IN THE SUPREME COURT OF THE STATE OF NEVADA

CITIZEN OUTREACH, INC.,

Appellant,

vs.

STATE OF NEVADA, by and through ROSS MILLER, its SECRETARY OF STATE,

Respondent.

Supreme Court No.: 63784

District Court Case No.: 11OC00360 1B

OPENING BRIEF OF APPELLANT CITIZEN OUTREACH, INC.

MUELLER, HINDS & ASSOCIATES, CHTD.
Craig A. Mueller, Esq.
Nevada Bar No. 4703
John J. Shimer, Esq.
Nevada Bar No. 11458
600 S. Eighth St.
Las Vegas, NV 89120
T: (702) 940-1234

And

Allen Dickerson*
Anne Marie Mackin*
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
Telephone: (703) 894-6800
Facsimile: (703) 894-6811

*pending admittance pro hac vice

Attorneys for Appellant
Citizen Outreach, Inc.

ATTORNEY GENERAL
Catherine Cortez-Masto
Kevin Benson
Senior Deputy Attorney General
Nevada Bar No. 9970
Attorney General's Office
100 North Carson St.
Carson City, NV 89701
T: (775) 684-1114
Attorneys for the Respondent
State of Nevada

Rule 26.1 Disclosure Statement

The Center for Competitive Politics has no parent corporation and issues no stock. The law firm of Mueller, Hinds & Associates, Chtd. represented Appellant before the district court.

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Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3(a)(1). Citizen Outreach appeals from a final Judgment entered on July 8, 2013. J. App. at 169. Citizen Outreach's Notice of Appeal was filed on August 8, 2013. J. App. at 172.

Issues Presented

1. Does the district court's imposition of PAC-style reporting requirements upon Citizen Outreach, absent a finding that Citizen Outreach's primary purpose was to influence a Nevada election, violate the First Amendment?
2. Did the district court properly interpret the meaning of express advocacy under 2009 law, given Nevada's rules of statutory construction and United States Supreme Court precedent?

Statement of the Case

This is an appeal from an entry of order in the First Judicial District Court in and for Carson City, ordering Citizen Outreach to "file its Campaign Contribution and Expense Reports Nos. 2 and 3 in compliance with NRS 294A.140 and 294A.210 for the 2010 election." J. App. at 171. THE HONORABLE JAMES T. RUSSELL, PRESIDING.

Statement of Facts

Appellant Citizen Outreach is a nonprofit Virginia corporation organized under § 501(c)(4) of the Internal Revenue Code. Appellee is Nevada Secretary of State Ross Miller who, by virtue of his office, is charged with enforcing the state's campaign finance laws. NRS 294A.420(1) (2013).

In 2010, Citizen Outreach spent more than $100 to distribute two flyers (collectively, "Flyers") discussing Assemblyman John Oceguera's activities and legislative record. J. App. at 81. "The Fiddling Flyer," J. App. at 76-78, noted that Mr. Oceguera had two taxpayer-funded jobs and listed legislation he supported, including specific tax increases he voted for. "The Nice Work Flyer,"

J. App. at 73-75, listed some, but not all, of this same information: it reported that Mr. Oceguera had two taxpayer-funded jobs, would be eligible for retirement at age 48, and listed tax increases Mr. Oceguera voted for as a state legislator.

It is undisputed that the Flyers do not contain "magic words" of express advocacy, exhorting a vote for or against any candidate for office. J. App. at 38. Whether the Flyers otherwise "advocate expressly" for the election or defeat of a candidate is a subject of this appeal. J. App. at 81; J. App. at 82.

In 2010, when Citizen Outreach distributed the Flyers, receiving contributions or making expenditures triggered the reporting requirements at issue here, including the requirement that an organization disclose its donors over $100. NRS 294A.140 (2007);[1] NRS 294A.210 (2007).[2] "Contributions" were defined as money given for the purpose of making expenditures,[3] and

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[1] The statute provided for the reporting of campaign contributions as follows:

> Every person who is not under the direction or control of a candidate for office at a primary election, primary city election, general election or general city election, of a group of such candidates or of any person involved in the campaign of that candidate or group which is not solicited or approved by the candidate or group, and every committee for political action, political party, committee sponsored by a political party and business entity which makes an expenditure on behalf of such a candidate or group of candidates shall…[within timeline required for reporting]…report each campaign contribution in excess of $100 he or it received during the period and contributions received during the period from a contributor which cumulatively exceed $100.

[2] Analogous statutory provision requiring reporting of "campaign expenses."

[3] Under NRS 294A.007 (2007): "Contribution" means a gift, loan, conveyance, deposit, payment, transfer or distribution of money or of anything of value other than the services of a volunteer, and includes:

> (a) The payment by any person, other than a candidate, of compensation for the personal services of another person which are rendered to a:
>
> (1) Candidate;

expenditures were defined, in pertinent part, as "[t]hose expenditures made for advertising on television, radio, billboards, posters and in newspapers; and [a]ll other expenditures made, to advocate expressly the election or defeat of a clearly identified candidate." NRS 294A.004 (2007). The law did not contain a definition of "advocate expressly," or any further definition of "expenditure." Because its Flyers did not expressly advocate the election or defeat of a candidate, Citizen Outreach did not file expenditure and contribution reports in connection with their distribution.

In 2011 and 2013—that is, *after* the activity giving rise to this appeal—the Nevada Legislature amended state law in two important ways. First, in 2011, the State for the first time defined express advocacy:

> 'Advocates expressly' or 'expressly advocates' means that a communication, taken as a whole, is susceptible to no other reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate or group of candidates or a question or group of questions on the ballot at a primary election, general election or special election. A communication does not have to include the words 'vote for,' 'vote against,' 'elect,' 'support' or other similar language to be considered a communication that expressly advocates the passage or defeat of a candidate or a question.

