

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaints)
Against Main Street Advocacy) **SUMMARY OF FACTS**
Fund and Others) **AND**
) **STATEMENT OF FINDINGS**

On June 7, 2010 Art Wittich filed a complaint against Main Street Advocacy Fund, Service Employees International Union, Ted Dick, John Brueggeman, John Ward, and Sarah Chamberlain Resnick, alleging they violated Montana campaign finance and practices laws and rules. The complaint alleges illegal coordination between political action committees (PAC's) and candidates, illegal corporate contributions to PAC's, failure to provide attribution on election materials, failure to file a statement of organization and periodic reports, and failure to report certain expenditures and contributions. On June 9, 2010, Mike Miller filed a complaint against Main Street Advocacy Fund, alleging that the group engaged in express advocacy and failed to include proper disclaimers, and failed to properly report contributions and expenditures. Both complaints will be addressed herein.

SUMMARY OF FACTS

1. In 2010 complainant Art Wittich was a Republican candidate in the primary election for the Montana State Senate in Senate District 35. His opponents in the primary were Shawn Moran, Dave Ponte, and Bruce Samson. Wittich received the most votes in the primary and advanced to the general election, where he prevailed.

2. In 2010 complainant Mike Miller was a Republican candidate in the primary election for the Montana House of Representatives in House District 84.

His opponent in the primary was Joe Dooling. Miller received the most votes in the primary and advanced to the general election, where he prevailed.

3. Main Street Advocacy Fund (MSAF) is an organization that claims to represent what it refers to as “traditional Republican values” and principles. MSAF is registered as a corporation in Washington, D.C. In 2010 MSAF registered as a political committee with the office of the Commissioner of Political Practices (COPP). John Ward was designated as the treasurer of MSAF and Sarah Chamberlain Resnick was designated as the deputy treasurer.

4. Service Employees International Union (SEIU) is a labor union headquartered in Washington, D.C. In 2010 SEIU was registered with the Commissioner as a political committee. Ted Dick was the treasurer.

5. In 2010 John Brueggeman was a Montana State Senator from Senate District 6.

6. Wittich’s complaint alleges that Shawn Moran was the candidate “favored” by MSAF, and that SEIU and Brueggeman coordinated with MSAF during the 2010 election. Specifically, the complaint alleges that during April and May, 2010, Dick met with staff at the Commissioner’s office to inquire about a direct mail piece that a non-profit C-4 organization planned to distribute, seeking to ensure that the piece did not contain express advocacy. According to the complaint, Dick also stated to staff at the Commissioner’s office that a national organization was paying for the flyers, as well as for some radio ads. The complaint alleges that shortly after Dick met with staff at the Commissioner’s office MSAF registered with the office as a political committee and filed a report of contributions and expenditures as an incidental political committee.

7. Wittich’s complaint alleges that Brueggeman, SEIU, MSAF, and others worked in concert and broke numerous campaign finance and reporting laws when radio ads were aired and direct mail pieces were distributed. The

complaint alleges that disclaimers on the ads were deficient, and that corporate treasury funds and resources were used to make direct contributions and expenditures, or to fund staff time, resulting in illegal in-kind contributions from corporations.

8. Wittich's complaint refers to two mailers funded by MSAF, both of which urge the reader to contact Shawn Moran "for more information" regarding the issues discussed in the mailers. As noted above, Moran was one of Wittich's opponents in the primary election.

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PO BOX 1630
Helena, MT 59624



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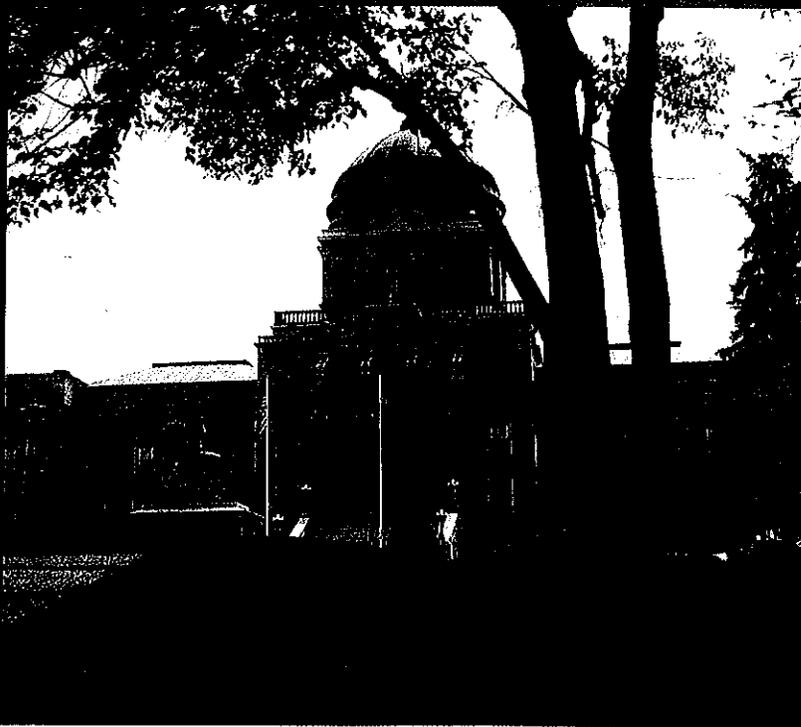
PRSRT STD
U.S. Postage
PAID

