House
Legislative
Analysis
Section

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REVISE BAN ON ANONYMOUS CAMPAIGN LITERATURE

House Bill 5765 (Substitute H-1)
First Analysis (4-30-96)

Sponsor: Rep. Frank M. Fitzgerald
Committee: House Oversight and Ethics

THE APPARENT PROBLEM:

Michigan's Campaign Finance Act requires that written campaign materials bear identification, and, in certain cases, disclaimers. Written materials such as billboards, placards, posters, and pamphlets that refer to elections, candidates, or ballot questions must identify the person paying for the material. Identification must include the words "Paid for by," followed by the full name, street number or post office box, city or town, state, and zip code of the person paying for the material. When the written material relates to a candidate and has not been authorized in writing by the candidate's candidate committee, it also has to have a disclaimer on it that says the material was "[n]ot authorized by the candidate committee" of the candidate in question. Disclaimers must be in the same form as identifications, except that a disclaimer must be preceded by the phrase "Not authorized by the candidate committee of (candidate's name)." The size and placement of the identification or disclaimer is determined by administrative rules promulgated by the secretary of state, which require that an identification or disclaimer (or both) to be "in a place and in a print clearly visible to and readable by an observer" (R 169.36). Violation of these disclosure and disclaimer requirements is a misdemeanor punishable by a fine of up to $1,000, imprisonment for up to 90 days, or both.

Although this section of the Campaign Finance Act was rewritten in 1978 (by Public Act 348), the basic identification and disclaimer requirements for printed campaign materials were included in the original law as enacted in 1976. Virtually every other state in the union, as well as the federal government, have enacted election disclosure requirements. The earliest statute of this sort was adopted by Massachusetts in 1890, and 24 states had similar laws by the end of World War I. California enacted an election disclosure requirement as early as 1901, but it abandoned its law after a California Court of Appeal declared the provision unconstitutional, relying on a U.S. Supreme Court decision (Talley v. California, 362 U.S. 60 [1960]) which invalidated a Los Angeles ordinance that prohibited all anonymous leafletting "in any place under any circumstances".

In 1995, the U.S. Supreme Court issued a decision [in McIntyre v. Ohio Elections Commission 115 S Ct 1511; 131 L Ed 2d 426 (1995)] holding that the Ohio Elections Code provision prohibiting the distribution of anonymous campaign literature violated the constitutional right of free speech guaranteed by the First Amendment to the U.S. Constitution (see BACKGROUND INFORMATION below). Since the Ohio law in question was similar to provisions in the Michigan Campaign Finance Act requiring identification on written campaign literature, the secretary of state requested an opinion from the attorney general on the constitutionality of the Michigan law. The attorney general opined that the disclosure requirement contained in the Michigan Campaign Finance Act did indeed violate the First Amendment to the U.S. Constitution and was, "accordingly, void and unenforceable in its entirety" (AGO No. 6895).

With the filing deadlines for this year's general elections fast approaching, legislation has been introduced to rewrite Michigan's campaign literature disclosure provisions to comply with the recent U.S. Supreme Court decision in McIntyre.

THE CONTENT OF THE BILL:

The bill would rewrite the disclaimer requirements for independently produced written campaign materials to exempt individuals (other than candidates) who acted independently and not as an agent for a candidate or any committee.

More specifically, the bill would eliminate the existing disclaimer requirement for independent expenditures for printed materials related to candidates which weren't authorized in writing by the candidate's candidate committee. The bill would continue to require disclaimers on printed matter relating to candidates that was an independent expenditure and that wasn't

authorized in writing by the candidate's candidate committee. However, the bill would exempt from its disclaimer requirements individuals other than candidates if the individual were acting independently and was not acting as an agent for a candidate or for any committee. The required disclaimer would have to say, "Not authorized by any candidate committee" (instead of "Not authorized by the candidate committee of [candidate's name]).

In addition, the bill would make the size and placement of identifications required under the act subject to rules promulgated by the secretary of state (currently, only the required disclaimers fall under this rules process), and would increase the amount of time for a misdemeanor violation to 93 days (instead of 90 days).

Finally, the bill would include a severability clause aying that if any portion of the bill were found invalid by a court, the remaining portions would continue in effect.

MCL 169.247

BACKGROUND INFORMATION:

The McIntyre case. In McIntyre v. Ohio Elections Commission, the United States Supreme Court reviewed the constitutionality of a fine imposed by the Ohio Elections Commission on an Ohio woman named Margaret McIntyre for distributing leaflets, some of which did not have her name on them, contrary to requirements in Ohio law.