> (2) Person who is not under the direction or control of a candidate or group of candidates or of any person involved in the campaign of the candidate or group who makes an expenditure on behalf of the candidate or group which is not solicited or approved by the candidate or group;
> (3) Committee for political action, political party, committee sponsored by a political party or business entity which makes an expenditure on behalf of a candidate or group of candidates; or
> (4) Person or group of persons organized formally or informally, including a business entity, who advocates the passage or defeat of a question or group of questions on the ballot, without charge to the candidate, person, committee or political party.
>
> (b) The value of services provided in-kind for which money would have otherwise been paid, such as paid polling and resulting data, paid direct mail, paid solicitation by telephone, any paid paraphernalia that was printed or otherwise produced to promote a campaign and the use of paid personnel to assist in a campaign.

AB 81 76th Leg., (Nevada 2011) (codified at NRS 294A.0025).

Second, in 2013, the Legislature clarified the scope of political reporting. Major purpose organizations engaged in at least $1,500 of express advocacy in a given year would disclose all contributors over $100. Non-major-purpose organizations engaged in at least $5,000 of express advocacy in a given year would still file reports, but only identify contributors who earmarked their contributions for use toward a particular electoral result.[4]

On December 1, 2011, Secretary Miller filed his First Amended Verified Complaint for Civil Penalties in the First Judicial District Court in and for Carson County. J. App. at 2. The Complaint requested civil penalties for Citizen Outreach's 2010 failure to register as a PAC and report its contributions and expenditures, an injunction compelling the filing of those reports under NRS 294A.140 and NRS 294A.210, and attorney's fees. J. App. at 5. On January 22, 2013, the district court granted Secretary Miller's Motion for Summary Judgment. J. App. at 108. On July 8, 2013, the district court entered a judgment ordering Citizen Outreach to pay attorneys' fees and civil penalties,

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[4] SB 246 77th Leg., (Nevada 2013) (codified at NRS 294A.0055(1)(b)). "Committee for political action means […] Any business or social organization, corporation, partnership, association, trust, unincorporated organization or labor union:

> (1) Which has as its primary purpose affecting the outcome of any primary election, primary city election, general election, general city election, special election or any question on the ballot and for that purpose receives contributions in excess of $ 1,500 in a calendar year or makes expenditures in excess of $ 1,500 in a calendar year; or
>
> (2) Which does not have as its primary purpose affecting the outcome of any primary election, primary city election, general election, general city election, special election or any question on the ballot, but for the purpose of affecting the outcome of any election or question on the ballot receives contributions in excess of $ 5,000 in a calendar year or makes expenditures in excess of $ 5,000 in a calendar year."

See also NRS 294A.230(2) (2013) (providing that "a person who qualifies as a committee for political action in accordance with subparagraph (2) of paragraph (b) of subsection 1 of NRS 294A.0055 is required to report only those contributions received for the purpose of affecting the outcome of any primary election, general election, special election or any question on the ballot.")

and file contribution and expenditure reports under NRS 294A.140 and NRS 294A.210 in connection with its distribution of the Flyers. J. App. at 169-171.

Summary of Argument

In this and previous enforcement actions, the Secretary of State has advanced a constitutionally unsound reading of Nevada campaign finance law. Constitutional infirmities aside, the Secretary here, and the district court below, fundamentally misread the relevant, now-superseded statutes which are the subject of this appeal. As a result, this enforcement action revives the very infirmities the Nevada Legislature aimed to cure in amending the state's campaign finance framework through AB 81 and SB 246.

The Secretary's reading of Nevada campaign finance law, as it existed in 2010, suffers from two fatal flaws.

First, the Secretary would impose PAC status upon Citizen Outreach in a facially unconstitutional manner. Specifically, this enforcement action seeks detailed contributor information from Appellant absent a finding that Citizen Outreach has the major purpose of influencing a Nevada election. Supreme Court precedent dating back to the civil rights cases of the 1950's and 1960's, and reiterated in the seminal campaign finance decision of *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), emphasizes that detailed, compulsory reporting of contributor information can only be required of organizations that exist to expressly advocate a particular result in an election. No such finding was made here.

Indeed, as a matter of First Amendment law, there are only two permissible triggers for detailed contributor reporting. First, if an organization has the major purpose of influencing an election, the government may constitutionally require it to file reports and report its donors. Second, an organization may lack such a major purpose, but engage in speech expressly advocating the

election or defeat of a candidate. In this latter case, the organization's general donors are not subject to compulsory disclosure. Instead, the state may require disclosure of only such donors as have earmarked their contributions to support express advocacy.

The Legislature, in enacting AB 81, explicitly incorporated this formulation, citing an essentially identical Maine statute upheld as constitutional in *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011). It is undisputed that the Secretary could not obtain the disclosure he seeks under this current law.

The second flaw in the Secretary's case is one of statutory interpretation. In 2010, Nevada law contained a reference to express advocacy, but did not define the term. Consequently, this phrase—borrowed from *Buckley v. Valeo*—must be interpreted as it was used in 1997, the year it was adopted by the Legislature via SB 215. Instead, the district court incorrectly applied *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and held that express advocacy under the now-superseded statute did not require express words of advocacy. That decision ignores the overwhelming weight of authority in 1997, and selectively reads legislative history as instead incorporating *Furgatch*—a case never even brought to the Legislature's attention.

This is problematic for several reasons. First, the prevailing understanding of express advocacy in 1997 was the "magic words" test that came from the Supreme Court's *Buckley* decision. *Furgatch* was merely a narrow application of *Buckley* to a particular, and difficult, fact pattern. It was also an outlying opinion, which may explain why there is no evidence that the Legislature considered it. Moreover, even if *Furgatch* did control the outcome of this case, no reasonable reading of that decision would convert the Flyers into express advocacy.

At a minimum, the Secretary cannot have this case both ways. It violates both fundamental principles of statutory construction and basic notions of justice to enforce today's law against Citizen

Outreach insofar as the scope of express advocacy has been broadened, but ignore today's law insofar as it appropriately limits the scope of donor disclosure.

