KROMKO V. CITY OF TUCSON: USE OF PUBLIC FUNDS TO INFLUENCE THE OUTCOMES OF ELECTIONS

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I. INTRODUCTION

In 1996, the Arizona Legislature enacted Sections 9-500.14, 15-511, and 11-410, prohibiting cities, towns, school districts, and counties from using public funds to influence the outcomes of elections.[1] Six years later, a Tucson citizen, John Kromko, sued the City of Tucson ("the City") under Section 9-500.14, claiming that the City had used public funds to advocate passage of two measures on an upcoming special referendum election. The case raised a question of first impression in Arizona: "[P]recisely what constitutes 'influencing the outcomes of elections' for purposes of the statute?"[2] The Arizona Court of Appeals, Division Two, concluded that a city would be found in violation of the statute only if it engaged in "express advocacy," which the court defined as "communication that, taken as a whole, unambiguously urges a person to vote in a particular manner."[3] Despite evidence of bias in the city's voter-education materials, the court found that, under this restrictive test, the City had not used public funds to influence the outcome of the election.

The election at issue was a citywide special referendum scheduled for May 21, 2002. It included two related propositions: adoption of the City's transportation improvement plan, and approval of a business tax increase to fund it.[4] The City distributed two pamphlets, maintained an Internet website, and aired a television spot featuring the city manager in support of the propositions.[5]

The "Tucson's Transportation Plan" pamphlet originally contained checked boxes and a green traffic light logo, suggesting support for the proposals.[6]

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1. ARIZ. REV. STAT. § 9-500.14 (2004) (regulating cities); ARIZ. REV. STAT. § 11-410 (2004) (regulating counties); ARIZ. REV. STAT. § 15-511 (2004) (regulating school districts).
2. Kromko v. City of Tucson, 47 P.3d 1137, 1139 (Ariz. Ct. App. 2002).
3. *Id.* at 1141 (citations omitted).
4. *Id.* at 1139.
5. Kromko v. City of Tucson, No. C20021902 (Super. Ct. Apr. 30, 2002).
6. *Id.* at 5.

After litigation commenced, however, the City removed the checked boxes and traffic light.[7] It deleted some language in the second pamphlet as well.[8] Although factual and accurate, the information in both pamphlets was presented in a one-sided manner.[9]

Kromko's complaint contended that the City and its city manager violated Section 9-500.14(A) "because the City was not simply educating the public through pamphlets, television announcements, and Internet websites but was advocating a vote in favor of the propositions, using City personnel, equipment, materials, and other resources to do so."[10] The trial court partially granted Kromko's request for a preliminary injunction, prohibiting the City from disseminating one pamphlet, broadcasting the television commercial, and displaying three of the web pages. The trial judge found these communications "likely to, intended to, or meant to influence the election outcome."[11] The court denied injunctive relief on the second pamphlet and four other pages of the website.[12]

The Arizona Court of Appeals, Division Two, granted an accelerated appeal and cross-appeal of the trial court's order. Reviewing the legal issues *de novo*, the court vacated the partial injunction and affirmed the denial of injunctive relief on the remaining campaign materials.[13] The Arizona Supreme Court declined review.[14]

II. LEGAL CONTEXT

Prior to enactment of Section 9-500.14, Arizona courts had addressed the propriety of using public funds to influence the outcome of an election only once, in 1933.[15] The controversy in *Sims v. Moeur*[16] centered on an initiative that would have repealed Arizona's "Workmen's Compensation Law."[17] An industrial commission, created by the workers' compensation statute, held compensation

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7. *Id.*

8. The City deleted the subtitle, "Ending the 3-Light Delay," from the second pamphlet. *Id.*

9. *Id.* "[T]estimony from the City's Deputy Director of Transportation, James Glock, reflects that the information in these pamphlets and on the website is factual and accurate, although these pamphlets admittedly do not contain information about *disadvantages* of the proposals." *Id.* (emphasis added); *see also Kromko*, 47 P.3d at 1141.

