

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 CITIZEN OUTREACH, INC.,

3 Appellant,

4 vs.

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

7 Respondent.

Supreme Court No.: 63784

District Court Case No.: 110C003601B

Electronically Filed  
Feb 25 2014 04:51 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

8  
9 **OPENING BRIEF OF APPELLANT CITIZEN OUTREACH, INC.**

10 MUELLER, HINDS & ASSOCIATES, CHTD.

11 Craig A. Mueller, Esq.

12 Nevada Bar No. 4703

13 John J. Shimer, Esq.

14 Nevada Bar No. 11458

15 600 S. Eighth St.

16 Las Vegas, NV 89120

17 T: (702) 940-1234

18 And

19 Allen Dickerson\*

20 Anne Marie Mackin\*

21 CENTER FOR COMPETITIVE POLITICS

22 124 S. West Street, Suite 201

23 Alexandria, VA 22314

24 Telephone: (703) 894-6800

25 Facsimile: (703) 894-6811

26 \*pending admittance pro hac vice

27 Attorneys for Appellant

28 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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Table of Contents**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Jurisdictional Statement .....1

Issues Presented .....1

Statement of the Case.....1

Statement of Facts.....1

Summary of Argument .....5

Argument .....7

    I. Standard of Review .....7

    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.....7

        a. Under United States Supreme Court precedent, comprehensive contributor reports may only be required of organizations with the major purpose of influencing elections. ....8

        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.” .....9

        c. These two thresholds for contributor disclosure have been universally adopted by state and federal courts, including this one. ....10

    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.” .....14

        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. ....14

        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.” .....15

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 .....17

    i. Rather than a rejection of *Buckley*, *Furgatch* is the exception that proves the rule: a high bar for express advocacy.....19

    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 .....21

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 .....23

    i. The Fiddling Flyer .....23

    ii. The Nice Work Flyer .....24

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.....26

Conclusion .....28

1 **Table of Authorities**

2 CASES

3 *AAF v. Miller,*

4 2012 Nev. Unpub. LEXIS 287 .....7, 13, 15

5 *Bates v. City of Little Rock,*

6 361 U.S. 516 (1960).....8

7 *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court,*

8 120 Nev. 575 (2004).....17

9 *Buckley v. Valeo,*

10 424 U.S. 1 (1976)..... *passim*

11 *Cal Pro-Life Council, Inc., v. Getman,*

12 328 F. 3d 1088 (9<sup>th</sup> Cir. 2003) .....11, 21

13 *Colo. Ethics Watch v. Senate Majority Fund, LLC,*

14 269 P.3d 1248 (2012).....15, 16

15 *Colo. Ethics Watch v. Senate Majority Fund, LLC,*

16 275 P.3d 674 (Colo. Ct. App. 2010) .....15, 16

17 *Eggleston v. Costello (In re Estate of Thomas),*

18 116 Nev. 492 (2000) .....7

19 *Emily’s List v. FEC,*

20 581 F.3d 1 (D.C. Cir. 2009).....10

21 *Faucher v. FEC,*

22 928 F.2d 468 (1<sup>st</sup> Cir. 1991).....14

23 *FEC v. Cent. Long Island Tax Reform Immediately Comm.,*

24 616 F.2d 45 (2d Cir. 1980) .....14

25 *FEC v. Christian Action Network, Inc.,*

26 110 F.3d 1049 (4<sup>th</sup> Cir. 1997) .....14

27 *FEC v. Furgatch,*

28 807 F.2d 857 (9<sup>th</sup> Cir. 1987) ..... *passim*

*FEC v. Machinists Non-partisan Political League,*

655 F.2d 380 (D.C. Cir. 1981).....12

1 *Garcia v. Prudential Ins. Co. of Am.*,  
2 293 P.3d 869 (Nev. 2013).....13

3 *Gibson v. Fla. Legislative Investigation Comm.*,  
4 372 U.S. 539 (1963).....8

5 *Governor Gray Davis Committee v. Court of Appeals of California*,  
6 125 Cal. Rptr. 2d 534 (Cal. Ct. App. 2002).....22

7 *Heller v. Give Nev. a Raise, Inc.*,  
8 120 Nev. 481 (2004) .....16

9 *Iowa Right to Life Committee, Inc. v. Williams*,  
10 187 F.3d 963 (1999).....23

11 *Kindred v. Second Judicial District Court*,  
12 116 Nev. 405 (2000) .....16

13 *McDonald v. Alexander*,  
14 121 Nev. 812 (2005) .....7

15 *Miller v. AAF*,  
16 No. 10 OC 00208 1B, Order Granting and Denying in Part  
17 Plaintiff’s Motion for Summary Judgment (November 13, 2013) .....13

18 *NAACP v. Alabama ex rel. Patterson*,  
19 357 U.S. 449 (1958).....8

20 *Nat’l Org. for Marriage v. McKee*,  
21 649 F.3d 34 (1st Cir. 2011)..... *passim*