Argument

I. Standard of Review

This Court reviews orders granting summary judgment *de novo*. *See, e.g., McDonald v. Alexander*, 121 Nev. 812, 815 (2005). Moreover, the outcome of this case depends upon questions of statutory interpretation: the meaning of "advocate expressly" under NRS 294A.004 (2007), as well as the scope of the PAC reporting required by NRS 294A.140 (2007) and NRS 294A.210 (2007). This Court also reviews questions of statutory interpretation *de novo*. *See, e.g., Eggleston v. Costello (In re Estate of Thomas)*, 116 Nev. 492, 494 (2000).

II. The Secretary's interpretation of Nevada law, as upheld below, subjects entities to PAC-style reporting requirements, regardless of whether they have a major purpose of influencing elections. Such a broad disclosure requirement cannot be harmonized with the First Amendment's protections for political freedoms, and is both facially unconstitutional and unprecedented.

Citizen Outreach is not the first appellant to challenge the Secretary of State's reading of Nevada's PAC reporting requirements. In *AAF v. Miller*, 2012 Nev. Unpub. LEXIS 287, Secretary Miller sued to compel disclosure of all contributors to Alliance for America's Future ("AAF"), in connection with activity which the Secretary maintained fell under NRS 294A.004 (2007). AAF responded by, among other things, challenging the Secretary's reading of "advocate expressly," because it did not believe its activity fell under the definition of that term. This Court declined to rule on that issue, however, because "the centerpiece statute, NRS 294A.004, was materially amended…[t]hus, the question presented is not likely to repeat in future cases." *Id.* at *6. The Secretary's breathtakingly broad view of the law and zealous attempts to enforce it, however, have brought the issue—quite rightly considered moot by this Court in 2012—back to the fore.

a. Under United States Supreme Court precedent, comprehensive contributor reports may only be required of organizations with the major purpose of influencing elections.

The Secretary seeks the general financial supporters of organizations engaging in a modest quantity of speech, speech that does not call for a vote for or against a candidate. This invasive endeavor bears comparison to the practices reviewed by the United States Supreme Court in the civil rights cases of the 1950's and 1960's. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963).

In these cases, state governments sought the names and addresses of NAACP supporters. In response, the Supreme Court concluded that it is "an essential prerequisite to the validity of…[state action which] intrudes into the area of constitutionally protected rights of speech, press, association[,] and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson*, 372 U.S. at 546. The Court found such an interest lacking in the context of limited issue speech. *See also NAACP*, 357 U.S. at 462 ("[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order" as a "requirement that adherents of particular…political parties wear identifying arm-bands.")

The Supreme Court adopted this approach in *Buckley v. Valeo*, 424 U.S. 1, from which NRS 294A.004 borrowed the term "advocate expressly." There, the Court noted that "[t]he constitutional right of association…stem[s] from the…recognition that '[e]ffective advocacy of both public and private points of view…is undeniably enhanced by group association.'" *Id*. at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460). Acting to safeguard this liberty, the Court stated explicitly that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment

rights.*"* *Buckley* at 66. The Court was further concerned by "the invasion of privacy of belief" generated by disclosure, given that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." *Id*. at 66 (quotation and citation omitted).

At the time of the *Buckley* decision, federal campaign finance law required disclosure from "political committees," a term defined only as organizations making "contributions" or "expenditures" over a certain threshold amount. *Id*. at 79. Since such a vague definition "could be interpreted to reach groups engaged purely in issue discussion," the Court promulgated the "major purpose" test to distinguish between entities subject to PAC reporting and those that were exempted from burdensome disclosure requirements. *Id*. The "major purpose" test is straightforward: the government may compel contributor information from "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. This is permissible *only* because such an organization's expenditures "are, by definition, campaign related." *Id*. Consequently, donors may be assumed to give to such organizations to further their purpose: influencing campaigns. But that assumption does not hold for organizations lacking such a purpose.

b. Absent a finding of major purpose, the Supreme Court has blessed compulsory reporting of only those contributors who earmark their contributions for "express advocacy."

In the context of an organization *without* "the major purpose" of supporting or opposing a candidate, the *Buckley* Court emphasized that "when the maker of the expenditure is…an individual other than a candidate or a group other than a 'political committee'–the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79. To insure the reporting requirements applicable to non-major-purpose organizations were "not impermissibly broad," the Court "construe[d] 'expenditure' for purposes of that section…to reach only funds used for

communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

Thus, absent a finding of major purpose, the Court deemed disclosure constitutionally appropriate *only* for an organization's earmarked political contributions or for an organization's express advocacy expenditures. *Id*. at 80. Further reiterating the narrow scope of this activity, the Court defined the term "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n. 108, incorporating by reference *id*. at 44 n. 52. These would become known as "magic words" of express advocacy. "This reading," the Court reasoned, "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

In short, the Court found that compelled disclosure of general contributors—which had long been constitutionally disfavored—can only be required of groups insofar as they exist to expressly advocate a particular electoral result. In such cases, donors may be presumed to *know* and *intend* that their money be used to unambiguously and in express terms call for a particular result in an election. Alternatively, if a contributor earmarks his or her donation for such purposes, then disclosure of that particular contributor is appropriate. This dual regime was the law of the land following *Buckley*—and the law of Nevada in 2010.

c. These two thresholds for contributor disclosure have been universally adopted by state and federal courts, including this one.

The federal courts of appeals have uniformly stated that "a political committee may 'only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) (quoting *Buckley* at 79); *Emily's List v. FEC*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009)

(noting in First Amendment challenge to FEC regulations governing how nonprofits raise and spend money for political speech, that such "regulations apply only to those non-profits that must register with the FEC as political committees—namely, groups that receive or spend more than $1000 annually for the purpose of influencing a federal election and whose 'major purpose' involves federal elections.") (citing *Buckley* at 79).

Similarly, "disclosure laws may not impose overly burdensome administrative costs and organizational requirements for groups…'whose major purpose is not campaign advocacy, but who occasionally make independent expenditures.'" *Cal Pro-Life Council, Inc., v. Getman*, 328 F. 3d 1088, 1104 n. 21 (9th Cir. 2003) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)).

