

September 27, 2013

The Honorable Ruth Johnson  
Secretary of State  
Executive Office  
Richard H. Austin Building  
430 W. Allegan Street  
Lansing, MI 48978

**Public Comments by the Brennan Center for Justice and Justice at Stake  
Re: State Bar of Michigan Declaratory Ruling Request Concerning Practical  
and Ethical Implications for Michigan Judicial Candidates of a 2004  
Interpretive Statement by the Secretary of State in the wake of three U.S.  
Supreme Court Decisions**

We write on behalf of the Brennan Center for Justice at N.Y.U. School of Law<sup>1</sup> and Justice at Stake<sup>2</sup> to comment on the request by the State Bar of Michigan for a declaratory ruling regarding interpretation of the Michigan Campaign Finance Act (MCFA) as applied to judicial election campaigns. For more than a decade, the Brennan Center and Justice at Stake have been tracking candidate fundraising and spending on television ads in state supreme court races, compiling estimates of total spending, and analyzing the tone and content of these ads. For the reasons herein, we support the State Bar's request for an updated interpretation of "expenditures" and urge that all electioneering spending in judicial campaigns be considered "expenditures" for the purposes of the MCFA, not merely spending that qualifies as express advocacy or its functional equivalent.

As explained in the State Bar's submission, the Department of State's 2004 interpretation of the MCFA, which exempts so-called "issue advocacy" advertisements from the "expenditures" subject to disclosure, is unnecessarily narrow in scope and out of keeping

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Its research, public education, and advocacy in this area focuses on improving selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches. This submission contains only the position of the Brennan Center and does not purport to represent the position of NYU School of Law.

<sup>2</sup> Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom, so that judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

with more recent Supreme Court precedent.<sup>3</sup> Reform is warranted. In Michigan's Supreme Court elections, political parties and special interest groups are spending record amounts on television ads that are electioneering by any reasonable definition, and the vast majority of this spending is undisclosed. As a result of lax disclosure requirements, Michigan has been buffeted by extreme spending and negative ads whose buyers are shielded by anonymity. Across the country, and in Michigan especially, we have seen negative advertising escalate, and with it, a severe deterioration of the public's perception of their state courts. Without adequate disclosure, judicial impartiality is called into question, as parties to lawsuits lack the information necessary to determine whether to seek recusal based on an adversary's support for a judge.

### 2012 saw record spending, largely undisclosed, on obvious electioneering in judicial campaigns

In 2012, candidates, parties, and interest groups reported five million dollars of spending on Michigan Supreme Court races.<sup>4</sup> An estimated additional \$8.3 million<sup>5</sup> to \$13.9 million<sup>6</sup> was spent on TV ads that were electioneering under any reasonable definition, but were neither reported to the Bureau of Elections nor disclosed to the citizens of Michigan.<sup>7</sup> This spending was never documented because it fell outside of the current narrow definition of "expenditure," which does not include so-called "issue ads" that are clearly aimed at influencing voters without explicitly advocating a vote for or against a candidate. According to calculations by the Michigan Campaign Finance Network, undisclosed spending on television "issue ads" accounted for approximately 75 percent of all spending in the 2012 Michigan Supreme Court campaign.<sup>8</sup>

Television spending by non-candidates in Michigan far surpassed television spending by non-candidates in every other state in the 2012 judicial election cycle. Estimates for other states with non-candidate television spending in state supreme court campaigns ranged from a low of approximately \$160,000 in Iowa to nearly \$3.1 million in North Carolina—not equaling even half of the lowest estimate for Michigan's non-candidate spending.<sup>9</sup> To

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<sup>3</sup> Letter from Brian DeBano, Chief of Staff, former Michigan Secretary of State Terri Land, to Robert LaBrant, former Executive, Michigan Chamber of Commerce (April 20, 2004), *available at* [http://michigan.gov/documents/sos/SBM\\_9-11-13\\_Declaratory\\_Ruling\\_Request\\_433928\\_7.pdf](http://michigan.gov/documents/sos/SBM_9-11-13_Declaratory_Ruling_Request_433928_7.pdf).

<sup>4</sup> Figure calculated by the Michigan Campaign Finance Network based on information reported to the Michigan Bureau of Elections. Information on file with the Michigan Campaign Finance Network.

<sup>5</sup> ALICIA BANNON ET AL., *NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* (forthcoming October 2013).

<sup>6</sup> Figure calculated by the Michigan Campaign Finance Network based on information reported to the Michigan Bureau of Elections. Information on file with the Michigan Campaign Finance Network.

