

**State of Minnesota
Campaign Finance & Public Disclosure Board
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REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA
under Minn. Stat. § 10A.02, subd. 12(b)**

ADVISORY OPINION 464

SUMMARY

A communication that does not use words or phrases of express advocacy and does not clearly include an electoral portion, does not contain express advocacy. A communication that clearly identifies a candidate, clearly includes an electoral portion, and could only be interpreted by a reasonable person as encouraging them to vote for a specific candidate contains express advocacy.

Facts

As a representative of an organization (the Organization), you ask the Campaign Finance and Public Disclosure Board for an advisory opinion regarding the application 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.¹ 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.”²

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.”³
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:

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

¹ [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)).

² 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)).

³ [FEC v. Wisconsin Right To Life, Inc.](#), 551 U.S. 449, 451 (2007).

(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.

Because the language added to Minnesota Statutes section 10A.01, subdivision 16a, is nearly identical to the text of paragraph (b) within 11 C.F.R. § 100.22, which contains the federal definition of “expressly advocating,” the Board will construe the new language in a manner that is consistent with how federal courts have applied the federal definition.⁴ Advisory opinions and statements of reasons issued by the FEC regarding the federal definition may be instructive. However, the Board is not bound to follow guidance issued by the FEC in applying Minnesota Statutes chapter 10A.

In 1986 the United States Supreme Court considered, in *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*, whether a flyer, referred to as a special edition of an organization’s newsletter, contained express advocacy.

The front page of the publication was headlined “EVERYTHING YOU NEED TO KNOW TO VOTE PRO–LIFE,” and readers were admonished that “[n]o pro-life candidate can win in November without your vote in September.” “VOTE PRO–LIFE” was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the “pro-life” candidates.

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A “y” indicated that a candidate supported the MCFL view on a particular issue and an “n” indicated that the candidate opposed it.⁵

The Court concluded that:

The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it 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.⁶

The Court therefore held that the flyer “represents express advocacy of the election of particular candidates distributed to members of the general public.”⁷

The meaning of the phrase “expressly advocating” was reviewed in *Federal Election Commission v. Furgatch* in 1987. The Ninth Circuit Court of Appeals considered whether a

⁴ See [Minn. Stat. § 645.08](#), providing that “technical words and phrases and such others as have acquired a special meaning . . . are construed according to such special meaning. . . .”

⁵ [FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 243 \(1986\)](#) (internal citation omitted).

⁶ *Id.* at 249.

⁷ *Id.* at 250.

newspaper advertisement published a week prior to a presidential election, criticizing President Carter, contained express advocacy.⁸ The advertisement accused President Carter of attempting to “buy entire cities, the steel industry, the auto industry, and others with public funds,” and of being divisive in “an attempt to hide his own record, or lack of it.”⁹ The advertisement ended by stating:

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.¹⁰

The court reversed a district court, concluding that “[w]e have no doubt that the ad asks the public to vote against Carter.”¹¹ The court rejected the notion that the text “don’t let him do it” and specifically the word “it” could be “read to refer to Carter’s degradation of his office, and his manipulation of the campaign process.”¹² The court concluded that the phrase “don’t let him” is a command.¹³ The court held that the advertisement contained “an express call to action, but no express indication of what action is appropriate.”¹⁴ The court determined that a “failure to state with specificity the action required does not remove political speech from the coverage of the Campaign Act when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate.”¹⁵ The court further held that “[r]easonable minds could not dispute that Furgatch’s advertisement urged readers to vote against Jimmy Carter” because that “was the only action open to those who would not ‘let him do it.’”¹⁶

The opinions in *MCFL* and *Furgatch* were two of a small number of judicial opinions relied upon by the FEC in drafting the text of 11 C.F.R. § 100.22.¹⁷ Since 1995 federal courts have repeatedly held that the FEC and states may, consistent with the First Amendment, regulate speech that is the functional equivalent of express advocacy.¹⁸ Express advocacy is not limited to the magic words listed in footnote 52 of *Buckley v. Valeo*, including “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”¹⁹

⁸ [FEC v. Furgatch, 807 F.2d 857 \(9th Cir. 1987\)](#).

⁹ *Id.* at 858.