22 *N.M. Youth Organized v. Herrera*,  
23 611 F.3d 669 (10th Cir. 2010) .....10

24 *N.Y. Civil Liberties Union, Inc. v. Action*,  
25 459 F. Supp. 75 (S.D.N.Y. 1978) .....12

26 *Orr Ditch & Water Co. v. Justice Court of Reno Township*,  
27 64 Nev. 138 (1947) .....26, 27

28 *Richey v. Tyson*,  
120 F. Supp. 2d 1298 (S.D. Ala 2000) .....12

*Spears v. Spears*,  
95 Nev. 416 (1979) .....13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Volle v. Webster*,  
69 F. Supp. 2d 171 (D. Me. 1999) .....12

*W. Virginians for Life, Inc. v. Smith*,  
919 F. Supp. 954 (S.D. W.Va. 1996).....14

*Washington State Republican Party v. Public Disclosure Commission*,  
4 P.3d 808 (Wash. 2000) .....22

*Worthington v. District Court*,  
37 Nev. 212 (1914) .....16

STATUTES

NRAP 3(a)(1).....1

NRS 294A.004 (2007) ..... *passim*

NRS 294A.007 (2007) .....2

NRS 294A.0025 (2011) .....3, 14, 18

NRS 294A.0055 (2013) .....4

NRS 294A.140 (2007) ..... *passim*

NRS 294A.210 (2007) ..... *passim*

NRS 294A.230(2) (2013).....4

NRS 294A.420(1) (2013).....1

OTHER AUTHORITIES

AB 81 76<sup>th</sup> Leg., (Nevada 2011)..... *passim*

Minutes of the Senate Committee on Government Affairs Hearing on SB 215  
(April 7, 1997) .....17, 18

SB 215 69<sup>th</sup> Leg., (Nevada 1997) (As Introduced) .....17

SB 215 69<sup>th</sup> Leg., (Nevada 1997) (First Reprint) .....17

SB 215 69<sup>th</sup> Leg., (Nevada 1997) ..... *passim*

SB 246 77<sup>th</sup> Leg., (Nevada 2013) ..... *passim*

1  
2  
3  
4  
5  
6

**Jurisdictional Statement**

7  
8  
9  
10  
11  
12

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.

13  
14

**Issues Presented**

- 15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28
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 Ocegüera’s activities and legislative record. J. App. at 81. “The Fiddling Flyer,” J. App. at 76-78, noted that Mr. Ocegüera had two taxpayer-funded jobs and listed legislation he supported, including specific tax increases he voted for. “The Nice Work Flyer,”



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

4 It is undisputed that the Flyers do not contain “magic words” of express advocacy, exhorting  
5 a vote for or against any candidate for office. J. App. at 38. Whether the Flyers otherwise “advocate  
6 expressly” for the election or defeat of a candidate is a subject of this appeal. J. App. at 81; J. App. at  
7 82.

8  
9 In 2010, when Citizen Outreach distributed the Flyers, receiving contributions or making  
10 expenditures triggered the reporting requirements at issue here, including the requirement that an  
11 organization disclose its donors over \$100. NRS 294A.140 (2007);<sup>1</sup> NRS 294A.210 (2007).<sup>2</sup>  
12 “Contributions” were defined as money given for the purpose of making expenditures,<sup>3</sup> and  
13  
14

15  
16 <sup>1</sup> The statute provided for the reporting of campaign contributions as follows:

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

27 <sup>2</sup> Analogous statutory provision requiring reporting of “campaign expenses.”

28 <sup>3</sup> 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;

1 expenditures were defined, in pertinent part, as “[t]hose expenditures made for advertising on  
2 television, radio, billboards, posters and in newspapers; and [a]ll other expenditures made, to  
3 advocate expressly the election or defeat of a clearly identified candidate.” NRS 294A.004 (2007).  
4 The law did not contain a definition of “advocate expressly,” or any further definition of  
5 “expenditure.” Because its Flyers did not expressly advocate the election or defeat of a candidate,  
6 Citizen Outreach did not file expenditure and contribution reports in connection with their  
7 distribution.  
8

9  
10 In 2011 and 2013—that is, *after* the activity giving rise to this appeal—the Nevada  
11 Legislature amended state law in two important ways. First, in 2011, the State for the first time  
12 defined express advocacy:

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

---

20 (2) Person who is not under the direction or control of a candidate or group of  
21 candidates or of any person involved in the campaign of the candidate or group  
22 who makes an expenditure on behalf of the candidate or group which is not  
23 solicited or approved by the candidate or group;

24 (3) Committee for political action, political party, committee sponsored by a  
25 political party or business entity which makes an expenditure on behalf of a  
26 candidate or group of candidates; or

27 (4) Person or group of persons organized formally or informally, including a  
28 business entity, who advocates the passage or defeat of a question or group of  
29 questions on the ballot, without charge to the candidate, person, committee or  
30 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.