<sup>7</sup> The different numbers represent differences in two methods of estimating total television spending. The higher estimate, from the Michigan Campaign Finance Network, is based on reports compiled by TV stations across Michigan that logged ads aired in state Supreme Court races. These estimates include a 15 percent agency fee for each advertisement. The lower estimate, by Kantar Media/CMAG, is based on an analysis of ads monitored by satellite technology, and does not include some local cable TV ads. This methodology is utilized to achieve homogeneity of national analysis. These estimates do not include agency fees.

<sup>8</sup> RICH ROBINSON, *A CITIZEN'S GUIDE TO MICHIGAN CAMPAIGN FINANCE 2012: DESCENDING INTO DARK MONEY* (June 2013), at 31, *available at*

[http://www.mcfn.org/pdfs/reports/MCFN\\_2012\\_Cit\\_Guide\\_final\\_rev.pdf](http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev.pdf)

<sup>9</sup> ALICIA BANNON ET AL., *NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* (forthcoming October 2013).



put Michigan's judicial election spending in further perspective, estimated non-candidate television spending in *every other 2012 state supreme court campaign combined* amounts to \$8,793,090—less than was almost certainly spent by non-candidates in Michigan alone.<sup>10</sup>

As explained by the State Bar in their request for a declaratory ruling, in the context of judicial elections, there is no legitimate purpose for so-called “issue ads” intended to allow the public to influence an elected official. Unlike legislative and executive officials, judges must make decisions based strictly on applying the law to the specific facts of a case, not based on popular opinion or public pressure. Further, any argument that these ads are not intended to influence voters simply strains credulity.

In 2012 Michigan was flooded with negative ads smearing judicial candidates that were obviously aired to influence voters. Even the positive ads aired in Michigan were clearly created to influence Michigan voters in favor of one candidate or another. One ad run by the Michigan Republican Party described Supreme Court Justices Steven Markman and Brian Zahra and Appellate Judge Colleen O'Brien as honest judges with integrity who hold government and special interests accountable on the bench. The ad ended by saying “Tell Markman, O'Brien, and Zahra to keep fighting for Michigan, keep fighting for our jobs.”<sup>11</sup> The ending was crafted to allow the Republican Party to sidestep campaign disclosure laws by avoiding language explicitly imploring Michigan residents to vote for the three candidates – surely they knew Markman, O'Brien, and Zahra must make decisions based only on the facts before them, and not on public pressure. In any event, the ad obviously meant to promote the three candidates.

The Michigan Democratic State Central Committee also ran a number of similar advertisements that were disguised as issue ads, but were clearly intended to persuade Michigan residents to vote for candidates Connie Kelley, Shelia Johnson, and Bridget McCormack. One such ad described Kelley, Johnson, and McCormack as having “zero tolerance for violence against women and kids.” The ad also stated that the women have kept criminals off the street and helped keep kids out of gangs. After describing the positive qualities of these three judicial candidates, the advertisement ended by saying, “Kelley, Johnson, and McCormack. These three protect families.” The Democratic State Central Committee ran a total of six positive ads that were similar to the one described above. Each one described Kelley, Johnson, and McCormack as strong supporters of women, children, and families, and ended with the same line: “These three protect families.”<sup>12</sup> Again, the message was more than clear. These ads were meant to sway voters to vote for judges favored by the Democratic Party.

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<sup>10</sup> ALICIA BANNON ET AL., *NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* (forthcoming October 2013).

<sup>11</sup> *As Michigan Rebuilds* (storyboard), *BUYING TIME 2012: MICHIGAN*, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/as%20Michigan%20rebuilds%20sb.PDF](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/as%20Michigan%20rebuilds%20sb.PDF).

<sup>12</sup> *These Three* (storyboard), *BUYING TIME 2012: MICHIGAN*, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/protecting%20families%201%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/protecting%20families%201%20sb.pdf).

### Lack of disclosure fosters extremely negative ads that harm public confidence in the courts

Inadequate disclosure of judicial campaign spending in Michigan judicial elections makes the state more susceptible to negative television advertisements. When ad sponsors do not need to disclose their identity, they are more likely to run harsh attack ads without fear of opprobrium or accountability to voters. Anonymity creates an environment that supports and encourages malicious behavior in judicial campaigns.

Twenty-one percent of all the judicial campaign ads that ran in Michigan in 2012 were negative in tone. Twenty percent of ads run by political parties were negative, and 100 percent of ads run by special interest groups were negative. A total of 3,273 negative ads aired in Michigan throughout the campaign season. This is far higher than any other state, none of which saw more than 2,000 such ads.<sup>13</sup> And the problem is getting worse – the 2012 Michigan Supreme Court campaign was the most negative, most expensive, and least transparent in state history.