10. *Kromko*, 47 P.3d at 1139. The City's referendum measure ultimately failed, however, when voters rejected the transportation plan on election day. Larry Copenhaver & Garry Duffy, *Credibility Gap Cited in City's Road Rout*, TUCSON CITIZEN, May 23, 2002, at 1C, *available at* 2002 WL 14256016.

11. *Kromko*, 47 P.3d at 1139.

12. *Id.*

13. *Id.* at 1137, 1142.

14. *Id.* at 1137, *rev. denied* (Sept. 24, 2002).

15. Op. Ariz. Att'y Gen. I00-020 (2000) at 6 n.4, *available at* 2000 Ariz. AG LEXIS 19 [hereinafter Op. Att'y Gen.].

16. 19 P.2d 679 (Ariz. 1933).

17. *Id.* at 680.

funds in trust for workers of the state until dispersed.[18] Members of the commission used the trust funds, however, to keep the initiative off the ballot, and to conduct a campaign to prevent its passage.[19] The campaign included newspaper advertising, radio broadcasting, circulars and letters, and payment of a hired campaign staff.[20]

Four commissioners were fired for alleged unauthorized campaigning and "other derelictions and misconduct."[21] The Arizona Supreme Court upheld the discharges on appeal.[22] The court reasoned, first, that if the commission was authorized to expend compensation funds for political purposes, the grant of that authority had to come from the statutes defining its powers and duties in relation to the funds.[23] It then found that the relevant statutes neither "expressly granted" nor "necessarily implied" the power to spend compensation funds for partisan purposes.[24] Thus, the industrial commissioners had overreached the scope of their statutorily delegated powers, and their discharges were proper.[25]

In 1996, the Arizona Legislature expressly denied Arizona state and local governments the power to use public funds for partisan campaign purposes.[26] Arizona Revised Statute Section 9-500.14, addressing municipalities, states:

> A. A city or town shall not use its personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections. Notwithstanding this section, a city or town may distribute informational reports on a proposed bond election as provided in § 35-454. Nothing in this section precludes a city or town from reporting on official actions of the governing body.
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> B. Employees of a city or town shall not use the authority of their positions to influence the vote or political activities of any subordinate employee.
>
> C. Nothing contained in this section shall be construed as denying the civil and political liberties of any employee as guaranteed by the United States and Arizona Constitutions.[27]

Although no Arizona court had interpreted Section 9-500.14 prior to the Arizona Court of Appeals in *Kromko*,[28] an Attorney General Opinion ("the

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18. *Id.*
19. *Id.* at 680–81.
20. *Id.*
21. *Id.* at 680.
22. *Id.* at 682.
23. *Id.* at 683.
24. *Id.* at 684.
25. *Id.* at 685 (noting that "[the] claim of right to spend [public money] for the purpose of influencing an election, or for lawyer's fees to prevent an election, comes as quite a shock").
26. ARIZ. REV. STAT. §§ 9-500.14, 11-410, 15-511 (2004) (enacted 1996).
27. ARIZ. REV. STAT. § 9-500.14.
28. Neither § 11-410 nor § 15-511 had been judicially interpreted prior to *Kromko*. Section 11-410 contains identical language to § 9-500.14 restricting the use of county resources for partisan campaigning. ARIZ. REV. STAT. § 11-410.

Opinion") interpreted the statute in 2000.[29] The Opinion relies heavily on case law from other states, particularly California, to form the conclusion that a "city or county may use its resources to respond to citizen inquiries that may concern election issues, but it must do so in a neutral manner that does not urge support or opposition to a measure."[30] Thus, "[a]lthough individual elected officials of cities and counties may advocate for or against matters that may be on the ballot, they cannot use public resources to support their efforts because of the prohibitions in §§ 9-500.14 and 11-410."[31] The Opinion cites the seminal California Supreme Court case *Stanson v. Mott*[32] to support an interpretation of Section 9-500.14 that would require an *ad hoc* analysis:

> Informational materials that do not advocate for or against a measure, but are not specifically required by statute, would require case-by-case evaluation to determine whether they are, based on all relevant circumstances, materials to influence the outcome of an election in violation of statute. This analysis requires "careful consideration of such factors as the style, tenor and timing of the publication."[33]

The Opinion thus suggests a broader definition of improper government advocacy than that which later would be adopted by the Arizona Court of Appeals.