1 AB 81 76<sup>th</sup> Leg., (Nevada 2011) (codified at NRS 294A.0025).

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

7  
8 On December 1, 2011, Secretary Miller filed his First Amended Verified Complaint for Civil  
9 Penalties in the First Judicial District Court in and for Carson County. J. App. at 2. The Complaint  
10 requested civil penalties for Citizen Outreach’s 2010 failure to register as a PAC and report its  
11 contributions and expenditures, an injunction compelling the filing of those reports under NRS  
12 294A.140 and NRS 294A.210, and attorney’s fees. J. App. at 5. On January 22, 2013, the district  
13 court granted Secretary Miller’s Motion for Summary Judgment. J. App. at 108. On July 8, 2013, the  
14 district court entered a judgment ordering Citizen Outreach to pay attorneys’ fees and civil penalties,  
15  
16

17  
18 <sup>4</sup> SB 246 77<sup>th</sup> Leg., (Nevada 2013) (codified at NRS 294A.0055(1)(b)). “Committee for political  
19 action means [...] Any business or social organization, corporation, partnership, association, trust,  
20 unincorporated organization or labor union:

21 (1) Which has as its primary purpose affecting the outcome of any primary election,  
22 primary city election, general election, general city election, special election or any  
23 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

24 (2) Which does not have as its primary purpose affecting the outcome of any primary  
25 election, primary city election, general election, general city election, special election  
26 or any question on the ballot, but for the purpose of affecting the outcome of any  
27 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.”

28 *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.”)

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

### 3 4 **Summary of Argument**

5 In this and previous enforcement actions, the Secretary of State has advanced a  
6 constitutionally unsound reading of Nevada campaign finance law. Constitutional infirmities aside,  
7 the Secretary here, and the district court below, fundamentally misread the relevant, now-superseded  
8 statutes which are the subject of this appeal. As a result, this enforcement action revives the very  
9 infirmities the Nevada Legislature aimed to cure in amending the state's campaign finance  
10 framework through AB 81 and SB 246.  
11

12 The Secretary's reading of Nevada campaign finance law, as it existed in 2010, suffers from  
13 two fatal flaws.  
14

15 First, the Secretary would impose PAC status upon Citizen Outreach in a facially  
16 unconstitutional manner. Specifically, this enforcement action seeks detailed contributor information  
17 from Appellant absent a finding that Citizen Outreach has the major purpose of influencing a Nevada  
18 election. Supreme Court precedent dating back to the civil rights cases of the 1950's and 1960's, and  
19 reiterated in the seminal campaign finance decision of *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per*  
20 *curiam*), emphasizes that detailed, compulsory reporting of contributor information can only be  
21 required of organizations that exist to expressly advocate a particular result in an election. No such  
22 finding was made here.  
23  
24

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

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

4         The Legislature, in enacting AB 81, explicitly incorporated this formulation, citing an  
5 essentially identical Maine statute upheld as constitutional in *Nat’l Org. for Marriage v. McKee*, 649  
6 F.3d 34 (1st Cir. 2011). It is undisputed that the Secretary could not obtain the disclosure he seeks  
7 under this current law.  
8

9         The second flaw in the Secretary’s case is one of statutory interpretation. In 2010, Nevada law  
10 contained a reference to express advocacy, but did not define the term. Consequently, this phrase—  
11 borrowed from *Buckley v. Valeo*—must be interpreted as it was used in 1997, the year it was adopted  
12 by the Legislature via SB 215. Instead, the district court incorrectly applied *FEC v. Furgatch*, 807  
13 F.2d 857 (9<sup>th</sup> Cir. 1987), and held that express advocacy under the now-superseded statute did not  
14 require express words of advocacy. That decision ignores the overwhelming weight of authority in  
15 1997, and selectively reads legislative history as instead incorporating *Furgatch*—a case never even  
16 brought to the Legislature’s attention.  
17  
18

19         This is problematic for several reasons. First, the prevailing understanding of express  
20 advocacy in 1997 was the “magic words” test that came from the Supreme Court’s *Buckley* decision.  
21 *Furgatch* was merely a narrow application of *Buckley* to a particular, and difficult, fact pattern. It was  
22 also an outlying opinion, which may explain why there is no evidence that the Legislature considered  
23 it. Moreover, even if *Furgatch* did control the outcome of this case, no reasonable reading of that  
24 decision would convert the Flyers into express advocacy.  
25  
26

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

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

### 3 **Argument**

#### 4 **I. Standard of Review**

5  
6 This Court reviews orders granting summary judgment *de novo*. *See, e.g., McDonald v.*  
7 *Alexander*, 121 Nev. 812, 815 (2005). Moreover, the outcome of this case depends upon questions of  
8 statutory interpretation: the meaning of “advocate expressly” under NRS 294A.004 (2007), as well as  
9 the scope of the PAC reporting required by NRS 294A.140 (2007) and NRS 294A.210 (2007). This  
10 Court also reviews questions of statutory interpretation *de novo*. *See, e.g., Eggleston v. Costello (In re*  
11 *Estate of Thomas)*, 116 Nev. 492, 494 (2000).  
12  
13

#### 14 **II. The Secretary’s interpretation of Nevada law, as upheld below, subjects entities to** 15 **PAC-style reporting requirements, regardless of whether they have a major purpose** 16 **of influencing elections. Such a broad disclosure requirement cannot be harmonized** 17 **with the First Amendment’s protections for political freedoms, and is both facially** 18 **unconstitutional and unprecedented.**

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

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

4           The Secretary seeks the general financial supporters of organizations engaging in a modest  
5           quantity of speech, speech that does not call for a vote for or against a candidate. This invasive  
6           endeavor bears comparison to the practices reviewed by the United States Supreme Court in the civil  
7           rights cases of the 1950's and 1960's. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449  
8           (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Fla. Legislative Investigation*  
9           *Comm.*, 372 U.S. 539 (1963).