BOZEMAN MT 59718-9136

TEKS Services



Who understands the need for government accountability and lower taxes?



Montanans need people that will fight for government accountability, lower taxes, and common sense solutions that keep spending under control.

Accountability

We need a state government that is more efficient, effective, and accountable to the people it serves. Leaders need to stand up to the special interests who want preferential treatment at the expense of taxpayers. They also need to be a watchdog for state agencies and our schools to ensure that our dollars are being spent wisely.

Taxes

In these tough economic times, the last thing we need is higher taxes. Our families and businesses are already struggling to make ends meet. We need leaders who recognize that more taxes mean more economic hardship for Montanans.



Common Sense

Perhaps most importantly, we need people that can bring common sense and practical solutions to our problems. The last thing we need is bickering and political fights. We need leaders who can roll up their sleeves and work together to solve problems.

Shawn Moran

Shawn Moran is a 37-year resident of the Gallatin Valley and the son of the late Judge Larry Moran. He is an active member of our community and self-employed businessman and real estate broker. Shawn is a strong supporter of agriculture, individual freedom, lower taxes, the reduction of wasteful spending, and the creation of a climate that helps small businesses succeed. He is also a valuable source of information on government accountability.



Call Shawn Moran at (406) 582-0870 for more information on how to make government more accountable.

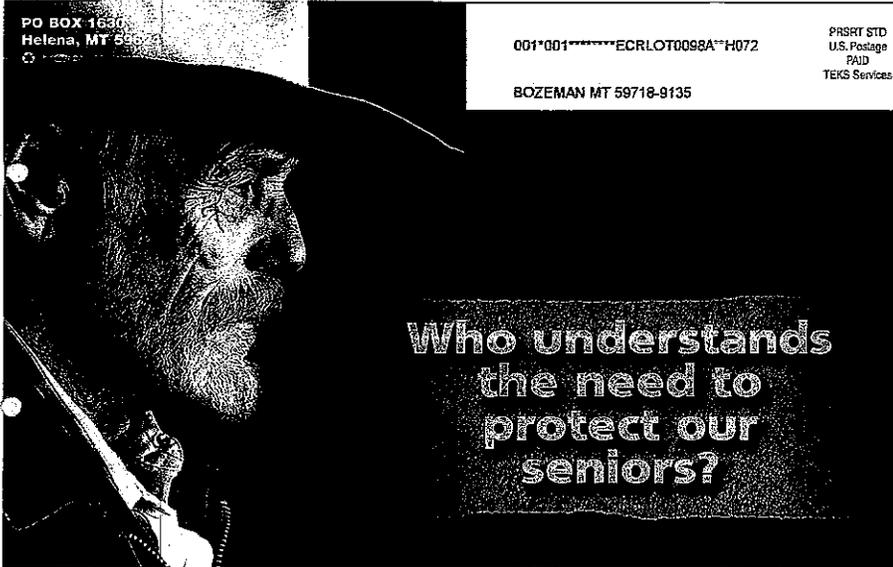
Notice to Voters: This advertisement is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy Fund, PO Box 1630, Helena, MT 59624

PO BOX 1630
Helena, MT 59624

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PSRST STD
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TEKS Services

BOZEMAN MT 59718-9135



Who understands
the need to
protect our
seniors?

**Our seniors have worked hard to make this country what it is today.
Now, we need people that will work just as hard for them.**

Taxes

The last thing people on a fixed income need is higher taxes. When taxes go up, it hits our seniors the hardest. What we need are people who recognize that we can't solve our budget problems by simply raising taxes. Government should be more efficient, effective, smaller, and smarter.

