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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

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ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable Randy Hinshaw
Member, House of Representatives
Post Office Box 182
Meridianville, Alabama 35759

Fair Campaign Practices Act –
Political Committees – Campaign
Contributions – Issue Advocacy –
Express Advocacy - Reporting
Requirements – Madison County

Alabama's Fair Campaign Practices Act ("FCPA") must be read in the light of the First Amendment as interpreted in *Buckley v. Valeo*, 424 U.S. 1 (1976). The FCPA, therefore, only applies to communications that expressly advocate the election or defeat of a candidate as defined in *Buckley*.

Dear Representative Hinshaw:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Does section 17-22A-1, *et seq.*, of the Code of Alabama require the reporting of expenditures and contributions that are used to influence, express or otherwise, the results of an election?

FACTS AND ANALYSIS

Alabama's Fair Campaign Practices Act ("FCPA") is now codified in section 17-5-1, *et seq.*, of the Code of Alabama. Section 17-5-8 of the FCPA requires political committees to file disclosure reports that account for contributions received and expenditures made "with a view toward influencing [an] election's result." ALA. CODE § 17-5-8 (2006). This Office has previously used the *Buckley* standard to determine whether an expenditure or contribution was made with a view toward influencing the result of an election. *Buckley v. Valeo*, 424 U.S. 1 (1976); Opinion to Honorable Jim Bennett, Secretary of State, dated November 5, 1999, A.G. No. 2000-028. In the *Bennett* opinion, this Office stated as follows:

The application of the FCPA must also be read in light of the First Amendment as interpreted in *Buckley v. Valeo*, 424 U.S. 1 (1976), which distinguishes between issue advocacy and express advocacy. This Office has always interpreted section 17-22A-2 [now codified as section 17-5-2] as applying to individuals or groups engaged in the express advocacy of a candidate or ballot proposition, i.e., "vote for" or "vote against." Section 17-22A-2 has never been interpreted to apply to individuals or groups purely debating or advocating political issues in the abstract, i.e., "proposition is good" or "proposition is bad." This would be pure issue advocacy, which cannot be regulated without violating the First Amendment.

Bennett at 5. Your opinion request asks whether the FCPA is still subject to the criteria of express advocacy and the use of certain magic words as applied in *Buckley* based on more recent court decisions.

In 2002, Congress amended the Federal Election Campaign Act of 1971 ("FECA") to address flaws in the system that had developed in the years since *Buckley*. *Id.* at 93. Many provisions of the new FECA were challenged and upheld by the United States Supreme Court in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). The *McConnell* Court explained the origin of the *Buckley* standard stating that the concept of express advocacy and the class of magic words were created as part of an effort to avoid vagueness concerns. In practice, however, the *Buckley* magic-words test was ineffective because advertisers were able to avoid

the line between express advocacy and issue advocacy by simply not using magic words, thereby influencing elections while concealing their identities from the public. *McConnell*, 540 U.S. at 193.

Congress replaced the *Buckley* test with the term “electioneering communication” and created a new four-part test. The term “electioneering communication” refers to: (1) a broadcast, (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. *McConnell*, 540 U.S. at 194. This new test was designed to address flaws in the federal campaign system and is not applicable to the Alabama FCPA because it applies to broadcasts clearly identifying a candidate for **federal** office.

In 2006, the Court of Appeals for the Fifth Circuit reviewed Louisiana Revised Statute section 18:1501.1(a), a provision of the Louisiana Campaign Finance law, in the light of a First Amendment challenge and determined that it was not unconstitutional on its face, as limited by judicial construction. *Ctr. For Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006). The Court limited the statute’s application to communications that expressly advocate the election or defeat of a candidate as defined in *Buckley*. The Court noted that though the *Buckley* magic-words test has been found to be ineffective as the sole means of differentiating between express advocacy and issue advocacy, the test remains viable as a tool of statutory construction when dealing with vague campaign finance regulations that may attempt to regulate speech protected under the First Amendment. *Carmouche*, 449 F.3d at 666.

According to *Carmouche*, *Buckley*’s express advocacy test remains the proper construction of state laws regulating election speech, unless the Legislature amends the state law to adopt an objective bright-line definition of the type of speech that is subject to regulation. *Id.*; *Anderson v. Spear*, 356 F.3d 651 (6th Cir 2004). Alabama’s FCPA has not been amended to adopt such a bright-line definition and, therefore, must be read in the light of the First Amendment as interpreted in *Buckley*. *Bennett* at 5. Like the Louisiana statute, the Alabama FCPA only applies to communications that expressly advocate the election or defeat of a candidate. *Bennett* at 5. As we stated in the *Bennett* opinion, “[s]ection 17-22A-2 has never been interpreted to apply to individuals or groups purely debating or advocating political issues in the abstract.” *Bennett* at 5.

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CONCLUSION

Alabama's FCPA must be read in the light of the First Amendment as interpreted in *Buckley v. Valeo*, 424 U.S. 1 (1976). The FCPA, therefore, only applies to communications that expressly advocate the election or defeat of a candidate as defined in *Buckley*.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Noel S. Barnes of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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