¹⁰ *Id.*

¹¹ *Id.* at 864.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 865.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ [Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35293-94 \(July 6, 1995\)](#).

¹⁸ See, e.g., [FEC v. Wisconsin Right To Life, Inc., 551 U.S. 449, 456-57 \(2007\)](#); [Citizens United v. FEC, 558 U.S. 310, 324-26 \(2010\)](#).

¹⁹ See *Buckley*, 424 U.S. at 44 n.52.

Issue One

The Organization may sponsor a television advertisement with the following script:

[Female 1] Governor Walz and the Democrats completely control our state government, and look at what they're doing.

[Male 1] They're building a new luxury office building, for themselves.

[Female 2] A building that will cost taxpayers \$77 million.

[Male 2] And to pay for their new luxury office building, they passed a record-setting tax increase

[Female 3] And our property taxes went up.

[Male 3] Instead of wasting our tax dollars on their new luxury office building, why aren't Governor Walz and Democrats fixing our roads and potholes?

[Female 1] Minnesota, we deserve better.

The Organization asks the Board to assume that the facts stated in the advertisement are true, the visual and audio components of the advertisement will be materially indistinguishable from those used in a 2014 Freedom Club State PAC advertisement that the Board's executive director referenced in testimony to a legislative committee regarding H.F. 3, and Governor Walz will seek re-election in 2026. The advertisement may run statewide in Minnesota:

- (i) in February 2026, when the Legislature may be in session;
- (ii) alternatively, in June 2026, when the Legislature is presumed to be adjourned;
- (iii) alternatively, in August 2026;
- (iv) alternatively, from August 12 through September 3, 2026; and
- (v) alternatively, in October 2026.

Would this communication qualify as express advocacy under the amended definition of "expressly advocating"? If the Board concludes that the answer is yes, would it make a difference if the statement "Minnesota, we deserve better" was replaced with a call to action such as "Call Governor Walz at (651) 201-3400 [the telephone number for the Governor's office] and tell him to spend our tax dollars on fixing roads and potholes instead of luxury office buildings"?

Opinion One

The Organization's hypothetical television advertisement clearly identifies a candidate. However, the advertisement does not use words or phrases of express advocacy, and it differs from the newspaper advertisement considered in *Furgatch* in at least one critical respect, in that it does not clearly refer to an election. While the advertisement considered in *Furgatch* stated

that President Carter’s success would result in “four more years,” the Organization’s hypothetical advertisement includes spoken words that, at best, make a vague reference to an upcoming election in stating “we deserve better.” The advertisement’s graphics likewise do not include clear electoral elements. Therefore, “the electoral portion of the communication is” not “unmistakable, unambiguous, and suggestive of only one meaning,” and the hypothetical advertisement does not contain express advocacy.

Whether the statement “Minnesota, we deserve better” is a call to action and could reasonably be perceived to encourage action other than action to defeat Governor Walz when coupled with a clear electoral portion may depend on the timing of the advertisement. For example, it may be the case that a reasonable mind could not conclude that an advertisement airing shortly before the 2026 general election, criticizing Governor Walz regarding a construction project that began in 2023 and stating “we deserve better” while referring to the election, when Governor Walz is on the general election ballot, encourages action other than action to defeat Governor Walz in the 2026 general election. However, the Board need not decide that issue due to the advertisement’s lack of a clear electoral portion.

Issue Two

The Organization may sponsor a television advertisement with the following script:

[Narrator] Look across the land, on farms, and in factories, in classrooms, and construction sites. Minnesota is working.

Four years ago, Minnesota faced a \$5 billion deficit.

[On screen text] “state faces \$5 billion deficit” [Citation to news article]

[Narrator] But Governor Tim Walz showed strong leadership. He raised taxes on the wealthiest two percent, so we could invest in our schools and reduce middle-class taxes. Now Minnesota has over 150,000 new jobs and a budget surplus.

[On screen text] “Tim Walz Calls for Tax Overhaul, Higher Rates for Wealthy”
[Quoting news article headline]

“Gov. Tim Walz
All-Day Kindergarten”

“Gov. Tim Walz
Reduced Middle-Class Taxes”

“Gov. Tim Walz
150,000 New Jobs”

“Gov. Tim Walz
\$1.2 Billion Surplus”

“Governor Tim Walz
Working for us”

[Narrator] Governor Tim Walz is working for us.