Fraud and Abuse

As the population of Montana grows older, crimes against our senior citizens are also on the rise. Punishment for crimes such as fraud and abuse against our seniors needs to be swift and harsh. We need tough new laws that provide law enforcement and prosecutors with the tools they need to reverse this disturbing trend.

Shawn Moran

Shawn Moran is a 37-year resident of the Gallatin Valley and the son of the late Judge Larry Moran. He is an active member of our community and self-employed businessman and real estate broker. Shawn is a strong supporter of agriculture, individual freedom, lower taxes, the reduction of wasteful spending, and the creation of a climate that helps small businesses succeed. He is also a valuable source of information on issues important to seniors.



Call Shawn Moran at (406) 582-0870 for more information on how we can support our senior citizens.

Notice to Voters: This advertisement is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy Fund, PO Box 1630, Helena, MT 59624

PO BOX 1630
Helena, MT 59624
♻️ 010127

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PRSRT STD
U.S. Postage
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TEKS Services



Who understands the need for government accountability and lower taxes?



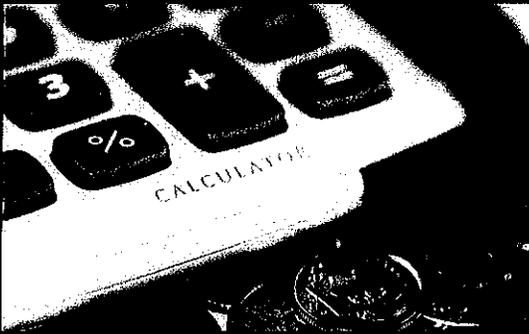
Montanans need people that will fight for government accountability, lower taxes, and common sense solutions that keep spending under control.

Accountability

We need a state government that is more efficient, effective, and accountable to the people it serves. Leaders need to stand up to the special interests who want preferential treatment at the expense of taxpayers. They also need to be a watchdog for state agencies and our schools to ensure that our dollars are being spent wisely.

Taxes

In these tough economic times, the last thing we need is higher taxes. Our families and businesses are already struggling to make ends meet. We need leaders who recognize that more taxes mean more economic hardship for Montanans.



Common Sense

Perhaps most importantly, we need people that can bring common sense and practical solutions to our problems. The last thing we need is bickering and political fights. We need leaders who can roll up their sleeves and work together to solve problems.

Joe Dooling

Joe Dooling is a small businessman and active member of our community. He believes there's more to be done to improve our business climate and create jobs. Joe supports a more efficient government, less taxes, and common sense land use. He's also a valuable source of information on government accountability.

Call Joe Dooling at (406) 431-3510 for more information on how to make government more accountable.

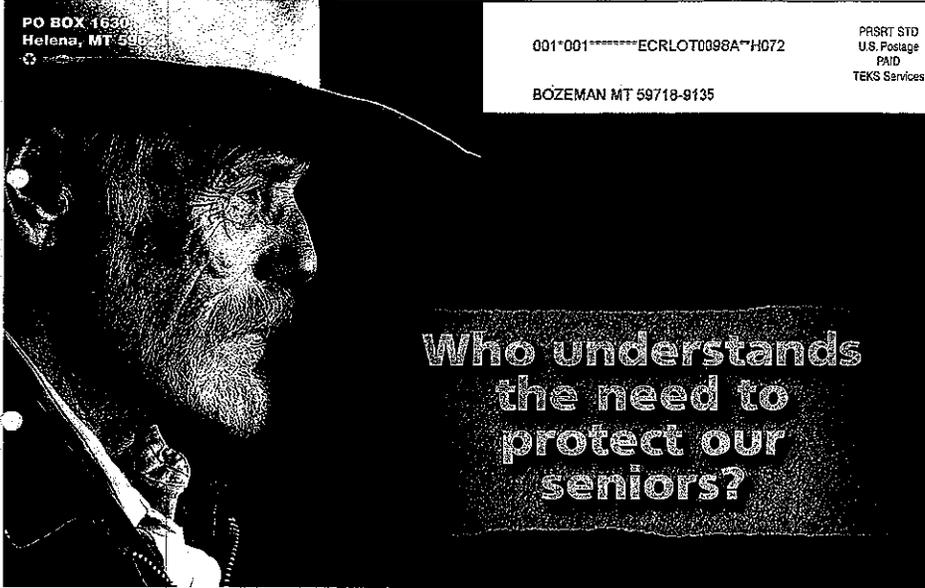
Notice to Voters: This advertisement is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy Fund, PO Box 1630, Helena, MT 59624

PO BOX 1630
Helena, MT 59624

001*001*****ECRLOT0098A**H072

PRSRT STD
U.S. Postage
PAID
TEKS Services

BÖZEMAN MT 59718-9135



Who understands
the need to
protect our
seniors?