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

19           The Supreme Court adopted this approach in *Buckley v. Valeo*, 424 U.S. 1, from which NRS  
20           294A.004 borrowed the term “advocate expressly.” There, the Court noted that “[t]he constitutional  
21           right of association...stem[s] from the...recognition that [e]ffective advocacy of both public and  
22           private points of view...is undeniably enhanced by group association.” *Id.* at 15 (quoting *NAACP v.*  
23           *Alabama*, 357 U.S. at 460). Acting to safeguard this liberty, the Court stated explicitly that  
24           “compelled disclosure has the potential for substantially infringing the exercise of First Amendment  
25             
26             
27             
28

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

4  
5 At the time of the *Buckley* decision, federal campaign finance law required disclosure from  
6 “political committees,” a term defined only as organizations making “contributions” or  
7 “expenditures” over a certain threshold amount. *Id.* at 79. Since such a vague definition “could be  
8 interpreted to reach groups engaged purely in issue discussion,” the Court promulgated the “major  
9 purpose” test to distinguish between entities subject to PAC reporting and those that were exempted  
10 from burdensome disclosure requirements. *Id.* The “major purpose” test is straightforward: the  
11 government may compel contributor information from “organizations that are under the control of a  
12 candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* This is  
13 permissible *only* because such an organization’s expenditures “are, by definition, campaign related.”  
14  
15 *Id.* Consequently, donors may be assumed to give to such organizations to further their purpose:  
16 influencing campaigns. But that assumption does not hold for organizations lacking such a purpose.  
17

18  
19 **b. Absent a finding of major purpose, the Supreme Court has blessed compulsory**  
20 **reporting of only those contributors who earmark their contributions for**  
21 **“express advocacy.”**

22 In the context of an organization *without* “the major purpose” of supporting or opposing a  
23 candidate, the *Buckley* Court emphasized that “when the maker of the expenditure is...an individual  
24 other than a candidate or a group other than a ‘political committee’—the relation of the information  
25 sought to the purposes of the Act may be too remote.” *Id.* at 79. To insure the reporting requirements  
26 applicable to non-major-purpose organizations were “not impermissibly broad,” the Court  
27 “construe[d] ‘expenditure’ for purposes of that section...to reach only funds used for  
28



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

3 Thus, absent a finding of major purpose, the Court deemed disclosure constitutionally  
4 appropriate *only* for an organization’s earmarked political contributions or for an organization’s  
5 express advocacy expenditures. *Id.* at 80. Further reiterating the narrow scope of this activity, the  
6 Court defined the term “expressly advocate” to encompass only “express words of advocacy of  
7 election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’  
8 ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Id.* at 80 n. 108, incorporating by reference *id.* at 44 n. 52.  
9 These would become known as “magic words” of express advocacy. “This reading,” the Court  
10 reasoned, “is directed precisely to that spending that is unambiguously related to the campaign of a  
11 particular federal candidate.” *Id.* at 80.  
12  
13

14  
15 In short, the Court found that compelled disclosure of general contributors—which had long  
16 been constitutionally disfavored—can only be required of groups insofar as they exist to expressly  
17 advocate a particular electoral result. In such cases, donors may be presumed to *know* and *intend* that  
18 their money be used to unambiguously and in express terms call for a particular result in an election.  
19 Alternatively, if a contributor earmarks his or her donation for such purposes, then disclosure of that  
20 particular contributor is appropriate. This dual regime was the law of the land following *Buckley*—  
21 and the law of Nevada in 2010.  
22  
23

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

26 The federal courts of appeals have uniformly stated that “a political committee may ‘only  
27 encompass organizations that are under the control of a candidate or the major purpose of which is  
28 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)

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

7 Similarly, “disclosure laws may not impose overly burdensome administrative costs and  
8 organizational requirements for groups...‘whose major purpose is not campaign advocacy, but who  
9 occasionally make independent expenditures.’” *Cal Pro-Life Council, Inc., v. Getman*, 328 F. 3d  
10 1088, 1104 n. 21 (9<sup>th</sup> Cir. 2003) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251  
11 (1986)).

