wiley

NEWSLETTER

WRF Obtains Ruling Limiting Louisiana Statute to Express Advocacy

July 2006

WRF election lawyers have persuaded the U.S. Court of Appeals for the Fifth Circuit in New Orleans to hold that vague state campaign finance definitions of "expenditure" must be narrowly construed to apply to spending for speech only if such speech uses explicit words to expressly advocate the election or defeat of a clearly identified candidate. *Center for Individual Freedom v. Carmouche*, No. 04-30877 (5th Cir. May 11, 2006).

This holding is an important limitation on the state's ability to impose reporting and disclosure requirements on all persons making "independent expenditures."

The U.S. Supreme Court's 1976 *Buckley* decision held that restrictions on spending for independent speech had to be precise, objective and narrow. Where federal campaign finance law used vague language such as "in connection with an election" to identify regulated spending, *Buckley* limited the restrictions to "express advocacy," sometimes called the "magic words" test.

The Supreme Court's 2003 *McConnell* decision allowed Congress to regulate a new category of speech because the statute's detailed definition of "electioneering communications" drew a bright line that was at least as precise and objective as the "express advocacy" standard. *McConnell* commented that Congress had good reason to adopt a new test since the "express advocacy" test was easily circumvented.

Many states, including Louisiana, read *McConnell* to relax the "express advocacy" standard in favor of a broader and more subjective construction of their campaign finance laws. In *Carmouche*,

Authors

Caleb P. Burns
Partner
202.719.7451
cburns@wiley.law

however, a three-judge panel of the U.S. Court of Appeals agreed with WRF's arguments that (1) *Buckley* remains the law, (2) a narrow and objective bright line is necessary and (3) until and unless Louisiana legislates an adequate alternative standard, the state's definition of "expenditure" must be limited to "express advocacy."

On July 11, 2006, the Fifth Circuit denied rehearing *en banc*.