**Our seniors have worked hard to make this country what it is today.
Now, we need people that will work just as hard for them.**

Taxes

The last thing people on a fixed income need is higher taxes. When taxes go up, it hits our seniors the hardest. What we need are people who recognize that we can't solve our budget problems by simply raising taxes. Government should be more efficient, effective, smaller, and smarter.

Fraud and Abuse

As the population of Montana grows older, crimes against our senior citizens are also on the rise. Punishment for crimes such as fraud and abuse against our seniors needs to be swift and harsh. We need tough new laws that provide law enforcement and prosecutors with the tools they need to reverse this disturbing trend.

Joe Dooling

Joe Dooling is a small businessman and active member of our community. He believes there's more to be done to improve our business climate and create jobs. Joe supports a more efficient government, less taxes, and common sense land use. He's also a valuable source of information on issues important to seniors.

Call Joe Dooling at (406) 431-3510 for more information on how we can support our senior citizens.

Notice to Voters: This advertisement is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy Fund, PO Box 1630, Helena, MT 59624

9. Miller's complaint refers to two similar mailers funded by MSAF, both of which urge the reader to contact Joe Dooling "for more information" regarding the issues discussed in the mailers. As noted above, Dooling was Miller's opponent in the primary election.

10. The two sets of mailers for both Moran and Dooling are similar. The Moran and Dooling "government accountability and taxes" mailers include the following statement: "Who understands the need for government accountability and lower taxes?" This statement is followed by the statement: "Montanans need people that will fight for government accountability, lower taxes, and common sense solutions that keep spending under control." Issues related to each of the three subjects (accountability, taxes, and common sense) are summarized, including the statement that "we need leaders" to accomplish the various goals associated with each of the three subjects. The mailers conclude with the names of Moran and Dooling, with a brief biographical summary and a summary of the political philosophy of each, along with the statement that each person is "a valuable source of information on government accountability." Each mailer concludes with a listing of a telephone number for, respectively, Moran and Dooling, urging the reader to call Moran or Dooling "for more information on how to make government more accountable."

11. The Moran and Dooling "seniors" mailers include the following statement: "Who understands the need to protect our seniors?" This statement is followed by the statements: "Our seniors have worked hard to make this country

what it is today. Now, we need people that will work just as hard for them.” Issues related to the subjects of “taxes” and “fraud and abuse” are then summarized. The mailers conclude with the names of Moran and Dooling, with a brief biographical summary and a summary of the political philosophy of each, along with the statement that each person is “a valuable source of information on issues important to seniors.” Each mailer concludes with a listing of a telephone number for, respectively, Moran and Dooling, urging the reader to call Moran or Dooling “for more information on how we can support our senior citizens.”

12. All mailers include the following disclaimer language: “Notice to Voters: This advertisement is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy Fund, P.O. Box 1630, Helena, MT 59624.”

13. Wittich’s complaint claims that MSAF mailers supported other Republican candidates in Montana running in the primary election, including Chas Vincent, Ron Arthun, Sandra Welch, Rob Cook, Jesse Barnhart, Debra Bonogofsky, Kelly Flynn, Charles “Les” Gilman, Patrick Connell, Gary MacLaren, and Jeffrey Welborn.

14. In response to the Wittich complaint, MSAF stated that while developing the flyers and radio ads Sarah Chamberlain Resnick conferred on a few isolated occasions with others, including Brueggeman and Dick. The response claims that none of the participants who consulted on the messaging acted in concert with any candidate operatives, and all of the information used in the flyers and radio ads was derived from public sources such as Internet websites.

15. All of the candidates listed in Fact 14, above, including Moran and Dooling, were contacted and asked about the flyers financed by MSAF. All candidates claimed that they had no contact with MSAF, SEIU, or anyone associated with the two groups, and that they had no advance notice that the mailers would be distributed. Several of the candidates stated they believed the mailers may have even hurt their candidacies. Based on the investigation conducted, there is no evidence of any coordination between any of the candidates and MSAF, SEIU, or anyone associated with the two groups.