13 A particularly germane example demonstrating the universal recognition of these two triggers  
14 comes from *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), upon which the Nevada  
15 Legislature explicitly relied in enacting SB 246.<sup>5</sup> In *McKee*, the United States Court of Appeals for  
16

---

19 <sup>5</sup> The Legislative Counsel’s Digest for SB 246 notes that “if the organization or entity does not have  
20 as its primary purpose affecting the outcome of any election or ballot question, it must report only  
21 those contributions received for the purpose of affecting the outcome of any election or ballot  
22 question.” Moreover, the Digest explicitly indicates the Legislature’s intent to rely upon the statutes  
found constitutional as construed in *McKee*:

23 The provisions of this bill requiring such organizations and entities to register with the  
24 Secretary of State as committees for political action and comply with campaign  
25 reporting requirements are modeled on statutes enacted by the State of Maine. (Me.  
26 Rev. Stat. Ann. tit. 21-A §§ 1051-1063) The Maine statutes and similar statutes from  
27 other jurisdictions have been upheld as constitutionally valid elections laws because  
28 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 (1<sup>st</sup> Cir. 2011); *Real Truth About  
Abortion, Inc. v. FEC*, 681 F.3d 544 (4<sup>th</sup> Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697

1 the First Circuit considered Maine’s political committee reporting requirements, which provided for  
2 “major-purpose PACs” and “non-major-purpose PACs” as follows:

3 [an organization which] has as its major purpose initiating, promoting, defeating or  
4 influencing a candidate election, campaign or ballot question must register as a PAC  
5 in Maine if it receives contributions or makes expenditures aggregating more than  
6 \$1,500 in a given calendar year for that purpose...Maine law [also] requires that an  
7 organization register as a PAC if it does not have as its major purpose promoting,  
8 defeating or influencing candidate elections but receives contributions or makes  
9 expenditures aggregating more than \$5,000 in a calendar year for the purpose of  
10 promoting, defeating or influencing in any way the nomination or election of any  
11 candidate to political office.

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

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

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

---

27  
28 F.3d 464 (7<sup>th</sup> Cir. 2012); *Family PAC v. McKenna*, 685 F.3d 800 (9<sup>th</sup> Cir. 2012); *Spechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)).

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

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

14  
15  
16  
17 In short, the district court in *AAF v. Miller* incorporated the dual trigger regime existing in  
18 current Nevada law, even though that case involved activity during the 2010 election. This was a  
19

---

20  
21 <sup>6</sup> Numerous federal district courts made similar findings. *See, e.g., FEC v. Machinists Non-partisan*  
22 *Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981); *Richey v. Tyson*, 120 F. Supp. 2d 1298,  
23 1311 (S.D. Ala 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 174-76 (D. Me. 1999); *N.Y. Civil*  
24 *Liberties Union, Inc. v. Action*, 459 F. Supp. 75, 84 n.5, 89 (S.D.N.Y. 1978).

25 <sup>7</sup> This Court declined to address the major purpose challenge because it “was not developed before  
26 this district court.” *Id.* at \*6. This Court has discretion to decide issues of constitutional significance  
27 raised for the first time on appeal. *See, e.g., Garcia v. Prudential Ins. Co. of Am.*, 293 P.3d 869, 872  
28 (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.

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

5  
6 **III. Contrary to the ruling below, the Ninth Circuit’s holding in *FEC v. Furgatch* does  
7 not compel—or even support---the Secretary’s reading of “advocate expressly.”**

8 **a. In 2010, Nevada’s statutes lacked a definition of “advocate expressly.”**  
9 **Consequently, this Court must interpret that phrase as it was used in 1997, when  
10 it was adopted by the Legislature.**

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

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

23 The district court chose not to apply *Buckley*, or any of the other cases on the books in 1997  
24 which identified the presence of “magic words” as essential to a finding of “express advocacy.”  
25 Instead, it relied upon the Ninth Circuit’s decision in *FEC v. Furgatch*, which held that “magic  
26 words” were not necessarily a precondition to an express advocacy finding. *Furgatch* still required,  
27  
28

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

4 Thus, in 1997, the overwhelming weight of authority construed “express advocacy” as  
5 requiring “magic words.” *Furgatch* was alone in seeing things differently, and that decision was itself  
6 carefully limited.  
7

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

11 In *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248 (2012), the Colorado  
12 Supreme Court was asked to interpret a 2002 constitutional amendment which included a reference to  
13 express advocacy in its definition of “expenditure.” COLO. CONST. art. XXVIII, § 2(8) (2012). Noting  
14 that “[t]he electorate, as well as the legislature, must be presumed to know the existing law at the  
15 time it amends or clarifies that law” the court considered the “settled definition of ‘express advocacy’  
16 when the voter initiative was adopted by the citizens of Colorado in 2002.” *Colo. Ethics Watch v.*  
17 *Senate Majority Fund, LLC*, 269 P.3d at 1254 (alterations, citation, and quotation marks omitted).  
18

19 The Supreme Court proceeded to affirm the Court of Appeals’s conclusion that, “at the time  
20 article XXVIII was passed by the voters, the definition of express advocacy appears to have been  
21 reasonably settled in federal and state case law.” *Colo. Ethics Watch v. Senate Majority Fund, LLC*,  
22 275 P.3d 674, 683 (Colo. Ct. App. 2010); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269  
23 P.3d at 1258. Specifically, express advocacy required “magic words:”  
24

25 Addressing a matter of first impression, we conclude that "expressly advocating the  
26 election or defeat of a candidate," as that phrase is used in the definition of  
27 "expenditures" in the Colorado Constitution, encompasses only communications using  
28 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.