A particularly germane example demonstrating the universal recognition of these two triggers comes from *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), upon which the Nevada Legislature explicitly relied in enacting SB 246.[5] In *McKee*, the United States Court of Appeals for

[5] The Legislative Counsel's Digest for SB 246 notes that "if the organization or entity does not have as its primary purpose affecting the outcome of any election or ballot question, it must report only those contributions received for the purpose of affecting the outcome of any election or ballot question." Moreover, the Digest explicitly indicates the Legislature's intent to rely upon the statutes found constitutional as construed in *McKee*:

> The provisions of this bill requiring such organizations and entities to register with the Secretary of State as committees for political action and comply with campaign reporting requirements are modeled on statutes enacted by the State of Maine. (Me. Rev. Stat. Ann. tit. 21-A §§ 1051-1063) The Maine statutes and similar statutes from other jurisdictions have been upheld as constitutionally valid elections laws because they promote an informed electorate by providing voters with pertinent and valuable information about organizations and entities that finance and disseminate election-related speech.

Id. (Citing *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34 (1st Cir. 2011); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697

the First Circuit considered Maine's political committee reporting requirements, which provided for "major-purpose PACs" and "non-major-purpose PACs" as follows:

> [an organization which] has as its major purpose initiating, promoting, defeating or influencing a candidate election, campaign or ballot question must register as a PAC in Maine if it receives contributions or makes expenditures aggregating more than $1,500 in a given calendar year for that purpose…Maine law [also] requires that an organization register as a PAC if it does not have as its major purpose promoting, defeating or influencing candidate elections but receives contributions or makes expenditures aggregating more than $5,000 in a calendar year for the purpose of promoting, defeating or influencing in any way the nomination or election of any candidate to political office.

McKee at 42 (citations and quotation marks omitted). The First Circuit found the Maine law constitutional by narrowly construing the scope of activity triggering compulsory contributor reporting, limiting the term "influence" to include only "communications and activities that expressly advocate for or against [a candidate] or that clearly identify a candidate by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate." *McKee* at 66-67.

This reflects adoption of the constitutional protections articulated in the civil rights cases and elaborated upon in *Buckley*:

> The First Amendment's guarantee of free speech applies with special vigor to discussion of public policy and the qualifications of political candidates. Indeed, "there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." Accordingly, "the First Amendment affords the broadest protection to such political expression in order 'to ensure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

F.3d 464 (7th Cir. 2012); *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012); *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)).

McKee at 51 (citing *Buckley* at 14; *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966); quoting *Buckley* at 14 (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)) (alterations omitted)).[6]

Nevada courts have also refused to require disclosure of contributions not earmarked for express advocacy. In *AAF v. Miller*, 2012 Nev. Unpub. LEXIS 287, for example, the Secretary sued for disclosure of all AAF's contributors nationwide based upon his conclusion that the organization had engaged in express advocacy. AAF asserted that "the definition of 'committee for political action' in NRS 294A.0055 is rendered unconstitutional by its lack of a 'major/primary purpose' limitation." *Id.* at *6. This Court declined to address the issue,[7] and by the time the appeal returned to the district court, SB 246 had been enacted. *Miller v. AAF*, No. 10 OC 00208 1B, Order Granting and Denying in Part Plaintiff's Motion for Summary Judgment (November 13, 2013) at 6. The district court subsequently limited disclosure to "all donor(s) who contributed more than $100 (including any in-kind contributions) and whose contributions were used in or traceable to the creation or dissemination of the Advertisement" at issue in that case. *Id.* at 18.

In short, the district court in *AAF v. Miller* incorporated the dual trigger regime existing in current Nevada law, even though that case involved activity during the 2010 election. This was a

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[6] Numerous federal district courts made similar findings. *See, e.g., FEC v. Machinists Non-partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1311 (S.D. Ala 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 174-76 (D. Me. 1999); *N.Y. Civil Liberties Union, Inc. v. Action*, 459 F. Supp. 75, 84 n.5, 89 (S.D.N.Y. 1978).

[7] This Court declined to address the major purpose challenge because it "was not developed before this district court." *Id.* at *6. This Court has discretion to decide issues of constitutional significance raised for the first time on appeal. *See, e.g., Garcia v. Prudential Ins. Co. of Am.,* 293 P.3d 869, 872 (Nev. 2013) (electing to address Constitutional point for the first time on appeal to clarify Nevada law in light of Supreme Court precedent). *Cf. Spears v. Spears*, 95 Nev. 416, 418 (1979) ("This court will not consider constitutional issues which are not necessary to the determination of an appeal.") (citation omitted). The *AAF* Court noted, "Alliance's efforts to assert a major/primary purpose argument on appeal illustrates the problem in attempting plenary appellate review in the context of an interlocutory appeal from a preliminary injunction order." *Id.* at *7-8. Review of the primary/major purpose issue is appropriate here because of the fundamental constitutional rights it implicates, which will not be subject to review by any other court.

correct reading of the statute—which ties "contribution" to "expenditures," which are express advocacy—and of constitutional law. The district court in this case should have done the same and, in the absence of a major purpose determination, limited disclosure to earmarked contributors. Instead, it issued a decision that was both facially unconstitutional and unprecedented.

III. Contrary to the ruling below, the Ninth Circuit's holding in *FEC v. Furgatch* does not compel—or even support---the Secretary's reading of "advocate expressly."

a. In 2010, Nevada's statutes lacked a definition of "advocate expressly." Consequently, this Court must interpret that phrase as it was used in 1997, when it was adopted by the Legislature.

The Legislature added the phrase "advocate expressly" to NRS 294A.004's definition of "expenditure" in 1997, with SB 215. It did not define this term, however, until 2011. *See* AB 81 (codified at NRS 294A.0025). Given this absence of statutory definition in 2010, the 1997 understanding of the term governs its meaning here.

