

individual candidate for city council at that time. The top of the page stated that the newspaper was a “SPECIAL ELECTION EDITION.”

- Page two consisted of a candidate comparison of two candidates for city council of Mesquite with questions and answers for both. It also included a reprint of a 1995 article from the Dallas Morning News, regarding the dismissal of drug charges against the individual. The middle of the article emphasizes in bold print, with larger font and between two solid black lines that “Prosecutors said all three cases against [the individual] were weakened because [the judge] would not allow evidence about drugs seized from [the individual’s] truck to be admitted in court. Police did not have a search warrant for the truck.”
 - Page three consisted of the final candidate comparison with the remaining candidate for city council of Mesquite with questions and answers. It also included a 1994 article from The Dallas Morning News concerning the city tightening its drug policy. The very bottom of page three contained a comic strip about electronic voting machines.
 - The top of page four included an article by, “The Mesquite Times Staff Writer,” concerning an altercation involving the individual and an elderly man, at a polling location. The writer of the article is not clearly identified, nor is the elderly man, involved in the altercation. Alongside the article is an advertisement for an elderly abuse hotline. The middle of the page consisted of another comic about electronic voting machines. The remainder of the page consisted of a political crossword, an advertisement for “The Chimney Sweep,” and a comic that states “kids who take drugs are losers.”
7. In response to the allegation, the respondent submitted an affidavit in which he swore that he found the complaint to be “totally without merit” for the following reasons:
1. The Mesquite Times is a newspaper registered with the State of Texas in Dallas County.
 2. Ownership of The Mesquite Times newspaper is a corporation in the State of Texas[.]
 3. No candidate was ever endorsed by The Mesquite Times newspaper[.]
 4. The complainant, does not even reside or work in Mesquite, the location of the election in the complaint but is a personal friend and active supporter of [another candidate - the individual who was the focus of the communication].
 5. Section 255.001 of the Election Code is an unconstitutional violation of the rights guaranteed to any entity by the First Amendment of the United States Constitution.
 6. The State of Texas does not have the right to take away an individual’s or entity’s anonymity in regard to any publication or otherwise abridge the freedom of speech or press.

8. According to Texas Secretary of State (SOS) records, Burr ridge Services Group, Inc. is a Domestic For-Profit Corporation. The certificate/charter for Burr ridge Services Group, Inc. was forfeited on February 9, 2007. However, SOS records show that on June 10, 2011, the forfeiture of the entity was aside. The respondent is listed as the CEO, President and Director of Burr ridge Services Group, Inc. Burr ridge Services Group Inc. did not have a valid charter in place at the time of the alleged acts.
9. Dallas County records show that The Mesquite Times is operating under an assumed name for Burr ridge Services Group, Inc. The respondent signed the assumed name certificate for The Mesquite Times as an officer, representative or attorney-in-fact of the corporation.
10. The respondent was responsible for the printing and distribution of the communication at issue.
11. "The Mesquite Times," at issue did not disclose a name for the publisher or distributor.
12. "The Mesquite Times," at issue did not disclose a contact telephone number for the publisher or distributor.
13. "The Mesquite Times," at issue did not disclose a contact mailing, e-mail, or physical address for the publisher or distributor.
14. "The Mesquite Times," at issue did not disclose the names of an editor or any other staff.
15. "The Mesquite Times," at issue did not disclose a contact telephone number for an editor or any other staff.
16. "The Mesquite Times," at issue did not disclose a contact mailing, e-mail, or physical address for an editor or any other staff.
17. "The Mesquite Times," at issue did not include information on how to obtain a subscription to the publication.
18. "The Mesquite Times," at issue did not include information on how to place advertising in the publication.
19. "The Mesquite Times," at issue did not indicate the interval in which it is published.
20. On May 2, 2011, another communication titled "The Mesquite Times" was published that was similar in many respects to the earlier communication, but opposed a measure. The respondent was responsible for its publication as well.
21. An expert witness testified at the formal hearing that "The Mesquite Times," at issue did not contain many of the characteristics of a newspaper, and in his expert opinion was not a bona fide newspaper.