The Organization asks the Board to assume that the facts stated in the advertisement are true, the visual components of the advertisement will be materially indistinguishable from those used in a 2014 Alliance for a Better Minnesota Action Fund advertisement that the Board’s executive director referenced in testimony to a legislative committee regarding H.F. 3, and Governor Walz will seek re-election in 2026. The advertisement may run statewide in Minnesota:

- (i) in February 2026, when the Legislature may be in session;
- (ii) alternatively, in June 2026, when the Legislature is presumed to be adjourned;
- (iii) alternatively, in August 2026;
- (iv) alternatively, from August 12 through September 3, 2026; and
- (v) alternatively, in October 2026.

Would this communication qualify as express advocacy under the amended definition of “expressly advocating”? If the Board concludes that the answer is yes, would it make a difference if the statement “Governor Tim Walz is working for us” was replaced with a call to action such as “Call Governor Walz at (651) 201-3400 [the telephone number for the Governor’s office] and tell him to keep focusing on the economy, cutting the deficit, and creating new jobs”?

Opinion Two

The Organization’s hypothetical television advertisement clearly identifies a candidate. However, the advertisement does not use words or phrases of express advocacy, and like the advertisement discussed in Opinion One, it does not clearly refer to an election. The Organization’s hypothetical advertisement includes spoken words that, at best, make a vague reference to an upcoming election in stating that Minnesota faced a budget deficit “[f]our years ago.” The advertisement’s graphics likewise do not include clear electoral elements. Therefore, “the electoral portion of the communication is” not “unmistakable, unambiguous, and suggestive of only one meaning,” and the hypothetical advertisement does not contain express advocacy.

Whether the statement “Governor Tim Walz is working for us” could reasonably be perceived to encourage action other than action to elect Governor Walz when coupled with a clear electoral portion may depend on the timing of the advertisement. For example, it may be the case that a reasonable mind could not conclude that an advertisement airing shortly before the 2026 general election, praising Governor Walz for actions taken over a four-year period and stating “Governor Tim Walz is working for us” while referring to the election, when Governor Walz is on the general election ballot, encourages action other than action to elect Governor Walz in the 2026 general election. However, the Board need not decide that issue due to the advertisement’s lack of a clear electoral portion.

Issue Three

The Organization may sponsor a mailer with the following language:

[Side 1] REP. DAVE LISLEGARD **BETRAYED** YOU!

BY VOTING TO **PROTECT** GOVERNOR TIM WALZ' EMERGENCY POWERS

[Photo of Rep. Lislegard with Gov. Walz in the background]

[Side 2] > Voted with Metro Democrats to protect Walz' Emergency Powers **indefinitely**

> Allowing the Governor to **shut down businesses** in the future.

MAKE DAVE LISLEGARD LISTEN. CALL HIM AT 651.296.0170
rep.dave.lislegard@house.mn.gov

DEMAND he keeps his promise & votes **YES** on the End Walz' Emergency Powers Resolution

SIGN THE PETITION AT
https://www.action4liberty.com/never_again

The Organization asks the Board to assume that the facts stated in the mailer are true, the visual components of the mailer will be materially indistinguishable from those used in a 2021 Action 4 Liberty mailer that the Board's executive director referenced in testimony to a legislative committee regarding H.F. 3,²⁰ and Representative Lislegard will seek election to the office of state representative for House District 7B in 2026. The mailer may be distributed to residents in House District 7B:

- (i) in February 2026, when the Legislature may be in session;
- (ii) alternatively, in June 2026, when the Legislature is presumed to be adjourned;
- (iii) alternatively, in August 2026;
- (iv) alternatively, from August 12 through September 3, 2026; and
- (v) alternatively, in October 2026.

Would this communication qualify as express advocacy under the amended definition of "expressly advocating"?

²⁰ Each side of the mailer referenced in testimony regarding H.F. 3 contained a photograph of then-Representative Julie Sandstede. The question states that the mailer would include a photograph of Representative Lislegard with Governor Walz in the background. Therefore, the Board assumes that the photograph of Representative Sandstede would be replaced with a photograph of Representative Lislegard.