As noted previously, express advocacy is a campaign finance term of art originating with *Buckley v. Valeo*, where the Supreme Court limited regulable political speech to ads bearing "magic words." *Id.* at 44 n 52. By 1997, several federal courts of appeals had considered the meaning of express advocacy, and all but one had *explicitly* limited the term's application to *Buckley*'s "magic words." *FEC v. Christian Action Network, Inc*., 110 F.3d 1049, 1053 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 470-71 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (en banc). *See also W. Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W.Va. 1996). *But see FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

The district court chose not to apply *Buckley*, or any of the other cases on the books in 1997 which identified the presence of "magic words" as essential to a finding of "express advocacy." Instead, it relied upon the Ninth Circuit's decision in *FEC v. Furgatch*, which held that "magic words" were not necessarily a precondition to an express advocacy finding. *Furgatch* still required,

however, that in order to constitute express advocacy a communication "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch*, 807 F.2d at 864.

Thus, in 1997, the overwhelming weight of authority construed "express advocacy" as requiring "magic words." *Furgatch* was alone in seeing things differently, and that decision was itself carefully limited.

b. The recent experience of the Colorado Supreme Court is instructive. In 2012, that court interpreted "express advocacy" under a 2002 state law, rejected *Furgatch*, and required "magic words."

In *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248 (2012), the Colorado Supreme Court was asked to interpret a 2002 constitutional amendment which included a reference to express advocacy in its definition of "expenditure." COLO. CONST. art. XXVIII, § 2(8) (2012). Noting that "[t]he electorate, as well as the legislature, must be presumed to know the existing law at the time it amends or clarifies that law" the court considered the "settled definition of 'express advocacy' when the voter initiative was adopted by the citizens of Colorado in 2002." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d at 1254 (alterations, citation, and quotation marks omitted).

The Supreme Court proceeded to affirm the Court of Appeals's conclusion that, "at the time article XXVIII was passed by the voters, the definition of express advocacy appears to have been reasonably settled in federal and state case law." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 683 (Colo. Ct. App. 2010); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d at 1258. Specifically, express advocacy required "magic words:"

> Addressing a matter of first impression, we conclude that "expressly advocating the election or defeat of a candidate," as that phrase is used in the definition of "expenditures" in the Colorado Constitution, encompasses only communications using the so-called "magic words" of *Buckley*, 424 U.S. at 44 n.52, and words substantially similar or synonymous thereto, and requires an express exhortation that the reader, viewer, or listener take action to elect or defeat a candidate.

Colo. Ethics Watch v. Senate Majority Fund, LLC, 275 P.3d at 676.

The Colorado courts also explicitly declined to rely upon *Furgatch*, noting that although its example "might support an argument that the federal definition of express advocacy was still in flux at the time Colorado voters amended our state constitution, such definitions were not binding on state courts in their interpretation of state campaign finance laws." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d at 685 (citation omitted); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d at 1256 ("Ethics Watch argues that under the plain meanings of the words 'express' and 'advocacy,' the definition of "expenditure"…was clearly intended to cover all ads that unmistakably communicate support or opposition to a candidate. This interpretation of article XXVIII, however, would require us to ignore the settled definition of "express advocacy" that existed at the time that Amendment 27 was adopted by the voters" (citation omitted)).

It is perhaps tempting to accord *Furgatch* more weight in Nevada than in Colorado, given that it is a decision of the Ninth Circuit. This is improper. "Where the federal circuits are in conflict, the authority of the Ninth Circuit…is entitled to no greater weight than decisions of other circuits." *Kindred v. Second Judicial District Court*, 116 Nev. 405, 414 (2000) (citing *Elliot v. Albright*, 257 Cal Rptr. 762, 765 (Cal. Ct. App. 1989)). The *only* decisions that bind this Court in adjudicating matters of state law are those of the United States Supreme Court. *See, e.g., Heller v. Give Nev. a Raise, Inc.*, 120 Nev. 481, 484 (2004) ("[d]ecisions of the United States Supreme Court are binding on Nevada courts under Article 1, Section 2 of the Nevada Constitution"); *Worthington v. District Court*, 37 Nev. 212, 235 (1914) (considering that "the Supreme Court of the United States…is the final arbiter of questions relating to the federal constitution.")

The district court below reached the opposite result, and relied almost entirely upon a decision of the Ninth Circuit Court of Appeals, rather than *Buckley* or the overwhelming weight of authority from other federal courts. This error stemmed from a misreading of statutory history.

c. A complete reading of the legislative history demonstrates that the Nevada Legislature incorporated the *Buckley* standard for express advocacy when it enacted SB 215.

The district court's conclusion that the Legislature intended to incorporate a *Furgatch* test for express advocacy relies upon a single line in the legislative history of SB 215 (1997). Indeed, the only direct support for this conclusion comes from a statement by deputy legislative counsel Sue Matuska that—as the district court acknowledged—"did not refer to *Furgatch* by name." J. App. at 103. Instead, Ms. Matuska merely noted "that generally express advocacy requires…'magic words,'" and "[w]ithout these words…the determination will be made upon the context of the entire publication." J. App. at 103 (quoting Minutes of the Senate Committee on Government Affairs, p. 8 (April 7, 1997)). *See also* J. App. at 41 (same).

A complete reading of the legislative history, however, demonstrates that the Legislature understood *Buckley*'s "magic words" as the standard for express advocacy in 1997. Indeed, "[w]hen a legislature adopts language that has a particular meaning or history, rules of statutory construction…indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81 (2004). More pointedly, a single deputy counsel's off-hand statement does not provide adequate evidence of the Legislature's intent.

Indeed, Ms. Matuska's single statement is not representative of the overall legislative history of SB 215 (1997). The statement considered SB 215 *as introduced*, before it was amended to include the "advocate expressly" language. *Compare* SB 215 69th Leg., (Nevada 1997) (As Introduced)

(making no changes to NRS 294A.004, thereby retaining definition of "campaign expenses" as all those "to further directly" election or defeat of a candidate) *with* SB 215 69th Leg., (Nevada 1997) (First Reprint) § 17 (substituting term "advocate expressly" for "to further directly.") Indeed, this amendment was made in response to legislators' concern about "whether SB 215 clearly differentiates between express advocacy and issue advocacy or whether language should be clarified." Minutes of the Senate Committee on Gov't Affairs, Hearing on SB 215 (April 7, 1997).