At a public meeting held in Westerville, Ohio, on April 27, 1988, to discuss a proposed school tax levy, Margaret McIntyre, with the help of her son and a friend, distributed leaflets she had written in opposition to the proposal. Some of the leaflets identified Mrs. McIntyre as the author, while others only said they expressed the views of "Concerned citizens and taxpayers." However, there was no suggestion that the leaflets contained false, misleading, or libelous material. At this meeting, where the superintendent of schools was to discuss the upcoming referendum on the proposed school tax, a school official who supported the tax proposal warned Mrs. McIntyre that her unsigned leaflets didn't conform to Ohio election laws. Despite the warning, Mrs. McIntyre showed up at another meeting the next night and handed out some more of her leaflets. The proposed school tax was defeated twice before it finally passed on its third try in November 1988. Five months later, the school official who had warned Mrs. McIntyre filed a complaint with the Ohio Elections Commission charging that her distribution of unsigned leaflets violated Section 3599.09(A) of the Ohio Code. (See below.) The commission agreed and imposed a fine of $100. The Franklin County Court of Common Pleas reversed, finding that Mrs. McIntyre did not "mislead the public nor act in a surreptitious manner," and concluded that the statute was unconstitutional as applied to her conduct. The Ohio Court of Appeals, by a divided vote, reinstated the fine, and the Ohio Supreme Court affirmed by a divided vote. In dissent, Justice Wright argued that the statute should be tested under a more severe standard than that used by the Ohio Supreme Court (which believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters were "reasonable" and "nondiscriminatory") because of its significant effect "on the ability of individual citizens to freely express their views in writing on political issues." He concluded that the Ohio provision was "not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre." Mrs. McIntyre died while the case was in litigation, but the executor of her estate, Joseph McIntyre, pursued her claim in the U.S. Supreme Court.

The Supreme Court's decision, delivered by Justice Stevens on April 19, 1995, opens by saying that "[t]he question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment." The court rejects Ohio's argument that the law under review was a reasonable regulation of the electoral process. For, as the court points out, unlike the case in Talley v. California, in which a Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances," Ohio (wisely, if implicitly) did not suggest "that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid." Noting that the Ohio statute contains a different limitation ("It applies only to unsigned documents designed to influence voters in an election") the court concludes that it "must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process."

In other cases in which the Supreme Court reviewed election code provisions governing the voting process itself, the court describes itself as having "pursued an analytical process comparable to that used by courts 'in ordinary litigation': we considered the relative interests of the State and the injured voters, and we evaluated the extent to which the State's interests necessitated the contested restrictions." In the McIntyre case, however, the court says that the "ordinary litigation" test doesn't

apply because unlike the statutory provisions challenged elsewhere "the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, although [the Ohio] provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech . . . Furthermore, the category of covered documents is defined by their content -- only those publications containing speech designed to influence the voters in an election need bear the required markings." The court concludes that "consequently, we are not faced with an ordinary election restriction; this case 'involves a limitation on political expression subject to exacting scrutiny.'"

The court says that "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment." The court notes that "core political speech need not center on a candidate for office" but extends "equally to issue-based elections such as the school-tax referendum that Mrs. McIntyre sought to influence through her handbills." In fact, "speech on income-tax referendum 'is at the heart of the First Amendment's protection.' . . . Indeed, the speech in which Mrs. McIntyre engaged -- handing out leaflets in the advocacy of a politically controversial viewpoint -- is the essence of First Amendment expression." And the court concludes that "[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre's. When a law burdens core political speech, we apply 'state interest'."

The Supreme Court also rejects Ohio's arguments that even under the strictest standard of review its disclosure requirement is justified by two important and legitimate state interests: one is Ohio's interest in preventing fraudulent and libelous statements, the other is in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. With regard to the latter state interest, the court says "[i]nsofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." The court thus concludes that "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."

The court did find that the state's interest in preventing fraud and libel "stands on a different footing" and that "this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." However, as the court had earlier pointed out, the statute in question "contains no language limiting its application to fraudulent, false, or libelous statements." At the same time, this disclosure requirement is not the only or even its principal weapon against fraud: Ohio's election code has detailed and specific prohibitions against making or disseminating false statements during political campaigns which apply both to candidate elections and to issue-driven ballot measures. The disclosure provisions thus serve as "an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators." Consequently, the court concludes that "[a]lthough these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [the Ohio disclosure statute's] extremely broad prohibition." Thus, while recognizing that a state's enforcement interest might justify a more limited identification requirement, the court concludes that "Ohio has shown scant cause for inhibiting the leafletting at issue here."

The court concludes, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse . . . Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the fact of the case before us."

