

**State of Minnesota  
Campaign Finance & Public Disclosure Board  
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603**

**THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE  
REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA  
under Minn. Stat. § 10A.02, subd. 12(b)**

**ADVISORY OPINION 459**

**SUMMARY**

The Board cannot provide opinions without specific factual information, either real or hypothetical, about the requestor's planned conduct. The Board declines to interpret the phrase "proximity to the election" to refer to a specific number of days prior to a primary or general election.

**Facts**

As a representative of an organization (the Organization), you ask the Campaign Finance and Public Disclosure Board for an advisory opinion regarding the definition of the term "expressly advocating" under Minnesota Statutes section 10A.01, subdivision 16a. The request is based on the following facts:

1. The Organization is a nonpartisan 501(c)(4) grassroots public policy advocacy organization that operates in multiple states, including Minnesota.
2. The Organization seeks to educate the public about legislative and executive branch measures that elected officials are considering, and to mobilize citizens to contact officials to support or oppose those measures.
3. The definition of the term "expressly advocating," codified at Minnesota Statutes section 10A.01, subdivision 16a, was amended in 2023. The revised definition became effective on August 1, 2023.
4. The language added to Minnesota Statutes section 10A.01, subdivision 16a, in 2023 is nearly identical to the text of paragraph (b) within 11 C.F.R. § 100.22, which contains the definition of "expressly advocating" applicable to entities under the jurisdiction of the Federal Election Commission (FEC).
5. The FEC's definitions of the terms "expressly advocating" and "clearly identified" were revised in 1995 "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates, in accordance with the judicial

interpretations found in” five separate judicial opinions.<sup>1</sup> The revised FEC definition of the term “expressly advocating” included elements from three judicial opinions “emphasizing the necessity for communications to be susceptible to no other reasonable interpretation but as encouraging actions to elect or defeat a specific candidate.”<sup>2</sup>

6. In 2007 the United States Supreme Court held that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>3</sup>
7. During legislative committee hearings regarding H.F. 3, the bill that was enacted in 2023 and amended the definition of “expressly advocating” under Minnesota Statutes section 10A.01, subdivision 16a, the Board’s executive director testified and provided six examples of past communications.

## INTRODUCTION

Prior to being amended in 2023, Minnesota Statutes section 10A.01, subdivision 16a defined “expressly advocating” as follows:

"Expressly advocating" means that a communication clearly identifies a candidate or a local candidate and uses words or phrases of express advocacy.

Minnesota Statutes section 10A.01, subdivision 16a presently defines “expressly advocating” as follows:

"Expressly advocating" means that a communication:

(1) clearly identifies a candidate or a local candidate and uses words or phrases of express advocacy; or

(2) when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because:

---

<sup>1</sup> [Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35293 \(July 6, 1995\)](#) (citing [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#), [FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 \(1986\)](#), [FEC v. Furgatch, 807 F.2d 857 \(9th Cir. 1987\)](#), [FEC v. National Organization for Women, 713 F. Supp. 428, 429 \(D.D.C. 1989\)](#), and [Faucher v. FEC, 743 F. Supp. 64 \(D. Me. 1990\)](#)).

<sup>2</sup> Id. at 35294 (citing [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#), [FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 \(1986\)](#), and [FEC v. Furgatch, 807 F.2d 857 \(9th Cir. 1987\)](#)).

<sup>3</sup> [FEC v. Wisconsin Right To Life, Inc., 551 U.S. 449 \(2007\)](#).

(i) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(ii) reasonable minds could not differ as to whether the communication encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.

Within its request the Organization stated that “the Board should clearly explain its reasoning for each conclusion so that the requester and all other similarly situated speakers in Minnesota can plan their public advocacy activities fully knowing whether they will trigger Minnesota’s independent expenditure reporting requirements.” The Organization also stated that it “seeks clarification . . . as to whether certain types of public communications like the examples . . . presented during legislative hearings on H.F. 3 would trigger the new ‘express advocacy’ standard.”

Within its request the Organization asserted that several of the examples referenced by the Board’s executive director in testimony regarding H.F. 3 “do not appear to qualify as express advocacy based upon how the federal judiciary and FEC have articulated the H.F. 3 standard.” The Organization made arguments as to why it believes that four of the examples would not constitute express advocacy under the revised definition of “expressly advocating” codified at Minnesota Statutes section 10A.01, subdivision 16a.

An advisory opinion represents the Board’s interpretation of the law with regard to particular factual situations. The Board may be unable to state a legal conclusion if the facts provided within a request for an advisory opinion are insufficient.<sup>4</sup> Minnesota Statutes section 10A.02, subdivision 12, provides that the Board “may issue and publish advisory opinions on the requirements of this chapter and of those sections listed in section 10A.022, subdivision 3, based upon real or hypothetical situations. An application for an advisory opinion may be made only by a person who is subject to this chapter and who wishes to use the opinion to guide the person’s own conduct.” By design, advisory opinions are intended to be forward-looking and guide future conduct, rather than consider past conduct.