Michigan's negative ads were not confined to any one party or ideology, and spanned all outside groups that bought TV time in the 2012 judicial race. The Michigan Democratic State Central Committee ran one attack ad against Supreme Court Justices Steven Markman and Brian Zahra claiming they always side with insurance companies. The ad went on to say that candidate Colleen O'Brien denied benefits to a cancer patient.<sup>14</sup> Another ad by the Democratic State Central Committee accused Justice Markman, Justice Zahra, and Judge O'Brien of protecting child pornographers and child rapists.<sup>15</sup>

The Michigan Republican Party also ran their own attack ads against candidates Connie Kelley, Shelia Johnson, and Bridget McCormack. One ad claimed Kelley was associated with "scandal-ridden Wayne County executive Bob Ficano,"<sup>16</sup> while another ad accused Johnson of having little experience and being a favorite of special interests.<sup>17</sup> The Judicial Crisis Network, a conservative Washington, D.C.-based group, ran a particularly nasty ad

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<sup>13</sup> ALICIA BANNON ET AL., *NEW POLITICS OF JUDICIAL ELECTIONS 2011-2012* (forthcoming October 2013).

<sup>14</sup> *Insurance Court* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/insurance%20court%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/insurance%20court%20sb.pdf).

<sup>15</sup> *Protecting Children Rev* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/STSUPCT\\_MI\\_MIDSCC\\_PROTECTING\\_CHILDREN\\_REV.PDF](http://www.brennancenter.org/sites/default/files/analysis/STSUPCT_MI_MIDSCC_PROTECTING_CHILDREN_REV.PDF).

<sup>16</sup> *Hardly Tough on Crime* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/hardly%20tough%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/hardly%20tough%20sb.pdf).

<sup>17</sup> *Praised* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012), [http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/praised%20sb.pdf](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/praised%20sb.pdf).



directly attacking McCormack. The ad featured a mother who accused McCormack of helping to free terrorists while she spoke about her son who was killed in Afghanistan.<sup>18</sup>

Negative ads like these are harmful to the Michigan court system. They suggest that the judiciary is just another political branch that can be swayed by special interests and money. In order for courts to carry out their constitutional duties, it is critical that the judiciary be not only fair and impartial in fact, but also perceived to be so by the public. As the United States Supreme Court has repeatedly emphasized, “[t]he legitimacy of the Judicial branch ultimately depends on its *reputation* for impartiality and nonpartisanship,”<sup>19</sup> and “justice must satisfy *the appearance of justice*.”<sup>20</sup>

### The lack of disclosure undermines important recusal rules

Under the current interpretation, the MCFA allows for most judicial election spending to remain secret, painting an incomplete picture of who funds judicial campaigns. Undisclosed spending in judicial races is problematic for many reasons, and can undermine public confidence in the Michigan court system. Significantly, the lack of disclosure makes it difficult to determine when judges should recuse themselves from cases. If a party in a particular lawsuit has expended substantial amounts of money in support of the election campaign of a certain judge, that judge must determine whether to step aside from that particular case in order to maintain an impartial bench. But if the public does not know who contributes to a campaign, they can’t ask judges to step down when they feel the fairness of the court is at risk. As the Supreme Court made clear in the landmark *Caperton v. Massey* case, there is a fundamental risk to due process when a judge hears a case involving a person who had a significant and disproportionate role in the judge’s election.<sup>21</sup> In order to protect due process of law, and to maintain judicial impartiality and the public’s confidence therein, the public must know who is funding judicial elections.

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Allowing significant television ad spending to go undisclosed in Michigan has led to expensive, partisan campaigns filled with special interest money and negative attack ads. These types of races fuel public suspicion that the judiciary is beholden to outside spending and influences, and the lack of disclosure threatens the operation of effective recusal practice. In judicial elections, there is no valid reason to exempt “issue ads” from disclosure, as judges must ignore public opinion and decide cases by impartially applying law to the facts of a specific case. A revised interpretation of the Michigan Campaign Finance Act is needed. All judicial electioneering expenditures should be considered “expenditures” under the MCFA and should be reported to the Bureau of Elections. This

<sup>18</sup> *Freed Terrorist* (storyboard), BUYING TIME 2012: MICHIGAN, BRENNAN CENTER FOR JUSTICE (September 12, 2012),

[http://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/freed%20sb.PDF](http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/freed%20sb.PDF).

<sup>19</sup> *Misretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

<sup>20</sup> *Offut v. United States*, 348 U.S. 11, 14 (1954) (emphasis added).

<sup>21</sup> *Caperton v. Massey*, 556 U.S. 868 (2009).

updated interpretation will help to strengthen the judiciary and the public's confidence in Michigan's courts.

Respectfully submitted,



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