III. ANALYSIS

A. Statutory Interpretation

Kromko argued that the City was required to present a fair and impartial analysis of the issues if it chose to educate the public on the ballot measure.[34] The Arizona Court of Appeals rejected the argument, stating that Kromko's primary authorities did not apply to Section 9-500.14(A).[35] Those authorities, noted the court, involved interpretation of "statutes applicable to state election ballots and publicity pamphlets."[36] Because Section 9-500.14 was not modeled after those statutes, the court inferred that the legislature did not intend to adopt their neutrality standard.[37] Instead, the court determined, the legislature modeled the language in Section 9-500.14 after *Buckley v. Valeo*,[38] a U.S. Supreme Court case

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29. Op. Att'y Gen., *supra* note 15.
30. *Id.* at 8.
31. *Id.* at 10.
32. 551 P.2d 1 (Cal. 1976).
33. Op. Att'y Gen., *supra* note 15, at 7 (quoting *Stanson*, 551 P.2d at 12).
34. Kromko v. City of Tucson, 47 P.3d 1137, 1139-40 (Ariz. Ct. App. 2002).
35. *Id.* at 1140. The court cited *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338 (Ariz. 1994) and *Arizona Legis. Council v. Howe*, 965 P.2d 770 (Ariz. 1998) as *Kromko*'s main authorities at oral argument. *Id.*
36. *Id.* (comparing ARIZ. REV. STAT. §§ 19-123, 124 to ARIZ. REV. STAT. § 9-500.14).
37. *Id.*
38. 424 U.S. 1 (1976).

addressing a challenge to reporting requirements for private contributions to candidates' campaigns for public office.[39]

B. The Modified Buckley *Test*

Recognizing the potential "mischief" that would result from a narrow *Buckley* interpretation of advocacy under Section 9-500.14, the Arizona Court of Appeals declined the City's invitation to construe the statute "as precluding only the expenditure of funds and use of resources for communications that expressly advocate a particular vote."[40] Instead, the court announced a modified test derived from the *Buckley* line of cases:[41] For a communication to be "designed to influence the outcome of an election," it must be such that reasonable minds could not differ as to whether the communication unambiguously urges a person to vote in a particular manner or clearly and unmistakably presents a plea for action, and identifies the advocated action.[42] A court must look at the communication as a whole, without regard to timing or other circumstances independent of the communication itself.[43]

C. Application of the Modified Buckley *Test*

Applying this modified *Buckley* standard to Kromko's claim, the court held that reasonable minds could differ as to whether the City's communications[44] encouraged a vote for the propositions.[45] The court supported its holding with two observations emphasizing the importance it placed on unambiguousness in government partisan advocacy. First, there were no words of express advocacy in the challenged communications.[46] Second, presenting information "in such a way that a reasonable person might conclude that the City was educating the public on the issues, albeit in an entirely positive light . . . [was] not necessarily the same as an unambiguous urging of the electorate to vote in favor of the propositions."[47] In a footnote, the court added that it would have found a checked box an unambiguous urging of a particular vote had the City left it in its pamphlet.[48]

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39. *Kromko*, 47 P.3d at 1140. The Arizona Attorney General Opinion recognized state and federal election laws defining campaign contributions and expenditures as the source of the phrase "for the purpose of influencing elections" as well, but the source of the language was not determinative in the Attorney General's analysis. Op. Att'y Gen., *supra* note 15, at 6–7.

40. *Kromko*, 47 P.3d at 1140–41 ("[S]uch a narrow construction of the statute leaves room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words, albeit that the message and purpose of the communication may be unequivocal.").

41. *Id.* at 1141.

42. *Id.*

43. *Id.*

44. *Id.* The court considered the communications as modified after the commencement of the litigation. *Id.* at 1141 n.4.

