

Michigan Bar Urges State to Begin Regulating Issue Advocacy

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Earlier this month, the Michigan State Bar invited Michigan Secretary of State Ruth Johnson to reinterpret state campaign finance law to reach all speech that “refers to” candidates for judicial office. If adopted, this standard would empower government officials to regulate speech on a limitless array of public issues.

Michigan's campaign finance law regulates “expenditures,” defined to include any payment made “in assistance of, or in opposition to” a candidate. Anyone making more than \$100 in expenditures in a year must file reports with the state; upon making \$500 in expenditures, corporations and other groups must also register and report as committees. The office of the Secretary of State, which administers these laws, has long held that an aggressive reading of the term “expenditure” would be suspect under the First Amendment. Because the term “relies on broad, ambiguous language,” the Secretary of State has steered clear of constitutional vagueness concerns by applying the law only to “express advocacy.” Under this bright-line rule, people who expressly advocate for or against a candidate—for example, by running an ad urging listeners to “vote for” or “vote against” a particular candidate—are on notice that they may need to report to the state. But speakers who express views on public issues more generally (termed “issue advocacy”) know that they won't have to report to the government, even if their speech also mentions candidates.

The Michigan State Bar envisions a much broader role for state regulators. In a recent letter to Secretary of State Johnson, the State Bar urged her to erase the line between express advocacy and issue advocacy in the context of judicial elections. When it comes to the Judicial branch, the State Bar says, all payments for speech “referring

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to” candidates should be treated as expenditures—with all the registration and reporting obligations that follow from that label.

The State Bar's position may trigger forceful responses in the upcoming comment period. For example, law review articles regularly “refer to” incumbent judges, both favorably and critically. And one former Michigan justice even co-authored a book castigating some of her former colleagues—not in an effort to harm their reelection prospects but, she claims, “to convey the need for reform in the way we select justices.” Some speakers may wonder whether these types of communications could qualify as campaign finance expenditures under the State Bar's proposal. An equally pressing question is whether the Secretary of State should be making that call in the first place without clear guidance from the Legislature.

The Michigan State Bar submitted its request for a declaratory ruling on September 11. (The letter is available [here](#).) The Secretary of State generally has 45 days from the date a request is received to issue a proposed response, after which interested persons have five days to offer written comments.