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

2  
3 The Colorado courts also explicitly declined to rely upon *Furgatch*, noting that although its  
4 example “might support an argument that the federal definition of express advocacy was still in flux  
5 at the time Colorado voters amended our state constitution, such definitions were not binding on state  
6 courts in their interpretation of state campaign finance laws.” *Colo. Ethics Watch v. Senate Majority*  
7 *Fund, LLC*, 275 P.3d at 685 (citation omitted); *Colo. Ethics Watch v. Senate Majority Fund, LLC*,  
8 269 P.3d at 1256 (“Ethics Watch argues that under the plain meanings of the words ‘express’ and  
9 ‘advocacy,’ the definition of “expenditure”...was clearly intended to cover all ads that unmistakably  
10 communicate support or opposition to a candidate. This interpretation of article XXVIII, however,  
11 would require us to ignore the settled definition of “express advocacy” that existed at the time that  
12 Amendment 27 was adopted by the voters” (citation omitted)).

13  
14 It is perhaps tempting to accord *Furgatch* more weight in Nevada than in Colorado, given that  
15 it is a decision of the Ninth Circuit. This is improper. “Where the federal circuits are in conflict, the  
16 authority of the Ninth Circuit...is entitled to no greater weight than decisions of other circuits.”  
17 *Kindred v. Second Judicial District Court*, 116 Nev. 405, 414 (2000) (citing *Elliot v. Albright*, 257  
18 Cal Rptr. 762, 765 (Cal. Ct. App. 1989)). The *only* decisions that bind this Court in adjudicating  
19 matters of state law are those of the United States Supreme Court. *See, e.g., Heller v. Give Nev. a*  
20 *Raise, Inc.*, 120 Nev. 481, 484 (2004) (“[d]ecisions of the United States Supreme Court are binding  
21 on Nevada courts under Article 1, Section 2 of the Nevada Constitution”); *Worthington v. District*  
22 *Court*, 37 Nev. 212, 235 (1914) (considering that “the Supreme Court of the United States...is the  
23 final arbiter of questions relating to the federal constitution.”)

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

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

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

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

26 Indeed, Ms. Matuska’s single statement is not representative of the overall legislative history  
27 of SB 215 (1997). The statement considered SB 215 *as introduced*, before it was amended to include  
28 the “advocate expressly” language. *Compare* SB 215 69<sup>th</sup> Leg., (Nevada 1997) (As Introduced)



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

8 At least as much of the legislative history—including other statements by legislative counsel,  
9 and SB 215 as enacted—indicates a specific reliance on Supreme Court precedent generally, and  
10 *Buckley* in particular. Though the minutes of the hearing on SB 215 never mention *Furgatch*, they  
11 make multiple references to the United States Supreme Court, and mention *Buckley* by name.<sup>8</sup> In  
12 fact, Ms. Matuska herself describes the proposed disclosure requirements as constitutional  
13 specifically *because* they are derived from *Buckley*: “[t]he United States Supreme Court, [Ms.  
14 Matuska] elucidated, has said...if the expenditure-disclosure requirements are narrowly construed,  
15  
16  
17  
18  
19

---

20 <sup>8</sup> The Minutes of the Senate Committee on Gov’t Affairs, Hearing on SB 215 (April 7, 1997) note:

21 Ms. Matuska mentioned a question was raised as to the constitutionality of the  
22 requirement mandating people in groups, including political parties, report the  
23 contributions received in excess of \$100 along with the name of the contributor. *She*  
24 *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;

25 Senator Raggio opined some indication should be added to differentiate between express  
26 and issue advocacy. Ms. Matuska agreed the bill could be amended in this way, though  
27 *she expressed concern regarding the definitions as if the Supreme Court alters its*  
28 *concept of those terms at a later date, then this provision would need to be changed as*  
*well.*

(emphases supplied).

1 applying only to express advocacy of the election or defeat of a candidate, then they would be  
2 constitutional.” *Id.* And in 1997, *Buckley* express advocacy meant “magic words.”<sup>9</sup>

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

5 *Furgatch* does not decide this case, but even that decision sets a high bar for express  
6 advocacy. The district court concluded that “in Nevada, express advocacy extends beyond just  
7 *Buckley*’s magic words,” J. App. at 102, but did not explore what standard exists in its place. Thus, it  
8 avoided a crucial analytical step: determining whether the Flyers could be interpreted as something  
9 other than express advocacy—however defined. In this regard, *Furgatch* can be instructive. The ad at  
10 issue there read:  
11

12  
13 The President of the United States continues degrading the electoral process and  
14 lessening the prestige of the office...And we let him...Carter has tried to buy entire  
15 cities, the steel industry, the auto industry, and others with public funds...He  
16 continues to cultivate the fears, not the hopes, of the voting public...His meanness of  
17 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.