45. *Id.* at 1141.

46. *Id.*

47. *Id.*

48. *Id.* at 1141 n.4.

D. Kromko's First Amendment Claim

Kromko further argued that any communication by the City on a ballot issue that was not fair and impartial violated his First Amendment rights under the U.S. Constitution. With minimal analysis, the court held that Kromko's First Amendment claim was without merit because the statute adequately "strikes a balance between the electorate's rights and the City's obligation to inform the public."[49]

IV. CRITICISM

The Arizona Court of Appeals' analysis depends on its interpretation of legislative intent, derived, not from the legislative record, but from the language of the statute itself.[50] However, similar language is found nationwide in statutes and case law that analyze advocacy in the context of government influence, not private contributions to candidates' election campaigns.[51] The problem with applying *Buckley*-type "express advocacy" rules is that the context of private campaign contributions is entirely different from the context of government influence over ballot measure elections as raised in *Kromko*.[52] Thus, the modified *Buckley* test may undercut, rather than advance, the purposes of the government speech limitations in the Arizona statute.

In *Buckley v. Valeo*, the U.S. Supreme Court considered the constitutionality of a federal campaign finance scheme[53] that included a provision requiring disclosure of some campaign expenditures.[54] The Court held that the scheme, although furthering an important government interest, threatened privacy of association and belief, and could indirectly deter the exercise of First Amendment rights.[55] Moreover, the private speech at issue involved core political speech, which receives the highest level of constitutional protection. The legislation was therefore subject to "exacting" scrutiny.[56] To reach a constitutional interpretation of the regulation, the Court narrowly construed both the disclosure

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49. *Id.* at 1141.

50. *Id.* at 1139–40.

51. *C.f.*, ALASKA STAT. § 15.13.145 (Michie 2003); GA. CODE § 21-5-30.2 (2004); OKLA. STAT. ANN. tit. 26 § 16-119 (West 2004); S.C. STAT. ANN. § 8-13-1346 (Law Co-op. 2003); TENN. CODE ANN. § 2-19-206 (2004); UTAH CODE ANN. § 20A-11-1203 (2003); WASH. REV. CODE ANN. § 42.17.190 (West 2004). *See, e.g.*, Mountain States Legal Found. v. Denver Sch. Dist., 459 F. Supp 357 (D. Colo. 1978) (declining to apply campaign finance law and adhering to the traditional approach to government election communications challenges); Stanson v. Mott, 551 P.2d 1 (Cal. 1976) (adopting a standard of neutrality and impartiality for government election communications); Palm Beach County v. Hudspeth, 540 So. 2d 147 (Fla. App. 1989) (adopting a standard of neutrality and impartiality); Schultz v. New York, 654 N.E.2d 1226 (N.Y. 1995) (adopting a standard of neutrality and impartiality).

52. *See* Buckley v. Valeo, 424 U.S. 1, 17 (1976).

53. Fed. Election Campaign Act of 1971, 2 U.S.C.A. §§ 431–54 (West 2004) (amended 1972).

54. *Buckley*, 424 U.S. at 19–20.

55. *Id.* at 64–65.

56. *Id.*

requirement and the campaign spending limit to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[57]

The express constitutional concerns in *Buckley*, privacy of association and belief, involved First Amendment guarantees to private citizens. Those First Amendment concerns—prompting the *Buckley* Supreme Court to narrowly construe express advocacy—are not similarly implicated in the context of government campaign speech.[58] Courts and commentators alike have found partisan governmental campaign advocacy constitutionally suspect and counter to fundamental democratic principles.[59] Thus, a narrow construction of express

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57. *Id.* at 44.

58. *See, e.g.*, Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning 2001*, 2001 SUP. CT. REV. 299, 341–42 (2001). Professor Jackson explains:

> Government speech poses genuinely difficult problems [different from private speech issues under the First Amendment]. Frequently it is motivated by efforts to influence elections and to retain the power of incumbents—but it is often a good idea for government to be responsive to those it represents, at least most of the time on most issues. Moreover, as many have noted, citizens have "an interest in knowing the government's point of view," and there are legitimate interests in using speech to advance government programs and policies. Yet to allow unrestricted use of government speech resources to influence elections could threaten the legitimacy of elections and lead to authoritarian (or worse) governments.