Within its request the Organization did not describe any real or hypothetical situations, or planned conduct, involving itself. The Organization’s request was largely limited to describing testimony given during legislative committee hearings and arguing why the communications cited as examples during that testimony should not qualify as express advocacy under a definition of the term “expressly advocating” that was not in effect at the time of the communications in question.

---

<sup>4</sup> See, e.g., [Advisory Opinion 447 \(June 6, 2018\)](#); [Advisory Opinion 348 \(May 28, 2003\)](#); [Advisory Opinion 306 \(June 14, 1999\)](#).

## **Issue One**

In 2014 the Freedom Club State PAC paid for a television advertisement that criticized “Governor Dayton and the Democrats” for enacting tax increases to pay for “a new luxury office building” and “wasting our tax dollars.” The advertisement asked why “Governor Dayton and the Democrats” are not “fixing our roads and potholes” rather than “wasting our tax dollars” and concluded with the statement “Minnesota, we deserve better.” Would this communication qualify as express advocacy under the amended definition of “expressly advocating”? Would it make a difference if the statement “Minnesota, we deserve better” was replaced with language such as “Call Governor Dayton at [official telephone number] and tell him to spend our tax dollars on fixing roads and potholes instead of luxury office buildings”?

## **Opinion One**

The facts stated within the request are insufficient to determine whether the communication would constitute expressly advocating the election or defeat of a clearly identified candidate or local candidate under the amended definition of “expressly advocating” codified at Minnesota Statutes section 10A.01, subdivision 16a, if made in the future. Such a determination is highly fact-dependent and contextual. If the Organization desires an opinion to guide its own conduct, it may submit a revised request describing real or hypothetical communications it may produce and the context in which those communications may be disseminated. That description should include, at a minimum, any spoken or written language to be used, copies or detailed descriptions of any graphical or pictorial elements, the offices sought by any candidate or local candidate who will be identified within the communication, the approximate time frame in which the communication may be disseminated, and a description of any other factors that may impact a reasonable person’s interpretation of whether the communication advocates the election or defeat of one or more clearly identified candidates. The language used within a communication is important in determining whether the communication constitutes express advocacy, and the substitution of one phrase for another certainly may impact the Board’s determination.

## **Issue Two**

In 2014 the Alliance for a Better Minnesota Action Fund paid for a television advertisement that praised Governor Dayton and contained the phrase “Minnesota is working.” The advertisement stated that four years prior there was a “\$5 billion deficit, but Governor Mark Dayton showed strong leadership . . . and now Minnesota has over 150,000 new jobs and a budget surplus.” The advertisement concluded with the statement “Governor Mark Dayton is working for us.” Would this communication qualify as express advocacy under the amended definition of “expressly advocating”? Would it make a difference if the statement “Governor Mark Dayton is working for us” was replaced with language such as “Call Governor Dayton at [official telephone number] and tell him to keep focusing on the economy, cutting the deficit, and creating new jobs”?

## Opinion Two

The facts stated within the request are insufficient to determine whether the communication would constitute expressly advocating the election or defeat of a clearly identified candidate or local candidate under the amended definition of “expressly advocating” codified at Minnesota Statutes section 10A.01, subdivision 16a, if made in the future. Such a determination is highly fact-dependent and contextual. If the Organization desires an opinion to guide its own conduct, it may submit a revised request describing real or hypothetical communications it may produce and the context in which those communications may be disseminated. That description should include, at a minimum, any spoken or written language to be used, copies or detailed descriptions of any graphical or pictorial elements, the offices sought by any candidate or local candidate who will be identified within the communication, the approximate time frame in which the communication may be disseminated, and a description of any other factors that may impact a reasonable person’s interpretation of whether the communication advocates the election or defeat of one or more clearly identified candidates. The language used within a communication is important in determining whether the communication constitutes express advocacy, and the substitution of one phrase for another certainly may impact the Board’s determination.

## Issue Three

In 2021 Action 4 Liberty disseminated printed literature with the following text, all in capital letters: “Rep. Julie Sandstede betrayed you! by voting to protect Governor Walz’ emergency powers.”<sup>5</sup> The reverse side of the mailer contained text stating, all in capital letters, “make Julie Sandstede listen. Call her at [phone number].” Would this communication qualify as express advocacy under the amended definition of “expressly advocating”? Would it make a difference if a call to action were added, such as “Call Representative Sandstede at [official telephone number] and tell her to oppose any new emergency powers for the Governor”?