At least as much of the legislative history—including other statements by legislative counsel, and SB 215 as enacted—indicates a specific reliance on Supreme Court precedent generally, and *Buckley* in particular. Though the minutes of the hearing on SB 215 never mention *Furgatch*, they make multiple references to the United States Supreme Court, and mention *Buckley* by name.[8] In fact, Ms. Matuska herself describes the proposed disclosure requirements as constitutional specifically *because* they are derived from *Buckley*: "[t]he United States Supreme Court, [Ms. Matuska] elucidated, has said…if the expenditure-disclosure requirements are narrowly construed,

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[8] The Minutes of the Senate Committee on Gov't Affairs, Hearing on SB 215 (April 7, 1997) note:

> Ms. Matuska mentioned a question was raised as to the constitutionality of the requirement mandating people in groups, including political parties, report the contributions received in excess of $100 along with the name of the contributor. *She pointed out the United States Supreme Court has held in Buckley v. Valeo* that it is constitutional to require disclosure of such contributions with the threshold of $100;
>
> Senator Raggio opined some indication should be added to differentiate between express and issue advocacy. Ms. Matuska agreed the bill could be amended in this way, though *she expressed concern regarding the definitions as if the Supreme Court alters its concept of those terms at a later date, then this provision would need to be changed as well.*

(emphases supplied).

applying only to express advocacy of the election or defeat of a candidate, then they would be constitutional." *Id.* And in 1997, *Buckley* express advocacy meant "magic words."[9]

i. Rather than a rejection of *Buckley*, *Furgatch* is the exception that proves the rule: a high bar for express advocacy.

Furgatch does not decide this case, but even that decision sets a high bar for express advocacy. The district court concluded that "in Nevada, express advocacy extends beyond just *Buckley*'s magic words," J. App. at 102, but did not explore what standard exists in its place. Thus, it avoided a crucial analytical step: determining whether the Flyers could be interpreted as something other than express advocacy—however defined. In this regard, *Furgatch* can be instructive. The ad at issue there read:

> The President of the United States continues degrading the electoral process and lessening the prestige of the office...And we let him…Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds…He continues to cultivate the fears, not the hopes, of the voting public…His meanness of spirit is divisive and reckless…If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT.

Furgatch, 807 F.2d at 858.

Attempting to apply *Buckley*, and noting that, "whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call," *id.* at 861, the court laid out a three-part test for making that assessment. "First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning." *Id.* at 864. In this regard, the court noted that the ad before it "directly attacks a candidate, not because of any stand on the issues of the election, but for his

[9] Moreover, to the extent the 1997 Legislature was constructively aware of *Furgatch*, it did not adopt a definition addressing the need (or lack thereof) for "magic words." It was only in 2011 that it passed AB 81 (codified at NRS 294A.0025 (2011)).

personal qualities and alleged improprieties in the handling of his campaign." *Id.* at 865. It reiterated the limiting principle ignored below: that the "standard [for express advocacy] is designed to limit the coverage of the disclosure provision 'precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" *Id.* at 860 (quoting *Buckley* at 80). Thus, *Furgatch* did not reject *Buckley*. It simply found that, on the facts before it, the nature of the advocacy was so unmistakable and so precise that the communication at issue was susceptible of no other reasonable interpretation than as a command to vote against President Carter.

"Second, speech may only be termed 'advocacy' if it presents a clear plea for action…." *Id.* at 864. The *Furgatch* decision turned on the court's conclusion that "[r]easonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'" *Id.* at 865. The court took pains to "emphasize that if *any* reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements," and was again careful to note that, "[t]his is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act." *Id.* at 864 (emphasis supplied). Here again, *Furgatch* did not establish the malleable, permissive test that the district court applied. It simply found that the communication before it was susceptible to no reasonable alternative reading other than express advocacy, as that term was used in *Buckley*.

"Finally," the court concluded, "it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." *Id.* at 864. Thus, even in *Furgatch*, had the ad urged the reader to call the President and tell him to modify his behavior—or even cry out for impeachment—this would

not have qualified as "express advocacy." This is because, with a slightly different script, the communication could plausibly have been read as something other than an appeal "urging the public to [reject] Carter at the polls." *Id.* at 865.

Furgatch has also been considered an outlying opinion given the extent to which it considered context in finding express advocacy. The court considered, in addition to the ad's "DON'T LET HIM DO IT" language, that the communication at issue had been disseminated via full-page ads in national newspapers circulated mere days before a presidential election. But it also explicitly emphasized the limited importance of context in making an express advocacy determination—an element of the holding that the district court overlooked. Indeed, *Furgatch* distinguished express advocacy from other judicial evaluations in which context plays a role. "When the constitutional and statutory standard is 'express advocacy,'" the court noted, "the weight that we give to the context of speech declines considerably. Our concern here is with the clarity of the communication rather than its harmful effects. *Context remains a consideration, but an ancillary one, peripheral to the words themselves*." *Id.* at 863 (emphasis supplied). Thus, *Furgatch* reiterated that findings of express advocacy are not to be considered lightly, and laid out a three-part test for making that determination.

ii. The Ninth Circuit has recognized that courts working to apply *Furgatch* misread the decision, grossly expanding its scope, and relying upon context to an extent which even *Furgatch* does not support.

As the Ninth Circuit has taken pains to reiterate, *Furgatch* does not establish the permissive standard that the district court applied below. Indeed, various lower courts have uniformly rejected an over-extension of the decision's consideration of context.

For example, in *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003), the court explicitly rejected state regulators' argument that, under *Furgatch*, the court was bound to uphold "regulation of those communications that when taken as a whole and in context

unambiguously urge a particular result in an election." *Id.* at 1098 (quotation marks and citation omitted). While recognizing that "*Furgatch* instructs that the communication may be considered 'as a whole' when determining express advocacy," the court noted in the same breath that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy. 'Context,' we emphasized, 'remains a consideration, but an ancillary one, peripheral to the words themselves.'" *Id.* (quoting *Furgatch*, 807 F.2d at 863) (emphasis in original).