Id. See also, *e.g.*, Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976) (noting that expenditures of public funds for election campaigns "raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions"); Stern v. Kramarsky, 375 N.Y.S.2d 235, 239 (N.Y.Sup.Ct. 1975) ("The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well-motivated, can only demean the democratic process."); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578, 580 (1979–80) (stating that government dissemination of "propaganda in support of a partisan viewpoint may pose [a great danger] to political rights of free expression . . . . The government's use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process.").

59. *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."). A federal district court in Colorado struck a similar note:

> The freedom of speech and the right of the people to petition the government for redress of grievances are fundamental components of guaranteed liberty in the United States. A use of the power of publicly owned resources to propagandize against an [initiative] by . . . those who were taxed to pay for such resources is an abridgment of those fundamental freedoms.

Mountain States Legal Found. v. Denver Sch. Dist., 459 F. Supp. 357, 360–61 (D. Colo. 1978) (citation omitted). A Florida state appellate court agreed emphatically:

> If government, with its relatively vast financial resources, access to the media and technical know-how, undertakes a campaign to favor or

advocacy applied to government speech may impede the free exchange of ideas, a fundamental purpose of First Amendment guarantees.[60]

The Arizona Court of Appeals relied on a California state appeals court case, *Schroeder v. Irvine City Council*,[61] to justify its application of the modified *Buckley* test.[62] In *Schroeder*, the plaintiff filed a taxpayer action for declaratory and injunctive relief against the City of Irvine, its city council, and four individual city council members, claiming that a city program encouraging citizens to vote constituted "political expenditures under the Political Reform Act of 1974,[63] ["PRA"] . . . and were therefore unlawful under *Stanson* [*v. Mott*[64]]."[65] The City successfully filed a motion to strike the complaint under California's anti-SLAPP[66] statute.[67]

> oppose a measure placed on the ballot, then by so doing government undercuts the very fabric which the constitution weaves to prevent government from stifling the voice of the people. An election which takes place in the shadow of omniscient government is a mockery—an exercise in futility—and therefore a sham.

Palm Beach County v. Hudspeth, 540 So. 2d 147, 154 (Fla. App. 1989). *See also Stern*, 375 N.Y.S.2d at 239 (describing government use of public funds to disseminate election propaganda as something that "may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America"); Ziegler, *supra* note 58, at 584 ("Toleration of . . . [government campaign advocacy] preserves the governing structure's democratic form without its democratic function.").

60. *See, e.g.*, *Stanson*, 551 P.2d at 10 (stating limitations on government partisan speech are imposed to "attain the free and pure expression of the voters' choice . . . [and to] avoid any feature that might adulterate or . . . frustrate, that free and pure choice"); Anderson v. City of Boston, 380 N.E.2d 628, 638 (Mass. 1978) ("Government domination of the expression of ideas is repugnant to our system of constitutional government."); *Stern*, 375 N.Y.S.2d at 239–40 ("For government agencies to attempt to influence public opinion on such matters inhibits the democratic process through the misuse of government funds and prestige. Improper expenditure of funds, whether directly through promotional and advertising activities or indirectly through the use of government employees or facilities cannot be countenanced."); Zeigler, *supra* note 58, at 584 ("[A] fundamental goal of democracy is to promote free and genuine citizen opinion."); Jay S. Bloom, Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815, 833 (1977–78) ("Freedom of expression is a method of achieving a more adaptable and hence a more stable political environment by maintaining the balance between healthy disagreement and necessary consensus. Governmental speech distorts this system by its coercive effect upon the otherwise free exercise of choice by the citizenry.").

61. 118 Cal. Rptr. 2d 330 (App. 2002).