III. Conclusions of Law

1. Disposition of this case is within the jurisdiction of the Texas Ethics Commission. GOV'T CODE § 571.061.
2. The respondent received legally sufficient notice of the hearing in this case. GOV'T CODE § 571.032 and 1 TAC § 12.21. The hearing was held in accordance with section 12.23, 1 Texas Administrative Code.
3. A person may not knowingly cause to be published, distributed, or broadcast political advertising containing express advocacy that does not indicate in the advertising that it is political advertising and the full name of the person who paid for the political advertising, the political committee authorizing the political advertising, or the candidate or specific-purpose committee supporting the candidate, if the political advertising is authorized by the candidate. ELEC. CODE § 255.001(a).
4. "Political advertising" means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that, in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television or appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website. *Id.* § 251.001(16).
5. A publication produced solely to persuade voters to support a publisher's view in regard to a particular election is political advertising. *See Ethics Advisory Opinion No. 183.*
6. The communication at issue was the first of its kind. A large portion of the communication consisted of re-printing old articles concerning alleged drug possession by an individual candidate, and an article concerning an altercation between that individual and an elderly man. The front page of the communication only included old articles concerning alleged drug possession by the individual. The communication did not have the characteristics of a bona fide newspaper. Considering the communication as a whole, the communication opposed an individual who was a candidate for city council in Mesquite, Texas. Since the communication at issue is a communication opposing a candidate for election to a public office that appears in a format similar to a circular or flyer, it was political advertising.
7. The respondent knowingly caused the political advertising to be published and distributed.
8. Political advertising that is authorized by a candidate, an agent of a candidate, or a political committee filing reports under title 15 of the Election Code shall be deemed to contain express advocacy. ELEC. CODE § 255.001(b).
9. There is no evidence that a candidate, an agent of a candidate, or a political committee authorized the political advertising at issue. Thus, the political advertising cannot be

deemed to contain express advocacy. Therefore, the political advertising at issue was required to have a disclosure statement as required by section 255.001 of the Election Code, if it actually contained express advocacy.

Express Advocacy

Historical Context

10. The term “express advocacy” was adopted from case law that developed in Texas and federal courts following the U.S. Supreme Court decision of *Buckley v. Valeo*, in which the Court addressed a federal law that prohibited a person from making over \$1,000 in expenditures “relative to a clearly identified candidate” in a calendar year. *Buckley*, 424 U.S. 1, at 38 (1976). Based upon the vagueness of the statutory language “relative to,” the Court ruled that the statute could only apply to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. *Buckley* provided examples of communications that contain express words of advocacy of election or defeat, “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44, n. 52. These words have been referred to in subsequent case law as “magic words.” *See*, e.g., *McConnell v. FEC*, 540 U.S. 93, at 191 (2003).
11. In case law since *Buckley*, federal and state courts reached different conclusions as to whether “express advocacy” requires specific language or “magic words,” such as “vote for.” In *Osterberg v. Peca*, the Supreme Court of Texas considered whether either member of a married couple violated various sections of the Election Code for failing to disclose direct campaign expenditures they made for a television broadcast. *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000). The Court found that the term “campaign expenditure” in section 251.001(7) of the Election Code, which was defined as “an expenditure made by any person in connection with a campaign for elective office or on a measure,” was similar to the definition of an “expenditure” in *Buckley* in that they were both “vague.” *Id.* at 51. Thus, the statute that required the disclosure of such expenditures when they were made by an individual in a candidate election could only apply to expenditures that “‘expressly advocate’ the election or defeat of an identified candidate.” *Id.*
12. To determine whether the advertisement in *Osterberg* contained express advocacy, the Court referred to the examples of express advocacy provided in *Buckley* and also cited *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), in which the United States Supreme Court “clarified that a message can be ‘marginally less direct’ than the examples listed in *Buckley* so long as its essential nature ‘goes beyond issue discussion to express electoral advocacy.’” *Osterberg*, at 52 (citing *MCFL*, 479 U.S. at 249).¹ The Texas Supreme Court also noted that different appellate courts and the FEC

¹ The communication at issue in *MCFL* was a “newsletter” distributed by a non-profit corporation that urged readers to “VOTE PRO-LIFE,” provided a list of candidates for each state and federal office in Massachusetts, and placed either a “y” or an “n” beside each candidate to indicate whether the candidate supported or opposed the corporation’s view on a particular issue. *MCFL*, 479 U.S. 238, 243 (1986). Some candidates had an asterisk beside their name to indicate who had a “100% pro-life voting record” and the newsletter included photographs of 13

have disagreed over whether a communication must contain “certain ‘magic words’ of advocacy akin to those listed in *Buckley*, or whether the communications should be judged as a whole and in context.” *Osterberg*, at 52.