Other courts—including state courts—have carefully limited their readings of *Furgatch*. In *Governor Gray Davis Committee v. Court of Appeals of California*, 125 Cal. Rptr. 2d 534 (Cal. Ct. App. 2002), a California appellate court interpreted a state statute that defined "expenditure" to include payments "used for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate." The court held that this definition must be "limited in accordance with the First Amendment mandate 'that a state may regulate a political advertisement only if the advertisement advocates in express terms the election or defeat of a candidate.'" *Id.* at 551 (quoting *Chamber of Commerce of United States v. Moore*, 288 F.3d 187, 190 (2002)). It specifically rejected the argument that *Furgatch* allowed an expansive reading of "expenditure," noting, "[t]he *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted in *Buckley*…Instead, we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate." *Id.* (citations and quotation marks omitted).

Similarly, *Washington State Republican Party v. Public Disclosure Commission*, 4 P.3d 808, 812 (Wash. 2000), dealt with the precise type of communication at issue here—a "Tell Gary Locke" ad—and noted the limited role of context in an express advocacy determination. Washington state regulators urged "that if this court reaches the question, [the Washington Supreme Court should]

follow the Ninth Circuit's approach in *Furgatch.*" *Id*. at 820. The court noted that "*Furgatch* modified, to some extent, the standard of *Buckley*," but also reiterated that, even under *Furgatch*, [i]ssue advocacy thus does not become express advocacy based upon timing. The right to freely discuss issues in the context of an election, including public issues as they relate to candidates for office, is precisely the kind of issue advocacy the Court recognized was beyond the reach of regulation." *Id*. at 820-21. It explained why this heavy reliance upon context is inappropriate, noting, "[t]he most effective political speech respecting issues vis-a-vis candidates may well occur in the thick of the election campaign." *Id*. at 821.

Moreover, the Washington Supreme Court explicitly rejected *Furgatch* itself: "*Furgatch*'s context approach invites too much in the way of regulatory and judicial assessment of the meaning of political speech. *Buckley* itself was concerned with this problem." *Id.* (citations omitted). *See also Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969 (1999).[10]

d. Even if *Furgatch* controlled this Court's reading of express advocacy under Nevada law, no proper application of that case could find that the Flyers constitute express advocacy.

Even if *Furgatch* bound this Court—or if the Legislature had mentioned, considered, or incorporated the *Furgatch* standard for express advocacy—the district court's ruling would still be in

[10] Where Iowa Administrative Code defined express advocacy in a manner "which tracks the language approved by Buckley," *Id.* at 969, and the statute at issue defined it under 11 C.F.R. 100.22(b) (similar to the *Furgatch* standard), the Eighth Circuit Court of Appeals noted: "[t]o avoid uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in *Buckley*, established a bright-line test," which concentrated "on whether the communication contains 'express' or 'explicit' words of advocacy for the election or defeat of a candidate. In contrast, the focus of the challenged definition is on what reasonable people or reasonable minds would understand by the communication. The definition does not require express words of advocacy." *Id*. (citations and quotation marks omitted). Since "the State's definition of express advocacy creates uncertainty and potentially chills discussion of public issues," there was likelihood of the Right to Life committee's success on the merits to protect "core First Amendment freedoms." *Id*. at 970.

error. Indeed, although the district court purported to rely upon *Furgatch*, the three-part analysis that case requires appears nowhere in its opinion.

i. The Fiddling Flyer

The Fiddling Flyer does not satisfy the rigorous three-part test for express advocacy outlined in *Furgatch*. First, it is not "unmistakable and unambiguous, suggestive of only one plausible meaning." *Furgatch*, 807 F.2d at 864. According to the district court, the Fiddling Flyer "attacks Mr. Oceguera's performance in the legislature by characterizing certain bills as 'worthless' and 'busy work,' and equating this to fiddling '[w]hile Nevada is burning.'" The court concludes, "this Flyer constitutes express advocacy because, like the Nice Work Flyer, it attacks Mr. Oceguera's character, and it also attacks his legislative record, which is directly related to his qualifications and fitness for the office of assemblyman." J. App. at 106. But the unmistakable and unambiguous attack on Mr. Oceguera as a candidate for office—a key finding in the *Furgatch* decision—is lacking here. The Fiddling Flyer focuses on legislation, and as such, could read as a call for better legislation, both from Mr. Oceguera and his colleagues in the Assembly.

Moreover, the Fiddling Flyer does not "command" (by presenting a clear plea for action, such as *Furgatch's* phrase "DON'T LET HIM DO IT"), nor does it make clear what action is advocated. The district court merely made the conclusory assertion that, "the only way of ending the 'fiddling' is to vote Mr. Oceguera out of office." J. App. at 106. But reasonable minds could also read this communication in myriad ways, including as a call to contact the sitting legislator and urge him to pass better laws. Thus, the high bar set by *Furgatch* has not been met, and the Fiddling Flyer is not regulable as express advocacy, as it can indeed be read as something other than "an exhortation to vote for or against a specific candidate."

ii. The Nice Work Flyer

Similarly, the Nice Work Flyer does not satisfy the *Furgatch* test for express advocacy. The Flyer is not "unmistakable and unambiguous, suggestive of only one plausible meaning," nor does it attack Mr. Oceguera based upon personal qualities or campaign improprieties. *Furgatch*, 807 F.2d at 864. The district court characterized the Nice Work Flyer as "claiming that [Mr. Oceguera] has received 'double pay,' 'gamed the system,' 'He's sticking us with the bill,' and he is 'Milking the Taxpayers.'" J. App. at 104 (capitalization in original). This, the district court concluded, "implies that this is illegal or immoral." J. App. at 105. But the process by which individuals holding government jobs also serve in the Legislature, and the numerous ways this benefits them financially, is a legitimate question of public policy, rather than a call to vote. Nor is it the only issue mentioned by the flyer.

