UNITED STATES FEDERAL ELECTION COMMISSION

In the matter of:

ELECTIONEERING COMMUNICATIONS

NOTICE 2007-16

Washington, D.C.

Thursday, October 18, 2007

1 PARTICIPANTS:

2 Panel 4

3 BRIAN SVOBODA

4 MICHAEL TRISTER

5 JEREMIAH L. MORGAN

6 Panel 5

7 STEPHEN HOERSTING

8 JOHN SULLIVAN

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHAIRMAN LENHARD: Good morning, I
4 would like to open the hearing of the Federal
5 Election Commission for Thursday, October 18,
6 2007.

7 This is a continuation of our
8 hearings on the question of whether the
9 agency should amend its regulations in light
10 of the Supreme Court's decision in Wisconsin
11 Right to Life.

12 We had a series of panels yesterday
13 and we will continue that today.

14 We have total, I believe, of seven
15 witnesses today who will occupy two different
16 panels. The first panel will last about an
17 hour and a half and we will then break for
18 lunch and reconvene with the second panel
19 this afternoon.

20 Each of the witnesses will have
21 five minutes for an opening statement. We
22 have a light display system on the table in

1 front of you to aid you in management of that
2 time.
3 The green light will appear and
4 will remain on for most of your time and will
5 start flashing when there is one minute left.
6 The yellow light will come on when
7 there is 30 seconds left and the red light
8 comes on when your time has expired.
9 After that we will open it up to
10 questions from the Commission. The
11 commissioners simply can seek recognition
12 from me and we will not go in any particular
13 order and the commissioners can have follow-
14 up questions as they wish.
15 In addition, the general counsel
16 and the staff director's representative will
17 also have an opportunity to ask questions if
18 they would like.
19 We had provided an opportunity for
20 opening statements yesterday and had one. I
21 assume none of the commissioners want to make
22 opening statements again today, in light of

1 yesterday's testimony? Hearing none, then we
2 will go to our first panel.
3 Welcome, gentlemen. Our first
4 panel this morning consists Brian Svoboda who
5 has ably come instead of Bob Bauer and is
6 appearing on behalf of the Democrat
7 Congressional Campaign Committee.
8 Mr. Svoboda, I don't know if you
9 know it or not, the Commission met earlier
10 and by a vote five to zero have decided that
11 you should read Mr. Bauer's blog this
12 morning, a bit of prose in the tradition of
13 Mr. Keats, so if you could do that for us,
14 that would be excellent.
15 Just kidding. We have Jeremiah
16 Morgan here on behalf of the Free Speech
17 Coalition, so welcome.
18 And Michael Trister who is here on
19 behalf of the Alliance for Justice.
20 We generally follow the
21 alphabetical order in order of our speakers.
22 Unless you have arranged among yourselves

1 differently that would involve Mr. Morgan
2 going first, Mr. Svoboda going second and Mr.
3 Trister going third.
4 Hearing no mention of an
5 alternative plan, Mr. Morgan, please proceed
6 at your leisure.
7 MR. MORGAN: Good morning, Chairman
8 Lenhard and members of the Commission.
9 My name is Jeremiah Morgan. I am
10 an attorney with the law firm of William J.
11 Olsen, P.C. and I am appearing today on
12 behalf of both the Free Speech Coalition and
13 Free Speech Defense and Education Fund.
14 Thank you allowing me the
15 opportunity to testify on the proposed
16 regulations.
17 The Free Speech Coalition was
18 founded in 1993 as a group of
19 ideologically-diverse nonprofit
20 organizations, primarily Internal Revenue
21 Code Section 501(c)4 organizations, and the
22 companies that work for them.

1 Its purpose is to protect such
2 organizations' First Amendment rights through
3 the reduction or elimination of excessive
4 regulatory burdens on those rights.
5 The Free Speech Defense and
6 Education Fund was established in 1996 and is
7 a section 501(c)3 education and litigation
8 sister organization of FSC. We filed written
9 comments on behalf of both organizations on
10 October 1, 2007.
11 Whenever an administrative agency
12 loses a case in court and is required to
13 rewrite its regulations, it faces the
14 temptation to minimize its loss through the
15 rulemaking process. We urge the Commission
16 to resist this temptation.
17 In this rulemaking proceeding, the
18 Commission should pick up where Chief Justice
19 Roberts left off in WRTL II.
20 In the final paragraph of the Chief
21 Justice's opinion, he said, "When it comes to
22 defining what speech qualifies as a