18 *Furgatch*, 807 F.2d at 858.

19 Attempting to apply *Buckley*, and noting that, “whether the advertisement expressly advocates  
20 the defeat of Jimmy Carter is a very close call,” *id.* at 861, the court laid out a three-part test for  
21 making that assessment. “First, even if it is not presented in the clearest, most explicit language,  
22 speech is ‘express’ for present purposes if its message is unmistakable and unambiguous, suggestive  
23 of only one plausible meaning.” *Id.* at 864. In this regard, the court noted that the ad before it  
24 “directly attacks a candidate, not because of any stand on the issues of the election, but for his  
25  
26

27  
28 <sup>9</sup> 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)).

1 personal qualities and alleged improprieties in the handling of his campaign.” *Id.* at 865. It reiterated  
2 the limiting principle ignored below: that the “standard [for express advocacy] is designed to limit the  
3 coverage of the disclosure provision ‘precisely to that spending that is unambiguously related to the  
4 campaign of a particular federal candidate.’” *Id.* at 860 (quoting *Buckley* at 80). Thus, *Furgatch* did  
5 not reject *Buckley*. It simply found that, on the facts before it, the nature of the advocacy was so  
6 unmistakable and so precise that the communication at issue was susceptible of no other reasonable  
7 interpretation than as a command to vote against President Carter.  
8

9  
10 “Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action....” *Id.* at  
11 864. The *Furgatch* decision turned on the court’s conclusion that “[r]easonable minds could not  
12 dispute that Furgatch’s advertisement is urging readers to vote against Jimmy Carter. This was the  
13 only action open to those who would not ‘let him do it.’” *Id.* at 865. The court took pains to  
14 “emphasize that if *any* reasonable alternative reading of speech can be suggested, it cannot be express  
15 advocacy subject to the Act’s disclosure requirements,” and was again careful to note that, “[t]his is  
16 necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising  
17 regulated by the Act.” *Id.* at 864 (emphasis supplied). Here again, *Furgatch* did not establish the  
18 malleable, permissive test that the district court applied. It simply found that the communication  
19 before it was susceptible to no reasonable alternative reading other than express advocacy, as that  
20 term was used in *Buckley*.  
21  
22

23  
24 “Finally,” the court concluded, “it must be clear what action is advocated. Speech cannot be  
25 ‘express advocacy of the election or defeat of a clearly identified candidate’ when reasonable minds  
26 could differ as to whether it encourages a vote for or against a candidate or encourages the reader to  
27 take some other kind of action.” *Id.* at 864. Thus, even in *Furgatch*, had the ad urged the reader to  
28 call the President and tell him to modify his behavior—or even cry out for impeachment—this would

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

4 *Furgatch* has also been considered an outlying opinion given the extent to which it considered  
5 context in finding express advocacy. The court considered, in addition to the ad’s “DON’T LET HIM  
6 DO IT” language, that the communication at issue had been disseminated via full-page ads in  
7 national newspapers circulated mere days before a presidential election. But it also explicitly  
8 emphasized the limited importance of context in making an express advocacy determination—an  
9 element of the holding that the district court overlooked. Indeed, *Furgatch* distinguished express  
10 advocacy from other judicial evaluations in which context plays a role. “When the constitutional and  
11 statutory standard is ‘express advocacy,’” the court noted, “the weight that we give to the context of  
12 speech declines considerably. Our concern here is with the clarity of the communication rather than  
13 its harmful effects. *Context remains a consideration, but an ancillary one, peripheral to the words*  
14 *themselves.”* *Id.* at 863 (emphasis supplied). Thus, *Furgatch* reiterated that findings of express  
15 advocacy are not to be considered lightly, and laid out a three-part test for making that determination.  
16  
17  
18  
19

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

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

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

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

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

25           Similarly, *Washington State Republican Party v. Public Disclosure Commission*, 4 P.3d 808,  
26 812 (Wash. 2000), dealt with the precise type of communication at issue here—a “Tell Gary Locke”  
27 ad—and noted the limited role of context in an express advocacy determination. Washington state  
28 regulators urged “that if this court reaches the question, [the Washington Supreme Court should]

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

9  
10  
11 Moreover, the Washington Supreme Court explicitly rejected *Furgatch* itself: “*Furgatch*'s  
12 context approach invites too much in the way of regulatory and judicial assessment of the meaning of  
13 political speech. *Buckley* itself was concerned with this problem.” *Id.* (citations omitted). *See also*  
14 *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969 (1999).<sup>10</sup>

15  
16 **d. Even if *Furgatch* controlled this Court’s reading of express advocacy under**  
17 **Nevada law, no proper application of that case could find that the Flyers**  
18 **constitute express advocacy.**

19 Even if *Furgatch* bound this Court—or if the Legislature had mentioned, considered, or  
20 incorporated the *Furgatch* standard for express advocacy—the district court’s ruling would still be in  
21

22  
23 <sup>10</sup> Where Iowa Administrative Code defined express advocacy in a manner “which tracks the  
24 language approved by *Buckley*,” *Id.* at 969, and the statute at issue defined it under 11 C.F.R.  
25 100.22(b) (similar to the *Furgatch* standard), the Eighth Circuit Court of Appeals noted: “[t]o avoid  
26 uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in  
27 *Buckley*, established a bright-line test,” which concentrated “on whether the communication contains  
28 '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.