Wisconsin Right to Life

13. In 2007, in *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), the Supreme Court considered whether a federal statute that prohibited a corporation from making an expenditure to broadcast, 30 or 60 days before an election, any communication that names a federal candidate for office and is targeted to a specified electorate, was constitutional. The case involved “issue ads” by Wisconsin Right to Life, Inc. (*WRTL*). The Court held the statute unconstitutional as applied to *WRTL* because the advertisements at issue were not “express advocacy or its functional equivalent.” *Id.* at 2660. The Court held that an advertisement should only be considered express advocacy or its functional equivalent:

. . . if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Id. at 2667.

14. In explaining the Supreme Court’s basis for determining that the broadcast at issue in *WRTL* was not the functional equivalent of express advocacy, the Court stated:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Id.

15. More recently, in, *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, the Supreme Court used the test for express advocacy from, *FEC v. Wisconsin Right to Life, Inc.*, to determine that a film qualified as the “functional equivalent of direct advocacy,” since there was no “reasonable interpretation” of the film “other than as an appeal to vote against” a candidate. *Id.* at 890. At issue in *Citizens United* was a feature length movie

candidates who had the most favorable voting record. *Id.* at 244. The Court stated that the newsletter “not only urges voters to vote for ‘pro-life’ candidates, but also identifies and provides photographs of specific candidates fitting that description.” *Id.* at 249. The Court ruled that the newsletter constituted express advocacy because it was not “mere discussion of public issues,” but rather “provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature.” *Id.*

concerning (at the time) Senator Hillary Clinton. In using the test from *WRTL* the Court stated:

Under this test, *Hillary*, is equivalent to express advocacy. The movie, in essence, is a feature length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voice-over narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected president. The narrator reminds viewers that 'Americans have never been keen in dynasties' and that 'a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton to the White House . . .'

Id.

16. The District Court found, there was no reasonable interpretation of *Hillary* other than an appeal to vote against Senator Clinton, and under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualified as the functional equivalent of express advocacy.
17. The commission has not defined "express advocacy" beyond deferring to *Buckley* and subsequent case law.²
18. It is clear from the political advertising at issue that the facts in this case are closer to those concerning the Hillary video in *Citizens United* than the issue advertising contained in *WRTL*. First, here the content is not consistent with that of an issue advertisement. It mentions no legislative issue. Second, unlike *WRTL*, the advertisements mention an election, the fitness for office of a candidate, and they take a position on the candidate's character.
19. Similar to the Hillary video in *Citizens United*, the political advertising at issue attacked the fitness for office of the individual by selectively including old articles concerning alleged drug possession by the individual. The Hillary video at issue in *Citizens United* asks, "whether she is 'the most qualified to hit the ground running if elected president,' after emphasizing facts that indicate she is not. Similarly, the political advertising at

² In Ethics Advisory Opinion No. 198, the commission stated: "[W]hether an actual communication constitutes express advocacy can be answered only on a case-by-case basis. Certainly, if a corporation spends treasury funds on a communication containing one or more of the phrases discussed in the *Buckley* opinion, or a communication analogous to the one questioned in *MCFL*, the expenditure would be prohibited under Election Code section 253.094. Whether other communications constitute express advocacy depends on the precise language of the communications, and on further authoritative court decisions." Ethics Advisory Opinion No. 198 (1994).

issue begins with a statement at the top that asks, “Do you REALLY know your candidate,” followed by a large heading for the first article concerning the individual that states “MESQUITE TRUSTEE CHARGED IN DRUG POSSESSION CASE,” using the second largest font on the page. The advertising at issue leaves little doubt that the purpose of the communication is to show readers that they may not really know the individual (i.e. that he had been previously charged with drug possession), and included articles that indicate he was not fit to hold public office. The advertising at issue is susceptible of no reasonable interpretation other than as an appeal to vote against the individual. Thus, based on Texas statutes and guidance provided by the courts, the political advertising at issue contained express advocacy and was required to include a political advertising disclosure statement. The commission found by a preponderance of evidence that there is a violation of section 255.001 of the Election Code.

20. The Texas Ethics Commission may impose a sanction against the respondent for a violation of a law administered and enforced by the commission. GOV'T CODE § 571.173.

Therefore, the Texas Ethics Commission orders that:

1. The respondent pay to the Texas Ethics Commission, within 30 days of the date of this order, a civil penalty in the amount of \$4,000.

Order Date: _____

FOR THE COMMISSION

David A. Reisman
Executive Director
Texas Ethics Commission