16. Wittich's complaint includes the script for a radio ad financed by MSAF, with language that is very similar to the language in the "government accountability and taxes" mailers. Following is the full script:

When it comes to the issue of government accountability, sometimes you've got to wonder if anyone is listening.

Montanans need people that will fight for lower taxes and common sense solutions that keep spending under control.

Government needs to be more efficient, effective, and accountable to the people it serves.

And in this tough economy, the last thing we need is higher taxes.

What Montanans do need are practical solutions and leaders who can roll up their sleeves and work together to solve problems.

Joe Dooling is a small businessman and active member of our community. He believes there's more to be done to improve our business climate and create jobs. Joe supports a more efficient government, less taxes, and common sense land use. He's also a valuable source of information on government accountability.

Please give Joe Dooling a call at (406) 431-3510 for more information

The radio ads conclude with the following statement: "This message is not paid for or authorized by any candidate. It is paid for by Main Street Advocacy."

17. Wittich's complaint alleges that MSAF made its first expenditure on May 5, 2010, and should have filed a C-2 Statement of Organization with the Commissioner within five days after making the expenditure. The complaint alleges that MSAF should also have designated a treasurer and a campaign depository within that same five-day period. According to the complaint, MSAF filed its C-2 on May 25, 2010, twenty days after making its first expenditure. Miller's complaint makes similar allegations, and also claims that MSAF was not an incidental committee, but instead was a political action committee with different reporting responsibilities.

18. MSAF filed a C-2 Statement of Organization and a C-4 Incidental Political Committee Finance Report on May 25, 2010. In a portion of the C-2 designated "Purpose of Committee," MSAF wrote:

MSAF consulted in advance with a representative of the Office of the Commissioner of Political Practices and believed it had informal guidance indicating that the messaging would not be deemed expenditures to support or oppose any candidate.

19. COPP records disclose that prior to MSAF filing its C-2, Ted Dick met with COPP staff to discuss flyers and radio ads that a "nonprofit C-4 group" was planning to distribute. COPP staff advised Dick of Montana's disclosure requirements, referring him to several previously issued COPP decisions discussing express advocacy. COPP staff advised Dick that the group may wish to

consult with an attorney, and that the group could request an advisory opinion from COPP pursuant to ARM 44.10.201.

20. The C-4 report filed by MSAF discloses that it received a \$10,000 contribution from SEIU on May 13, 2010, for what it designated as “non-candidate support.” Following consultation with Mary Baker, Program Supervisor for COPP, MSAF returned the contribution to SEIU on May 24, 2010. The portion of the C-4 disclosing the expenditure for the refund states: “Guidance on 5/22/10 from Commissioner of Political Practices changed circumstances, so refund made.”

21. According to its C-4 report, MSAF paid Beryllium, a media buyer in the state of Washington, \$20,007 on May 5, 2010, for what is described in the report as “Communication, production, and consulting for messages mentioning C Vincent, R Arthun, S Moran, S Welch, R Cook, J Barnhart, D Bonogofsky, K Flynn, C Gilman, J Dooling, P Connell, G MacLaren, and J Welborn.”

STATEMENT OF FINDINGS

The complaints allege the following violations:

1. Corporate treasury funds were used to make illegal direct corporate contributions to candidates, in violation of Mont. Code Ann. § 13-35-227
2. The disclaimers on the radio ads and flyers were deficient.
3. In 2010 MSAF illegally coordinated its activities with John Brueggeman and numerous candidates in Republican primary elections throughout Montana.

4. MSAF filed its C-2 Statement of Organization more than five days after making an expenditure, in violation of Mont. Code Ann. 13-37-201.

5. The depository named on MSAF's C-2 is not "necessarily" authorized to conduct business in Montana.

6. MSAF failed to file periodic reports pursuant to statutory requirements.

7. MSAF failed to report independent expenditures and in-kind contributions.

8. MSAF was not an incidental political committee, but was instead a political action committee with different reporting responsibilities.

1. Alleged Illegal Corporate Spending

The Wittich complaint alleges that MSAF made illegal corporate expenditures in connection with candidate campaigns, in violation of Mont. Code Ann. § 13-35-227. As noted in Fact 15, above, there is no evidence that MSAF coordinated its political messaging with any candidate or candidate's campaign. Because MSAF is a corporation (Fact 3), it is necessary to discuss the laws regulating corporate campaign spending, as well as federal case law ruling on constitutional issues pertaining to corporate expenditures. Mont. Code Ann. § 13-35-227(1) provides that a corporation may not make a contribution or expenditure in connection with a candidate, a political committee that supports or opposes a candidate, or a political party. The statute includes a prohibition on corporations making independent expenditures.

