speech to be consistent with the First Amendment.” *Id.* The district court test violated *Buckley*’s mandate that the speaker not be left “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning.” *Buckley*, 424 U.S. at 43. The Fifth Circuit understood that, to “avoid this result, the [Supreme] Court emphasized the need for a clear line between regulated and unregulated speech.” *Moore*, 288 F.3d at 195. Accordingly, the Fifth Circuit held that *Buckley* means just what it says: a “communication constitutes ‘express advocacy’ – and may therefore be subject to mandatory disclosure regulations – only if it contains explicit words advocating the election or defeat of a clearly identified candidate.” *Id.* at 195-96.

The Fifth Circuit then held that the advertisements at issue “do not constitute ‘express advocacy’ under the bright-line approach adopted above,” because the “advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates.” *Id.* at 198. It rejected the argument that a number of ad attributes or contextual factors could appropriately be substituted for the undisputed absence of any explicit words exhorting viewers to take specific electoral action. The Fifth Circuit found that “communications that discuss in glowing terms the record and philosophy of specific candidates” do not constitute express advocacy “unless they also contain words that exhort viewers to take specific electoral action for or against the candidates,” and “contextual factors” such as the date of broadcast or similarity to other ads “are irrelevant to our determination whether the advertisements contain express advocacy.” *Id.* at 197. Accordingly, the Fifth Circuit held that “the First Amendment protects the . . . advertisements, and consequently the advertisements are not subject to regulation.” *Id.* at 199.⁹

In light of the Fifth Circuit’s holding that express advocacy includes only explicit words of electoral action, Plaintiff’s attempt to stretch the express advocacy standard to

⁹ The timing of the *Moore* decision clarifies the position taken by an earlier Ethics Advisory Opinion from the Texas Ethics Commission. Op. Tex. Ethics Comm’n No. 198 (1994) (“Opinion”). That Opinion concluded that communications containing words listed in *Buckley*’s footnote 52 would certainly qualify as express advocacy, but other communications that did not contain those words were not necessarily protected by the First Amendment and had to be evaluated for express advocacy on a case-by-case basis. However, the Opinion expressly qualified its position with the caveat that the Fifth Circuit had not addressed the exact meaning of “express advocacy.” After that Opinion, the Fifth Circuit decided *Moore*, which rejects the position of the Texas Ethics Commission.

cover a broader range of speech is constitutionally flawed. *Cf.* Plaintiff’s Merits Br. at 27. The trial court erred by failing to consider whether TAB’s mailings contained explicit words of advocacy before ordering Relators to disclose information about those mailings.

CONCLUSION AND PRAYER

A state may only regulate that over which it has authority. Under the holdings of *Buckley*, *MCFL*, *Osterberg*, and *Moore*, Texas lacks authority to regulate independent political speech under its broadly-written statute unless the speech contains express advocacy. The trial court made no finding that the speech at issue contained such advocacy. Accordingly, *amici* respectfully request that this Court grant Relators’ petition for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of *Amicus Curiae* Chamber of Commerce of the United States has been forwarded by U.S. certified mail, return receipt requested, on this the 19th day of May 2004, to the following parties or counsel of record:

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