62. Kromko v. City of Tucson, 47 P.3d 1137, 1141 (Ariz. Ct. App. 2002).

63. CAL. GOV'T CODE §§ 81000–91015 (West 2004).

64. 551 P.2d 1 (Cal. 1976).

65. *Schroeder*, 118 Cal. Rptr. 2d at 338.

66. SLAPP suits are typically filed by economically powerful corporations, "not to vindicate a legally cognizable right . . . [but to] punish activists by imposing litigation costs on them for exercising their [First Amendment rights]." *Id.* at 336. Here, the allegedly harassing lawsuit was brought by a lone taxpayer against his city government. *Id.*

67. *Id.* at 348.

In determining that Schroeder could not show a likelihood of prevailing on the merits, the court noted that the California legislature had specifically exempted voter registration programs from the general PRA statutory scheme.[68] Rather, cities could "spend funds to encourage voters to register and vote" because public policy and legislative purpose encourages it.[69] Thus, expenditures to promote voter registration and participation were proper absent express advocacy and as long as the voter registration was conducted "without regard to political affiliation."[70] The court then applied the PRA's definition of "independent expenditure" to articulate the modified *Buckley* test for government partisan advocacy: Public expenditures are unlawful political expenditures "only if the communications either expressly advocate[], or taken as a whole unambiguously urge[], passage or defeat of [a measure]."[71] The court held that the voter registration program neither expressly advocated nor unambiguously urged a particular vote because most of its communications "did not even identify [the measure], either by title or subject matter."[72] Only one communication specifically referenced the measure, as one item on an extensive list of state ballot measures and state and federal candidates for public office.[73] Therefore, the voter registration program was found to be a proper public expenditure.[74]

The Arizona Court of Appeals, however, reads *Schroeder* more broadly, contrary to the established California standard for government campaign speech.[75] The generally applicable standard is that a governmental agency, not otherwise authorized by statute, must maintain reasonable neutrality in disseminating public information.[76] A court must determine if a government communication is a "fair presentation of the facts" by "careful[ly considering] . . . the style, tenor and timing of the publication."[77] This reasonable neutrality approach, moreover, has been widely embraced.[78] Thus, the Arizona Court of Appeals, in following an expansive

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68. *Id.* at 340.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 340–41.
74. *Id.* at 341.
75. *Stanson v. Mott*, 551 P.2d 1 (Cal. 1976), remains the leading California case articulating the general rule for government partisan speech. *See* Californians for Scientific Integrity v. Regents, 97 Cal. Rptr. 2d 501, 504 (App. 2000); Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102, 119 (App. 1997); Choice-in-Education League v. Los Angeles Unified Sch. Dist., 21 Cal. Rptr. 2d 303, 210–13 (App. 1993). In a recent, unpublished decision, the California Court of Appeals explained that the modified *Buckley* express advocacy standard applies only when a plaintiff challenges government voter registration activities as improper government political expenditures, leaving the general rule of *Stanson* intact. Juliano v. Long Beach Unified Sch. Dist., 2003 WL 21205986 at 2, 6 (Cal. App. 2003).
76. *Stanson*, 551 P.2d at 11 n.6.
77. *Id.* at 12. The court noted while articulating the test that communications purporting to contain only relevant factual information can nonetheless be improper. *Id.*
78. *See, e.g.*, Stanson v. Mott, 551 P.2d at 8–9 ("[E]very court which has addressed the issue to date has found the use of public funds . . . improper, either on the ground that such use was not explicitly authorized or on the broader ground that such

reading of *Schroeder* and applying the modified *Buckley* test to government campaign speech, has adopted a minority view from an arguably inapposite context.