In 2010 Western Tradition Partnership (WTP) and two other incorporated entities filed a lawsuit in state court against the Attorney General and COPP, contending that the statute's prohibition of independent corporate expenditures is unconstitutional. In a decision issued on October 18, 2010, Judge Jeffrey Sherlock declared that the statute as it pertains to independent corporate expenditures is unconstitutional and unenforceable based on the First Amendment to the United States Constitution. Judge Sherlock's Order permanently enjoined the defendants from enforcing the independent expenditure prohibition in Mont. Code Ann. § 13-35-227(1).

Judge Sherlock's decision was reversed by the Montana Supreme Court in *American Tradition Partnership, Inc. v. Bullock, et al.*, 2011 MT 328, 363 Mont. 220, 271 P.3d 1. The United States Supreme Court granted certiorari¹ and summarily reversed the decision of the Montana Supreme Court, finding that Montana's statutory prohibition on independent corporate expenditures violates the First Amendment. *American Tradition Partnership, Inc. v. Bullock, et al.*, 132 S. Ct. 2490 (2012). The United States Supreme Court relied on its prior holding in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Based on the United States Supreme Court's decision in *American Tradition Partnership*, MSAF's independent messaging cannot be prohibited under Mont. Code Ann. § 13-35-227.

¹ A writ (order) of a higher court to a lower court to send all the documents in a case to it so the higher court can review the lower court's decision. Certiorari is most commonly used by the United States Supreme Court, which is selective about which cases it will hear on appeal.

2. Alleged Illegal Disclaimers

The Wittich complaint alleges that the disclaimers on the flyers and radio ads financed by MSAF do not contain information such as MSAF's true address and the name of its treasurer. Mont. Code Ann. § 13-35-225(1) requires that all "communications advocating the success or defeat of a candidate, political party, or ballot issue . . . must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication." In the case of a political committee the disclaimer language must include the name of the committee, the name of the treasurer, and the address of the committee or the treasurer. COPP has interpreted this statutory requirement to apply only to communications that expressly advocate the success or defeat of a candidate, political party, or ballot issue.

Roberts v. Griffin & Lewis & Clark County, Summary of Facts and Statement of Findings, at 8 (Nov. 19, 2009).

Montana's statutes and COPP's administrative rules do not define "express advocacy." Federal case law offers persuasive authority to assist with interpretation of the term to ensure that enforcement of Montana's law is consistent with constitutional principles. The "express advocacy" standard was devised by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) to avoid problems of unconstitutional overbreadth in attempts to regulate political speech. The Court narrowly construed the federal statutory definition of "expenditure" to apply, for certain purposes, "only to expenditures for

communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Buckley* at 44. The Court recognized that general discussions of issues and candidates are distinguishable from more pointed exhortations to vote for or against particular persons. In a footnote the Court listed examples of express advocacy, which have become known as “magic words,” including phrases such as “vote for,” “elect,” “support,” “cast your ballot for,” “vote against,” “defeat,” “reject,” etc. *Buckley* at 44, n. 52.

Ten years later, in *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”), the Court determined that a communication need not include one or more of the particular phrases listed in *Buckley* to constitute express advocacy, finding that a message that is “marginally less direct” than a “vote for” message, or that “in effect” provides an explicit directive, can be express advocacy. The Supreme Court determined that the “essential nature” of such ads “goes beyond issue discussion to express electoral advocacy.” *MCFL* at 249.

In *Federal Election Comm’n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the Ninth Circuit Court of Appeals considered whether a political advertisement expressly advocated the defeat of President Jimmy Carter in the days before the 1980 presidential election. The Court noted that a “proper understanding of the speaker’s message can best be obtained by considering speech as a whole.” *Furgatch* at 863. Rejecting the use of a “magic words” approach as a test of express advocacy, the Court stated that applying such a test could result in

permitting campaign spenders to “remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.” *Furgatch* at 863. The Court set forth the following test:

We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Furgatch at 864.

The Court divided this standard into three components:

- 1) Speech is “express” only if “its message is unmistakable and unambiguous, suggestive of only one plausible meaning.”
- 2) Speech amounts to “advocacy” only “if it presents a clear plea for action,” as opposed to being merely informative.
- 3) It must be clear what action is advocated. If “reasonable minds could differ” regarding whether the speech encourages a vote for or against a candidate, it is not “express advocacy.”