Furthermore, the Nice Work Flyer does not "command, presenting a clear plea for action." *Furgatch*, 807 F.2d at 864. The district court summarily concludes that the language "[i]t's time to tell John Oceguera that he needs to work like the rest of us!" must be express advocacy because "the only way the reader can 'tell' Mr. Oceguera 'to work like the rest of us' is by voting him out of office." J. App. at 105. But "[i]t's time to tell John Oceguera…"may mean precisely that, and bears no resemblance to a command like "DON'T LET HIM DO IT."

Similarly, the statement does not present a clear plea for action. The district court ignores the many ways citizens may communicate with their elected representatives—such as calling, writing, tweeting, and visiting the Legislature—that do not involve casting a vote. Moreover, given that the Nice Work Flyer criticized Mr. Oceguera for receiving a firefighter salary while employed as a legislator, the reader could have implored Mr. Oceguera to "work like the rest of us," by urging him to stop receiving his salary from the fire department, petitioning the fire department itself, or calling for legislation that prevents legislators from receiving dual compensation from the State.

Finally, the context of the Flyers does not change this result. As noted above, even the *Furgatch* court insists that context is merely a "peripheral" and "ancillary" factor in making an express advocacy determination, and proximity to an election cannot transform a communication into express advocacy. Indeed, the context in which the Flyers were distributed is quite different from the context of the communication considered in *Furgatch*. The *Furgatch* communication was disseminated via full-page ad in the *New York Times* one week before the presidential election, and in the *Boston Globe* three days before the presidential election. *Furgatch*, 807 F.2d at 858. Thus, the Ninth Circuit noted

> Our conclusion is reinforced by consideration of the timing of the ad. The ad is bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in. It refers repeatedly to the election campaign and Carter's campaign tactics. Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

Id. at 865. By contrast, the record here lacks any indication whatsoever that the Flyers were distributed under similar circumstances.

IV. At a minimum, only one version of Nevada campaign finance law—the one applicable when Citizen Outreach distributed the Flyers, or the one applicable now—can control.

The district court upheld an interpretation of Nevada campaign finance law that considers legislative amendments insofar as they broaden the pivotal definition of express advocacy, but ignores them insofar as they limit those entities subject to onerous PAC disclosure. This violates several principles of statutory construction in addition to those already discussed.

First, the district court's reading of Nevada law imposes PAC reporting absent either a finding of primary purpose, or an "earmarking plus express advocacy" limitation on disclosure. This violates *Buckley*'s pronouncement regarding donor disclosure, and thus, the

> rule of construction to the effect that the legislature is presumed to have intended to legislate constitutionally, and that, as between two possible constructions of an

> ambiguous statute, or an ambiguous word or phrase therein, that construction should be applied which will lead to the constitutionality of the act, in preference to the construction which would lead to its unconstitutionality.

Orr Ditch & Water Co. v. Justice Court of Reno Township, 64 Nev. 138, 162 (1947) (citations omitted).

The district court's decision also yields an unjust result, in violation of the principle that justice and effect are to be considered in construing statutes. In the words of this Court,

> Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice, it would seem that the effect of the statute should be of primary concern. If this is so, the effect of a suggested construction is an important consideration and one which the court should never neglect. Consequently, where the language of the statute is ambiguous or susceptible to more than one construction, the court should not hesitate to consider the consequences which will follow the adoption of a particular construction, in determining the question whether the asserted construction represents the legislative intent.

Orr Ditch & Water Co. v. Justice Court of Reno Township, 64 Nev. at 172 (citation omitted).

Here, the district court allowed the Secretary to impose a level of disclosure upon Citizen Outreach which is *unprecedented* absent a finding of primary purpose. This, to be sure, is an unjust result, especially after the fact. Even more troubling, however, are the potential consequences for all speakers should the decision below stand. This action sets the dangerous precedent of allowing an elected official to cobble together certain statutory amendments—ignoring others—and retroactively impose this Frankenstein law against independent speakers. This undermines justice for Citizen Outreach, and potentially all organizations espousing views different from the opinions of those in power.

Finally, in seeking to read statutory amendments as clarifying the law for some purposes but not others, the Secretary violates his own principle of statutory construction that, "when a doubtful interpretation is made clear through subsequent legislation, that legislation is persuasive evidence of what the legislature originally intended." J. App. at 42 (citation omitted). In construing 2010 law, the

Secretary seeks to consider subsequent legislation insofar as it broadens the definition of "express advocacy," but ignore subsequent legislation insofar as it limits reporting to those entities with a major purpose of influencing elections, or those who receive donations earmarked for express advocacy. But just as the doubtful interpretation of "advocate expressly" was clarified, so was doubt about the level of activity required to trigger political committee status and the type of disclosure that status entailed. Thus, the Secretary, and this Court, must choose which law controls: the law at the time of the communication—or two laws passed *after* the communication was distributed. In either case, Citizen Outreach cannot be asked to provide this level of invasive disclosure for these specific flyers.

Conclusion

For the forgoing reasons, Citizen Outreach respectfully requests that this Court vacate the district court's decision below and schedule the case for oral argument.

Dated this 25th day of February, 2014.

Respectfully Submitted,

Craig A. Mueller
Nevada Bar No. 4703
John J. Shimer
Nevada Bar No. 11458
MUELLER, HINDS & ASSOCIATES
600 South Eighth Street
Las Vegas, Nevada, 89101
Telephone: (702) 940-1234
Facsimile: (702) 940-1235

Allen Dickerson*
Anne Marie Mackin*
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
Telephone: (703) 894-6800
Facsimile: (703) 894-6811
*admission *pro hac vice* pending

Certificate of Compliance

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 12 point.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 35 pages.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of February, 2014.

John J. Shimer
Nevada Bar No. 11458
MUELLER, HINDS & ASSOCIATES
600 South Eighth Street
Las Vegas, Nevada, 89101
Telephone: (702) 940-1234
Facsimile: (702) 940-1235