The modified *Buckley* test, by limiting impropriety to "express advocacy," may fail to protect public elections from undue government influence.[79] Although a one-sided presentation might not be deemed to "unambiguously urge" a particular outcome, the public may be ill-equipped to differentiate between neutral voter-education pamphlets required by statute and other, partisan materials distributed by the government.[80] Recipients of materials like those disseminated by the City may assume the materials are nonpartisan and neutral, and may feel no need to investigate an issue any further. Thus, communications deemed something less than "express advocacy" may, nonetheless, influence voter opinion. The modified *Buckley* standard leaves room for future mischief. As the U.S. Supreme Court cautioned over a century ago,

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expenditures are never appropriate."); Leigh Contreras, Comment, *Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. City of Las Cruces*, 27 N.M.L. REV. 517, 518 (1997) (noting that jurisdictions that have addressed the issue of government partisan speech "have reached the almost uniform consensus that, in the context of an election, messages from the government may inform but they may not directly persuade"). *See also, e.g.*, Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 819 (N.D. Ala.. 1988) ("The government has an obligation to remain neutral and not spend public funds advocating or opposing an initiative on the ballot."); Mountain States Legal Found. v. Denver Sch. Dist., 459 F. Supp. 357, 360 (D. Colo. 1978) ("If it is assumed that the board of education has the power to spend public funds and use public facilities for the purpose of informing the electorate about [a referendum to amend the state constitution], there is strong precedent for requiring fairness and neutrality in that effort."). For more recent cases applying a *Stanson*-type standard, see Board of Educ. v. State Elections Enforcement Comm'n, 21 Conn. L. Rptr. 335 (Super. 1998), *available at* 1998 WL 61571; Palm Beach County v. Hudspeth, 540 So. 2d 147, 154 (Fla. App. 1989) ("While the county not only may but should allocate tax dollars to educate the electorate on the purpose and essential ramifications of referendum items, it must do so fairly and impartially."); Dollar v. Town of Cary, 569 S.E.2d 731, 733 (N.C. App. 2002); Smith v. Dorsey, 599 So. 2d 529, 542 (Miss. 1992) ("We find compelling wisdom and sound logic in [the interstate] line of cases which recognizes a balanced, informational role in educating the local community about referendum proposals."); Schultz v. State, 654 N.E.2d 1226, 1230 (N.Y. App. 1995) (holding that the New York Constitution would support "the use of public funds to inform and educate the public, in a reasonably neutral fashion, on the issues in an election so that voters [would] more knowledgeably exercise their franchise"); Putter v. Montpelier Pub. Sch. Sys., 697 A.2d 354, 358 (Vt. 1997). *Cf.* Ark. Op. Atty. Gen. No. 2000-162, at 5 (Ark. A.G. 2000), *available at* 2000 WL 1251867; N.D. Op. Atty. Gen. No. 2002-L-61, at 2–4 (N.D. A.G. 2002), *available at* 2002 WL 31426676.

79. *See* Jackson, *supra* note 58, at 335 ("An election serves a legitimating role only if it is perceived to reflect the views of the voters in that election—freely formed, uncorrupted by fear of violence, and not subject to undue influence from any source. On this standard, it must be acknowledged that many of our elections are a long way from this ideal.").

80. For local initiative and referendum measures, cities are required to distribute publicity pamphlets that describe the measures and include arguments for and against them. ARIZ. REV. STAT. § 19-141 (West 2004).

"illegitimate and unconstitutional practices [often] get their first footing" in their "mildest and least repulsive form."[81]

V. CONCLUSION

In *Kromko*, the Arizona Court of Appeals interpreted Arizona Revised Statute Section 9-500.14(A) to apply only in cases of the most obvious partisan dissemination of information. Less overt messages, according to the court, pass statutory muster. Municipal advocacy is not "express advocacy if reasonable minds could differ . . . whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action."[82] The court rejected the reasonable neutrality approach that Kromko urged, that the Arizona Attorney General had endorsed, and that the vast majority of courts to have considered the issue have adopted. The outcome in *Kromko* suggests that cities in Arizona will have considerable leeway to advocate particular outcomes on ballot questions by disseminating materials containing one-sided or biased information, so long as the materials are arguably intended to inform and not persuade.

81. Boyd v. United States, 116 U.S. 616, 635 (1886).
82. Kromko v. City of Tucson, 47 P.3d 1137, 1141 (Ariz. Ct. App. 2002).