Furgatch at 864. In 1995, the Federal Election Commission (FEC) adopted a regulation defining “expressly advocating” based in large part on standards established by the United States Supreme Court in *Buckley* and the Ninth Circuit in *Furgatch*.

In response to a flood of soft money (political money donated in such a way as to avoid limits and/or disclosure requirements) used to fund issue ads, Congress

enacted the Bipartisan Campaign Reform Act of 2002 (BCRA). In enacting Section 203(a) of the BCRA, Congress in effect repudiated the “magic words” test by including regulation of “electioneering communications,” defined as any broadcast, cable or satellite communication referring to a clearly identified federal candidate and airing within 30 days of a primary or 60 days of a general election, that targeted the electorate of that candidate. Under the provision, corporations and unions are prohibited from paying for any electioneering communications and any person spending more than \$10,000 in a calendar year on electioneering communications must file disclosure reports with the FEC.

In *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), the United States Supreme Court considered a challenge to the BCRA electioneering communications restrictions on broadcast ads. The challenge was based on the argument that “*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy and that speakers possess an inviolable First Amendment right to engage in the latter category of speech.” *McConnell* at 190. The Supreme Court rejected the argument that the First Amendment “erects a rigid barrier between express advocacy and so-called issue advocacy,” stating that such a notion “cannot be squared with [the Court’s] longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.” *McConnell* at 193. The Court ultimately agreed that *Buckley*’s magic words requirement was “functionally meaningless,” and upheld the BCRA electioneering communications provision

against a constitutional challenge, finding that the majority of the ads at issue in the underlying litigation were the “functional equivalent” of express advocacy. *McConnell* at 193-94, and 206.

In 2004 Wisconsin Right to Life (WRTL), a corporation, broadcast some ads that it believed were not subject to the “electioneering communications” restrictions of the BCRA. WRTL filed a lawsuit against the FEC seeking a declaratory judgment that its ads qualified for an as-applied exemption from the restrictions. The transcript of one of WRTL’s radio ads is set forth below:

PASTOR: And who gives this woman to be married to this man?

BRIDE’S FATHER: Well, as father of the bride, I certainly could. But instead, I’d like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

VOICE-OVER: Sometimes it’s just not fair to delay an important decision. But in Washington it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates don’t get a chance to serve.

It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

Visit: BeFair.org

Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.

The case eventually ended up in the United States Supreme Court, with Chief Justice Roberts writing for the majority, that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no

reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Wisconsin Right to Life v. Federal Election Comm’n*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”). The Court applied the test to *WRTL*’s ads:

Under this test, *WRTL*’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

WRTL at 470. The FEC and intervenors argued that “contextual” factors proved that the ads were the equivalent of express advocacy. They cited evidence that during the same election cycle when the ads ran, *WRTL*’s political action committee actively opposed Senator Feingold’s reelection and identified filibusters as a campaign issue. FEC and the intervenors also noted that the ads were to be aired near the time of elections, but not near actual Senate votes on judicial nominees. The Court considered the extent to which “context” can be considered under the test it had approved:

Given the standard we have adopted for determining whether an ad is the “functional equivalent” of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad “describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future,” [citation omitted] – but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.

WRTL at 473-74.

In response to Justice Scalia's objection that the test approved by the Court was vague, the majority opinion noted:

[W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.

WRTL at 474, n. 7 (emphasis in original).

The Court in *WRTL* also rejected the FEC's argument that any ad that includes an appeal to citizens to contact elected representatives is the functional equivalent of an ad saying defeat or elect that candidate. The Court observed: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions." *WRTL* at 470.

In summary, the United States Supreme Court appears to have abandoned the stringent "magic words" test in favor of what is purported to be an objective test for express advocacy, which can be summarized as follows:

A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

WRTL, 551 U.S. at 469-70.

Reviewed against this legal backdrop, the flyers and radio ads financed by MSAF do not expressly advocate. Although the flyers were distributed and the ads were aired before the June 2010 primary election, they do not advocate for or against the election of any candidate to public office. In fact, none of the ads even mention the upcoming election, a political party, or a candidate. The flyers and ads identified the person named in the ad as “a valuable source of information” on the issues discussed therein, and provided a telephone number to call the person “for more information.” The Supreme Court has emphasized that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. (Emphasis added). The messages financed by MSAF could reasonably be interpreted as a suggestion that the reader or listener contact a person who is identified as a “valuable source of information” to obtain more information on the issues described in the ads. While the ads were run and the flyers were distributed just prior to the primary election, the Supreme Court has counseled that “contextual factors” such as timing of particular messages is normally not relevant to the inquiry into whether the ads constitute express advocacy. Moreover, the Supreme Court has noted that “in a debatable case, the tie is resolved in favor of

protecting speech.” *WRTL* at 474, n. 7.