Opinion Three

The Organization’s hypothetical mailer clearly identifies a candidate. However, it does not use words or phrases of express advocacy, and it does not clearly refer to an election. Moreover, it does not clearly encourage action to elect or defeat a candidate, and instead encourages two alternative actions, namely contacting Representative Lislegard and signing an online petition. Therefore, the hypothetical mailer does not contain express advocacy.

Issue Four

The Organization may sponsor a printed voter guide with the following language:

2026 Voter Guide:	Tim Walz & Peggy Flanagan	Jeff Johnson & Donna Bergstrom
Governor		
What are your values and priorities?		
Making healthcare more affordable and accessible by giving every Minnesotan the option to get coverage through MinnesotaCare?	Yes	No
Fixing our roads, bridges and transportation infrastructure?	Yes	No
Combating climate change by investing in local, renewable energy jobs?	Yes	No
Promoting vocational schools and trade programs?	Yes	Yes
Fully and equitably funding our schools and supporting Universal Pre-K for Minnesota kids?	Yes	No

Join your friends & neighbors on Tuesday, November 3rd. Thank you for voting!

The Organization asks the Board to assume that the facts stated in the voter guide are true, the visual components of the mailer will be materially indistinguishable from those used in a 2018 LIUNA Minnesota voter guide that the Board’s executive director referenced in testimony to a legislative committee regarding H.F. 3, Walz-Flanagan and Johnson-Bergstrom will be opposing governor-lieutenant governor candidate tickets in the 2026 general election, and the voter guide will be distributed statewide in October 2026.

Would this communication qualify as express advocacy under the amended definition of “expressly advocating”?

Opinion Four

The Organization’s hypothetical voter guide clearly identifies four candidates. It does not use words or phrases of express advocacy such as “vote for,” “vote against,” “elect,” or “defeat.”²¹ However, in calling on readers to join their friends and neighbors on election day and thanking them in advance for voting, “the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning.” The voter guide also clearly encourages readers to vote for the Walz-Flanagan ticket, and clearly does not encourage another kind of action.

The voter guide is structured as a series of questions comprised of incomplete sentences with one-word responses supposedly provided by each slate of candidates. The attribution of the one-word responses to each slate of candidates is made clear by the statement, appearing atop the list of questions, which states “What are your values and priorities?” The Board does not believe that the Organization intends to assert that Jeff Johnson, Donna Bergstrom, or any representative of the Johnson (Jeff) for Governor committee has ever or will ever respond to a question asking whether fixing roads, bridges, and transportation infrastructure is a priority with an unqualified “No.”

While not identical to the flyer considered in *MCFL* that included the exhortation “VOTE PRO-LIFE,”²² the publication at issue here includes names and pictures of candidates, specifically identifies the office sought by the candidates for governor, identifies the date of the general election, and refers to “voting” at that election. These attributes, combined with the nature of the questions and the false attribution of “responses” within the voter guide, lead to the conclusion that the guide unmistakably and unambiguously is suggestive of one meaning—it encourages voting for the Walz-Flanagan ticket in the election on November 3. Whether the communication includes the phrase “voter guide” is immaterial, because regardless of how the communication is characterized on its face, reasonable minds could not differ as to whether it encourages readers to vote for the Walz-Flanagan ticket. The hypothetical voter guide contains express advocacy.

Board Note

The Organization’s request is specific in asking whether the hypothetical communications contain express advocacy, which may impact whether the Organization is required to register with the Board, file campaign finance reports with the Board, and include the disclaimer required by Minnesota Statutes section 211B.04, subdivision 2, in preparing and disseminating campaign

²¹ See *Buckley*, 424 U.S. at 44 n.52 (listing these, and other, words and phrases of express advocacy).

²² See *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 243.

material. The opinions provided therefore do not address whether the Organization may be required to file statements of electioneering communications pursuant to Minnesota Statutes section 10A.202, and include the disclaimer required by Minnesota Statutes section 10A.202, subdivision 4, when making the hypothetical communications.

Issued September 4, 2024



David Asp, Chair
Campaign Finance and Public Disclosure Board