The Ohio law. The section of the Ohio Revised Code Annotated [Section 3559.09(A) (1988)] in question said:

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517 of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words 'paid for by' followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title."

Section 3599.09(B) contains a comparable prohibition against unidentified communications uttered over the broadcasting facilities of any radio or television station.

FISCAL IMPLICATIONS:

The House Fiscal Agency says the bill has no fiscal implications. (4-30-96)

ARGUMENTS:

For:

The bill would replace the existing campaign literature disclosure provisions, recently declared unconstitutional by the attorney general in light of last year's McIntyre decision, with more narrowly written provisions that presumably would pass constitutional muster while also continuing to protect people from the worst of campaign advertising abuses.

Mandatory disclosure laws with regard to campaign advertisements arise from the concern (in the words of the Illinois Supreme Court in People v. White) that the public could be misinformed, and an election swayed, by anonymous "eleventh-hour" smear campaigns to which candidates couldn't meaningfully respond. The fear of the effect of anonymous character assassination on elections -- especially late in a campaign, when a candidate might not be able to respond effectively -- appears to be both bipartisan and widespread. So-called "negative campaigning" is widely perceived to be not only on the rise, but, what is worse (for candidates, at least), it appears to be effective: Candidates who run the "dirtiest" campaigns are believed to win their campaigns for office more often than those who don't. Many people believe that "mudslinging" is an effective campaign tool, arguing that if it weren't then people wouldn't engage in it. Therefore, the argument goes, since negative campaigning seems to be here to stay, in order to minimize its potential effectiveness (if not its use) certain constraints need to be placed at least on its anonymous use by requiring that all campaign advertising -- whether written, broadcast, or telecast, and whether positive or negative -- identify the sponsor. Then, at least, people can judge for themselves whether or not to give credence to the campaign ads' claims. For most people, it is clear that a candidate's opponents are more likely to make questionable claims about the candidate than his or her supporters, and that, therefore, these claims are to be taken with the proverbial grain of salt.

Although the Supreme Court found Ohio's "extremely broad prohibition" unconstitutional, it also said that a state's enforcement interest might justify a more limited identification requirement. Thus, for example, the court pointed out that the Ohio law "encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to election of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to

leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity." Under the bill, PACs would still have to identify campaign literature that they produced, but individuals acting independently would be able to engage in anonymous leafletting, complying with the Supreme Court's ruling in the McIntyre case. Although some people have expressed concern over the proposed "loophole" for individuals, the bill would exempt only individuals who were acting independently and not as the agent of any candidate. And surely this exemption is not likely to result in campaign abuses. In the first place, as the Supreme Court pointed out in McIntyre, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message." But perhaps even more importantly, as the court further pointed out (quoting another, earlier U.S. Supreme Court decision, "Of course, the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'". Finally, the court further quotes a New York Supreme Court decision that struck down a similar New York statute as overbroad: "Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth."

Against:

The bill would exempt individuals "acting independently and not acting as an agent for a candidate or any committee." It also would re-regulate campaign literature relating to a candidate that is "an independent expenditure that is not authorized in writing by the candidate committee of that candidate," by requiring a disclaimer saying that the literature was "not authorized by any candidate committee." However, while the Campaign Finance Act defines "independent expenditure," it doesn't define "acting independently." What if political parties or political action committees or individual candidates asked individuals to distribute anonymous leaflets on behalf of the party or committee? Won't this constitute a significant loophole allowing for anonymous abusive campaign practices?

Response:

Although the bill, as written, would allow the possibility that some people might abuse the First Amendment protections it affords individuals, the balance between protecting free speech and requiring public accountability may inevitably involve that risk. What is clear is that existing law has been declared unconstitutional, and, as such, entirely "void and unenforceable." Unless the legislature acts quickly, not only will individuals be exempted from any campaign literature requirement, so, too, will all other "persons" -- including businesses, proprietorships, firms, partnerships, joint ventures, syndicates, business trusts, labor organizations, companies, corporations, associations, committees, or "any other organization or group of persons acting jointly" (which is the act's definition of "person"). If problems do arise where individuals "front" for candidates or political parties or campaign committees, then investigations will have to be made. What is certain, however, is that if nothing is done, then the level of negative campaigning that has been done under the now-voided provisions of the law almost certainly would rise even further.

POSITIONS:

The secretary of state supports the bill. (4-25-96)

The attorney general supports the bill. (4-25-96)

The Michigan State Chamber of Commerce supports the bill. (4-25-96)

Common Cause of Michigan supports the bill. (4-29-96)

Michigan Citizens Action supports the bill. (4-30-96)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.