## Opinion Three

The facts stated within the request are insufficient to determine whether the communication would constitute expressly advocating the election or defeat of a clearly identified candidate or local candidate under the amended definition of “expressly advocating” codified at Minnesota Statutes section 10A.01, subdivision 16a, if made in the future. Such a determination is highly fact-dependent and contextual. If the Organization desires an opinion to guide its own conduct, it may submit a revised request describing real or hypothetical communications it may produce and the context in which those communications may be disseminated. That description should include, at a minimum, any spoken or written language to be used, copies or detailed descriptions of any graphical or pictorial elements, the offices sought by any candidate or local

---

<sup>5</sup> See [Probable Cause Determination in the Matter of Complaint of the Minnesota DFL regarding Action 4 Liberty and Action 4 Liberty PAC \(July 29, 2021\)](#).

candidate who will be identified within the communication, the approximate time frame in which the communication may be disseminated, and a description of any other factors that may impact a reasonable person's interpretation of whether the communication advocates the election or defeat of one or more clearly identified candidates. The language used within a communication is important in determining whether the communication constitutes express advocacy.

#### **Issue Four**

In 2018 printed literature was disseminated by LIUNA Minnesota with the names and photographs of two sets of governor and lieutenant governor candidates, who were running together. The literature contained the text "2018 Voter Guide: Governor" and "Join your friends & neighbors on Tuesday, November 6<sup>th</sup>. Thank you for voting!" The literature included a list of policy objectives below the heading "What are your values and priorities?" The literature contained the word "Yes" below a picture of Tim Walz and Peggy Flanagan, and the word "No" below a picture of Jeff Johnson and Donna Bergstrom, with respect to four of the listed policy objectives, implying that those objectives were a priority for one slate of candidates, but not the other. Would this communication qualify as express advocacy under the amended definition of "expressly advocating"?

#### **Opinion Four**

The facts stated within the request are insufficient to determine whether the communication would constitute expressly advocating the election or defeat of a clearly identified candidate or local candidate under the amended definition of "expressly advocating" codified at Minnesota Statutes section 10A.01, subdivision 16a, if made in the future. Such a determination is highly fact-dependent and contextual. If the Organization desires an opinion to guide its own conduct, it may submit a revised request describing real or hypothetical communications it may produce and the context in which those communications may be disseminated. That description should include, at a minimum, any spoken or written language to be used, copies or detailed descriptions of any graphical or pictorial elements, the offices sought by any candidate or local candidate who will be identified within the communication, the approximate time frame in which the communication may be disseminated, and a description of any other factors that may impact a reasonable person's interpretation of whether the communication advocates the election or defeat of one or more clearly identified candidates.

#### **Issue Five**

Within its request the Organization did not present any facts regarding issue five, except for stating that it seeks clarity regarding "what 'proximity to the election' means" within Minnesota Statutes section 10A.01, subdivision 16a. The organization also argued that "the Board should conclude that the 'proximity to the election' concept in Minnesota's new express advocacy standard is a reference to the 30-/60-day pre-election time windows that the Supreme Court addressed" in 2007 in *FEC v. Wisconsin Right to Life, Inc.*

## Opinion Five

As used in Minnesota Statutes Chapter 10A, the word “election” means “a primary, special primary, general, or special election.”<sup>6</sup> The word “proximity” is defined by Black’s Law Dictionary as “[t]he quality, state, or condition of being near in time, place, order, or relation,”<sup>7</sup> and by the Oxford English Dictionary as “[t]he fact, condition, or position of being near or close by in space; nearness.”<sup>8</sup> Non-technical words and phrases that have not acquired a special meaning “are construed according to rules of grammar and according to their common and approved usage.”<sup>9</sup> When a statute is unambiguous, courts must apply its plain meaning.<sup>10</sup> Courts cannot add words to a statute that the legislature “intentionally or inadvertently left out.”<sup>11</sup> Likewise, the Board cannot supply language that would substantially alter the meaning of a statute enacted by the legislature. Because the legislature has not limited the phrase “proximity to the election” to be applicable only during particular time periods, the Board declines the Organization’s invitation to do so.

Issued March 8, 2024

  
\_\_\_\_\_  
David Asp, Chair  
Campaign Finance and Public Disclosure Board

---

<sup>6</sup> [Minn. Stat. § 10A.01, subd. 15](#). Those terms are further defined within [Minn. Stat. § 200.02, subds. 2-5](#).

<sup>7</sup> Proximity, Black’s Law Dictionary (11th ed. 2019).

<sup>8</sup> Proximity, Oxford English Dictionary (3<sup>rd</sup> ed. 2023), [oed.com/dictionary/proximity\\_n](https://www.oed.com/dictionary/proximity_n).

<sup>9</sup> [Minn. Stat. § 645.08](#).

<sup>10</sup> [Great River Energy v. Swedzinski, 860 N.W.2d 362, 364 \(Minn. 2015\)](#) (citing [Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 \(Minn. 2001\)](#)).

<sup>11</sup> [Great River Energy v. Swedzinski, 860 N.W.2d 362, 364 \(Minn. 2015\)](#) (quoting [Genin v. 1996 Mercury Marquis, 622 N.W.2d 114, 117 \(Minn. 2001\)](#)).