Because the messages funded by MSAF do not expressly advocate for or against a candidate, political party, or ballot issue, they were not subject to the disclaimer requirements of Mont. Code Ann. § 13-37-225.

3. Alleged Illegal Coordination

No evidence was disclosed tending to show coordination between any candidates and MSAF, SEIU, or anyone associated with the two groups. See Fact 15.

4. Alleged Late Filing of MSAF’s Statement of Organization

The complaints allege that MSAF failed to file a Statement of Organization within five days of making an expenditure, citing Mont. Code Ann. § 13-37-201. Montana law defines a “political committee” to include a person other than an individual who makes a contribution or expenditure to oppose a candidate. Mont. Code Ann. § 13-1-101(22)(a). A “person” includes “a corporation, association, firm, partnership. . . or other organization. . .” Mont. Code Ann. § 13-1-101(20). A political committee is required to file a Statement of Organization (Form C-2) within five days after making an expenditure. Mont. Code Ann. § 13-37-201.

MSAF reported that it paid Beryllium, a media buyer in the state of Washington, \$20,007 on May 5, 2010, for what is described in its C-4 campaign finance report as production and related costs for “messages” mentioning thirteen candidates. MSAF filed a C-2 Statement of Organization on May 25, 2010. If

MSAF was a political committee and its May 5, 2010 payment was an expenditure, it was required to file a C-2 on May 10, 2010.

In *Western Tradition Partnership, et al. v. Murry, et al.*, First Judicial District Cause No. BDV-2010-1120, the plaintiffs challenged a number of campaign finance and disclosure statutes and regulations, including Montana's statutory definition of "expenditure" in Mont. Code Ann. § 13-1-101(11)(a), which provides:

"Expenditure" means a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election.

Plaintiffs filed a motion for summary judgment, arguing that the statutory definition of "expenditure" is unconstitutionally vague. Judge Jeffrey Sherlock rejected the argument, but acknowledged that the term "influencing" presents "some vagueness problems," citing *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65-67 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012). To avoid potential constitutional issues, Judge Sherlock determined that the statutory definition should be narrowly construed, as follows:

In order to avoid the facial challenge presented to it, the First Circuit narrowed the term "influence." This Court will do the same by adopting the language of the First Circuit Court. Thus, as used in Montana's campaign finance disclosure requirements, specifically Section 13-1-101(11)(a), MCA, the use of the word "influencing" will only include communications and activities that expressly advocate for or against a candidate or ballot issue or that clearly identify a candidate or ballot issue by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate or ballot issue. *Nat'l Org. for Marriage*, at 66-67.

Western Tradition Partnership, Order on Motion for Summary Judgment, at 18 (Dec. 14, 2011).

Applying the interpretation of Montana's statutory definition as directed by Judge Sherlock in *Western Tradition Partnership*, the radio ads and flyers financed by MSAF in this case did not expressly advocate (see analysis under Claim 2, above). Thus, they were not expenditures and the provisions of Mont. Code Ann. § 13-37-201 do not apply. MSAF was not required to file a C-2 Statement of Organization.

5. Alleged Improper Depository Listed on the C-2

Because MSAF was not required to file a C-2 Statement of Organization, any deficiency in the information regarding the campaign depository required by Mont. Code Ann. § 13-37-205 is irrelevant.

6. Alleged Failure to File Periodic Reports

As noted above, Montana law defines a "political committee" to include a person other than an individual who makes a contribution or expenditure to oppose a candidate. Mont. Code Ann. § 13-1-101(22)(a). Because MSAF did not make an expenditure, it was not required to register as a political committee or file periodic reports.

7. Alleged Failure to Report Independent Expenditures and In-Kind Contributions

See discussion above regarding expenditures and political committee status.

8. Allegation that MSAF Was Not an Incidental Political Committee

See discussion above regarding expenditures and political committee status.

CONCLUSION

There is insufficient evidence to conclude that MSAF, SEIU, Ted Dick, John Brueggeman, John Ward, or Sarah Chamberlain Resnick violated Montana campaign finance and practices statutes or rules.

Dated this 27th day of March, 2013.



Jay Dufrechou, Deputy Commissioner
Commissioner of Political Practices