1 functional equivalent of express advocacy
2 subject to the electioneering communications
3 act, the issue we do have to decide, we give
4 the benefit of the doubt to speech, not
5 censorship."
6 The regulations proposed by the
7 Commission do not appear to follow suit.
8 They do not give the benefit of the doubt to
9 the rights guaranteed by the First Amendment.
10 The Commission's jurisdiction is
11 limited to the regulation of federal
12 elections, and yet the Commission is being
13 asked by some in Congress and some who will
14 testify here today to protect incumbents from
15 criticism or pressure from their
16 constituents.
17 That should no longer be possible
18 as the Supreme Court in WRTL II blew a hole
19 in Congress's attempt to give each
20 congressman and senator a preelection
21 trademark on the use of their names.
22 Alternative 1's exemption would

1 unconstitutionally maintain the reporting
2 requirement for issue advertisements such as
3 WRTL's.
4 While the NPRM maintains that the
5 Commission "could construe" WRTL II as not
6 affecting the reporting requirements for
7 electioneering communications, such a reading
8 is not only illogical, but unconstitutional.
9 The Commission cannot demand
10 reporting without a nexus to federal
11 elections. If it cannot regulate certain
12 electioneering communications, it obviously
13 cannot require reports on those expenditures.
14 The same is true for disclaimer
15 requirements. Likewise, Alternative 2 is
16 unconstitutionally structured to exempt issue
17 ads from its definition of "electioneering
18 communications." This is backwards.
19 The WRTL II court's opinion not
20 allow WRTL's ads as an exemption to BCRA
21 Section 203. Instead, the court defined an
22 ad that is "the functional equivalent of

1 express advocacy only if the ad is
2 susceptible of no reasonable interpretation
3 other than as an appeal to vote for or
4 against a specific candidate."
5 The NPRM converts this into an
6 exemption "if the communication is
7 susceptible of a reasonable interpretation
8 other than as an appeal to vote for or
9 against a specific candidate."
10 The converse of a statement is not
11 the same as a statement, and when in doubt,
12 stick with the court's configuration.
13 Actually, neither alternative
14 proposed in this NPRM would adequately
15 incorporate the principles of the Supreme
16 Court's decision in WRTL II.
17 The two proposals appear to be
18 based on the presumption that the
19 constitutional difficulties can be remedied
20 by creating an exemption in the faulty
21 regulations.
22 This has the effect of shifting the

1 burden of proof to those engaging in
2 political speech that they are covered by the
3 exemptions or within the safe harbors.
4 The Supreme Court in WRTL II
5 affirmed that ads such as WRTL's are
6 political speech. Thus, the application of
7 BCRA Section 203 is subject to strict
8 scrutiny, and therefore the Commission has
9 the burden to prove that a particular ad is a
10 prohibited electioneering communication.
11 Commission regulations should not
12 be written so that an organization has to
13 prove that it exempt.
14 Lastly, with respect to the NPRM's
15 interest in "basic background information"
16 clause of the Supreme Court decision, the
17 NPRM treats that decision with selective
18 creativity, which appears to show a lack of
19 respect for the actual text of the opinion.
20 The Chief Justice said, "Courts
21 need not ignore basic background information
22 that may be necessary to put an ad in

1 context."

2 The Commission could avoid entirely

3 any consideration of "basic background

4 information" if it heeded the court's other

5 admonitions.

6 The court said, for example, "that

7 the proper standard... must entail the

8 minimal if any discovery." There generally

9 should be no discovery or inquiry into the

10 sort of contextual factors highlighted by the

11 FEC.

12 Finally, "the need to consider such

13 background should not become an excuse for

14 discovery, for a broader inquiry of the sort

15 we have just noted raises First Amendment

16 concerns." And yet none of these relevant

17 portions of the Chief Justice's opinion were

18 even discussed by the NPRM.

19 Sadly in discussing "basic

20 background information," the NPRM manipulates

21 the court's language to maximize its own role

22 and to minimize the sphere of political

1 speech.