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

3 **i. The Fiddling Flyer**

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

15 Moreover, the Fiddling Flyer does not “command” (by presenting a clear plea for action, such  
16 as *Furgatch*’s phrase “DON’T LET HIM DO IT”), nor does it make clear what action is advocated.  
17 The district court merely made the conclusory assertion that, “the only way of ending the ‘fiddling’ is  
18 to vote Mr. Ocegüera out of office.” J. App. at 106. But reasonable minds could also read this  
19 communication in myriad ways, including as a call to contact the sitting legislator and urge him to  
20 pass better laws. Thus, the high bar set by *Furgatch* has not been met, and the Fiddling Flyer is not  
21 regulable as express advocacy, as it can indeed be read as something other than “an exhortation to  
22 vote for or against a specific candidate.”  
23  
24  
25  
26  
27  
28

**ii. The Nice Work Flyer**

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

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

21 Similarly, the statement does not present a clear plea for action. The district court ignores the  
22 many ways citizens may communicate with their elected representatives—such as calling, writing,  
23 tweeting, and visiting the Legislature—that do not involve casting a vote. Moreover, given that the  
24 Nice Work Flyer criticized Mr. Ocegüera for receiving a firefighter salary while employed as a  
25 legislator, the reader could have implored Mr. Ocegüera to “work like the rest of us,” by urging him  
26 to stop receiving his salary from the fire department, petitioning the fire department itself, or calling  
27 for legislation that prevents legislators from receiving dual compensation from the State.  
28



1 Finally, the context of the Flyers does not change this result. As noted above, even the  
2 *Furgatch* court insists that context is merely a “peripheral” and “ancillary” factor in making an  
3 express advocacy determination, and proximity to an election cannot transform a communication into  
4 express advocacy. Indeed, the context in which the Flyers were distributed is quite different from the  
5 context of the communication considered in *Furgatch*. The *Furgatch* communication was  
6 disseminated via full-page ad in the *New York Times* one week before the presidential election, and in  
7 the *Boston Globe* three days before the presidential election. *Furgatch*, 807 F.2d at 858. Thus, the  
8 Ninth Circuit noted  
9  
10

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

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

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

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

25 First, the district court’s reading of Nevada law imposes PAC reporting absent either a finding  
26 of primary purpose, or an “earmarking plus express advocacy” limitation on disclosure. This violates  
27 *Buckley*’s pronouncement regarding donor disclosure, and thus, the  
28

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

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

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

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

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

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

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

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

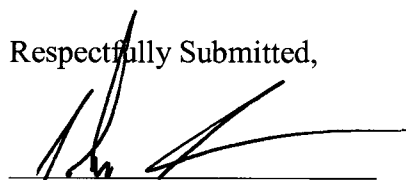
1 Secretary seeks to consider subsequent legislation insofar as it broadens the definition of “express  
2 advocacy,” but ignore subsequent legislation insofar as it limits reporting to those entities with a  
3 major purpose of influencing elections, or those who receive donations earmarked for express  
4 advocacy. But just as the doubtful interpretation of “advocate expressly” was clarified, so was doubt  
5 about the level of activity required to trigger political committee status and the type of disclosure that  
6 status entailed. Thus, the Secretary, and this Court, must choose which law controls: the law at the  
7 time of the communication—or two laws passed *after* the communication was distributed. In either  
8 case, Citizen Outreach cannot be asked to provide this level of invasive disclosure for these specific  
9 flyers.  
10  
11

### 12 **Conclusion**

13  
14 For the forgoing reasons, Citizen Outreach respectfully requests that this Court vacate the  
15 district court’s decision below and schedule the case for oral argument.  
16

17 Dated this 25<sup>th</sup> day of February, 2014.

18 Respectfully Submitted,

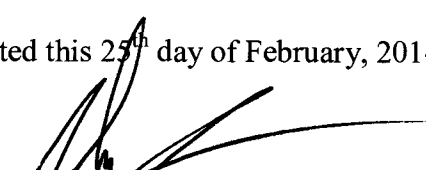
19  
20   
21 Craig A. Mueller  
22 Nevada Bar No. 4703  
23 John J. Shimer  
24 Nevada Bar No. 11458  
25 MUELLER, HINDS & ASSOCIATES  
26 600 South Eighth Street  
27 Las Vegas, Nevada, 89101  
28 Telephone: (702) 940-1234  
Facsimile: (702) 940-1235

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 25<sup>th</sup> 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