2 Hopefully the Commission will

3 reject both alternatives and adopt one which

4 honors the language of the First Amendment as

5 Chief Justice Roberts did at the close of his

6 WRTL II opinion.

7 Thank you.

8 CHAIRMAN LENHARD: Mr. Svoboda?

9 MR. SVOBODA: Thank you, Mr.

10 Chairman. Bob Bower sends his apologies to

11 the Commission. I am told that he is not

12 writing more poems as we speak, but was

13 called away on urgent client business.

14 Like as I might to read his poem,

15 unlike him I have no poetic skills.

16 So, instead I am here on behalf of

17 the Democratic Congressional Campaign

18 Committee.

19 We have a slightly different

20 perspective than Mr. Morgan at least does on

21 the matter and the task before the

22 Commission.

1 Mr. Morgan asked the Commission to
2 "pick up where Chief Justice Roberts left
3 off," and proceed to lend further effect of
4 the Supreme Court's decision, but the
5 Commission has a different job than Chief
6 Justice Roberts did.
7 His job was and remains to
8 interpret and enforce the statute that
9 Congress wrote and to lend the statute the
10 maximum possible effect.
11 It has to construe the statute
12 obviously to avoid constitutional
13 difficulties, but it is left at the end of
14 the day with the principal task of fidelity
15 to what it was that Congress passed and there
16 is real peril for the Commission the more it
17 attempts to do on this front in this
18 rulemaking, especially in the small amount of
19 time in which you have to act before the
20 presidential elections.
21 As we mentioned in our comments,
22 the Commission is always, as an

1 administrative agency, on the weakest
2 possible ground in court litigation when
3 positions it's advancing are not the result
4 of an interpretation of the statute or an
5 interpretation of the terms of the statute,
6 but rather the Commission's predictions about
7 what a court might do, or what a court could
8 do, or what a court should do.
9 Any one of the eight of us here
10 talking this morning might have an opinion
11 about what WRTL II means and what Chief
12 Justice Roberts meant and what a court might
13 say in the future and each one of the eight
14 of us would enjoy the same level of deference
15 from the district court if the Commission
16 gets sued, as I expect it probably will by
17 somebody in some fashion, which is none.
18 So the Commission has to be very
19 cautious and very sparing in how it
20 approaches this task at least at this moment
21 and that is why we urge the Commission to
22 adopt a minimalist, if you will, version of

1 Alternative 1 before the Commission.
2 Obviously it needs to conform its
3 regulations to what it was that the Supreme
4 Court did this past June, but it needs to do
5 so very carefully because there are
6 developments that none of us as yet are going
7 to be able to completely foresee.
8 And we are especially mindful of
9 this with regard to the disclosure
10 requirements, an issue that was not before
11 the Court in WRTL II, and an issue where if
12 you read McConnell and you read the court
13 opinions that it's not clear that the same
14 method of legal review and the same standard
15 applies.
16 For example in the McConnell case
17 the Supreme Court made it clear that there
18 was a difference between banning speech on
19 the one hand and requiring disclosure of
20 activities related to that speech on the
21 other.
22 And certainly when faced with a

1 statute that on its face unambiguously
2 requires that disclosure the Commission is
3 simply not able to say that that doesn't
4 matter. We don't think that can
5 constitutionally be upheld.
6 It might try that, but that
7 position is going to be vulnerable upon
8 review.
9 So the Commission needs to be very
10 careful about drawing inferences from the
11 WRTL case and making predictions about what
12 the courts might do and particularly in this
13 short time frame, and I hate to say, given
14 who I represent, but a conservative course of
15 action I think is going to serve the
16 Commission best here.
17 And that brings me to the second
18 point we raised in our comments, which is the
19 definition of express advocacy and whether
20 the Commission ought to open up 100.22 and
21 give it a second look under the circumstances
22 of WRTL.

1 Our position for much the same
2 reasons is that the Commission should not.
3 The Commission was not considering in WRTL II
4 what is or is not express advocacy and
5 whether 100.22 is constitutional or wasn't
6 constitutional.
7 It claimed to be reviewing the
8 regulation of something else entirely, the
9 functional equivalent of express advocacy.
10 A car is a car, but the functional
11 equivalent of a car is not a car. It might
12 be some completely different sort of vehicle
13 that goes faster, or goes slower. It has
14 different attributes and the Commission needs
15 to be mindful of that.
16 Clearly Congress didn't think that
17 they were regulating express advocacy when
18 they wrote Title II of BCRA and clearly they
19 thought they were regulating something else.
20 It is important to note and here I
21 will conclude my comments, that to revise
22 100.22 at this point has the effect to create

1 havoc well beyond the corporate and union
2 interests that are here today seeking review
3 of the WRTL case.
4 For example, party committees and
5 PACs issue communications every day in
6 reliance on the Commission's current
7 definition of express advocacy.
8 I mean, for example, we are going
9 to have a different president of the United
10 States in January 2009, whoever that may be,
11 and knock wood it will be a Democrat, and my
12 client is apt to be issuing communications
13 that will be referring to that person and
14 probably referring to them quite positively
15 and probably flunking the PASO standard.
16 Is that express advocacy of that
17 individual? In most of the contexts in which
18 we do that, plainly not, but that is an
19 example of how the Commission, if it acts too
20 quickly, too precipitously on this front can
21 cause issues for others in the regulated
22 community that it need not and should not

1 cause.

2 Thank you for your time.

3 CHAIRMAN LENHARD: Thank you. Mr.

4 Trister?

5 MR. TRISTER: Thank you, Mr.

6 Chairman. I would like to start by weighing

7 in on this issue of alternative wonders and

8 Alternative 2 particularly and how it bears

9 on the reporting requirements.

10 I tend to agree with those like Mr.

11 Svoboda who have argued that the Roberts

12 opinion does not resolve the issue.

13 If it did, if it was unequivocal

14 even though the issue was not raised, if the

15 reasoning and the language of the opinion was

16 so absolutely clear on the question, then

17 you'd have to follow it, but I don't think

18 you can fairly argue that position.

19 Not only was the issue not raised,

20 it was not discussed and as a number of the

21 comments point out there is a serious

22 question about what the standard of review is

1 for constitutional purposes and whether it is
2 even the same standard as was being applied
3 in that case. And so on.
4 I think it simply is not fair
5 really to construe the case as having
6 resolved the question and left the Commission
7 really with no choice. But that I think only
8 puts the question before you of what do you
9 then do? What is your choice?
10 This is where I have to part
11 company with Mr. Svoboda. Frankly, the
12 conservative approach that he says he is
13 arguing for is in fact Alternative 2. Let me
14 say why.
15 Basically the court has left you in
16 a position where they have created a new
17 category of speech which was not before
18 Congress when it wrote its reporting
19 requirements.
20 That's the fact. We don't know and
21 it's really impossible to know for us how
22 Congress would have decided this question.

1 Yet it does raise important
2 constitutional questions. It strikes me that
3 the real question then is what does this
4 agency do without any guidance by Congress on
5 these difficult questions.
6 One of the key questions will be
7 has Congress decided that it wants reporting
8 in this area, this very narrow category of
9 speech which really did not exist, and
10 secondly, what kind of reporting does it
11 want? And it strikes me that those are
12 questions that should be answered by Congress
13 in the first instance and not by the court.
14 Given that position, the correct
15 institutional position for the Commission is
16 to adopt Alternative 2 and basically say to
17 Congress, if you want reporting in this area,
18 legislate, tell us what you want. Answer the
19 difficult questions.
20 Do you want reporting of this
21 particular type of speech, this narrow
22 category of speech which is constitutionally

1 protected at least in some of its
2 ramifications.
3 Do you want reporting so that if
4 there are going to be challenges, as Mr.
5 Svoboda says, then we will at least know that
6 Congress had made the decision that there are
7 interests at stake that require reporting in
8 this area and it has also addressed the
9 question of how that reporting should take
10 place.
11 The reporting requirements that
12 exist that were written as part of BCRA were
13 written in the context essentially of
14 individuals and unincorporated entities being
15 able to do electioneering communications.
16 They were not written for
17 corporations, nonprofit corporations, for-
18 profit corporations, and unions, who are the
19 ones that now have this category of speech
20 opened up to them.
21 So it strikes me that the
22 conservative approach here, institutionally,

1 is for the Commission to essentially send
2 this back to Congress.
3 I realize there are time limits
4 involved, but from the standpoint of
5 Congress, at least, this is a fairly new
6 issue.
7 The court acted in June. We are
8 sitting here in October and they've got
9 plenty of time to address this question when
10 and if they want to and I think an
11 appropriate approach in that context is
12 Alternative 2 which leaves it to Congress to
13 resolve.
14 A second point I would like to move
15 on to now came from my reading of the
16 comments that were filed. And it has to do
17 with this question of what is a safe harbor.
18 I read the proposal in the NPRM as
19 presenting first a general rule which tracks
20 the Roberts opinion and then creates two safe
21 harbors.
22 I assumed, and our comments

1 proceeded from the assumption, that the way
2 that would work is that if you fell within
3 one of the two safe harbors then you were per
4 se protected.
5 If you did not, then the inquiry
6 switches back to the general rule.
7 I had thought that that was fairly
8 clear and some of the comments certainly
9 follow that approach. What worries me is
10 that there were some comments that were
11 submitted which suggest that the safe harbor
12 is sort of the end-all of the discussion --
13 that in effect if you don't fit within the
14 safe harbor for grassroots lobbying, then
15 that's it. There is no further inquiry.
16 I don't recall the specifics of
17 this, but there were several sets of comments
18 which seemed to make that assumption and that
19 worries me, so I would urge that if you're
20 going to have safe harbors that you make it
21 clear that the safe harbor is just that, a
22 safe harbor.

1 I do a lot of tax work. We have
2 lots of safe harbors in terms of tax work.
3 It's an opportunity. If you fit within it,
4 that is the end of the discussion, but if you
5 don't fit within it, there is still the
6 general rule to be applied.
7 It is especially important because
8 of the issue of burden of proof. We think
9 that the court made it absolutely clear that
10 the burden of proof in this instance and on
11 these questions is on the Commission.
12 If the Commission wants to prohibit
13 or penalize a group for having made a
14 communication which violates Section 203, the
15 burden is on the Commission to show that it
16 can do it constitutionally.
17 CHAIRMAN LENHARD: If I can just
18 jump in, I think the little red light is
19 sadly indicating your time is up.
20 MR. TRISTER: I am sure I will have
21 a chance to continue.
22 CHAIRMAN LENHARD: On your last

1 point, we had some discussion of this
2 yesterday. Your sense of what safe harbors
3 were to achieve is the sense of the
4 Commission as to what the safe harbors were
5 to achieve and we have noted a number
6 commenters had some confusion on it and
7 certainly we will try to clarify that in
8 whatever the final rule is.
9 Now we will open the hearing to
10 questions and comments from the Commission.
11 Vice Chairman Mason.
12 VICE CHAIRMAN MASON: Mr. Morgan, I
13 appreciate your comments, I appreciate where
14 you are coming from, and I am always asking
15 people in general to comment before the
16 Commission and have people who reflect the
17 views you represent comment, but I have a
18 problem.
19 Today is October 18. One of the
20 parties has just set the date for the Iowa
21 caucuses for January 5th which means that the
22 statutory time frames relevant to this issue

1 that we are dealing with go into the effect
2 on December 6th.
3 That is 46 days from now. We have
4 to do something and we don't have the choice
5 of saying that we are not going to do it or
6 we don't understand.
7 You have presented some cogent
8 criticisms of the approaches, but we don't
9 have the choice of going back to the drawing
10 board.
11 What we thought we were trying to
12 do was fill in some of the spaces and give
13 people something that they could work with.
14 Otherwise your clients are going to be out
15 there wanting to run ads and you will be
16 looking at the Supreme Court decision and
17 making your own interpretations.
18 Mr. Svoboda pointed out, how much
19 deference is that going to get? And what
20 kind of risk? And how does the Commission?
21 Believe you me, we didn't pass the law. We
22 didn't file the lawsuit. We didn't write the

1 opinion. We didn't really ask for a lot of
2 this and clearly from the Commission's
3 enforcement perspective, whether we like
4 policy or not it, is a whole lot easier to
5 enforce the blanket rule.
6 You mention a federal candidate on
7 a broadcast, boom, you're out of there.
8 I am just left a little bit
9 disappointed that you would not give us
10 something to work with from the perspective
11 of somebody who is out there representing
12 people and presumably would want some further
13 guidance.
14 If you haven't put anything out
15 already, I don't know what there is, but I
16 wanted to note that and urge you the next
17 time to think about the predicament the
18 Commission is in.
19 Because we don't have the choice of
20 postponing the enforcement of the statute.
21 So try give us something to work with.
22 If you have a way, for instance,

1 and I will let you respond if you want to, of
2 putting in the regulatory language the test
3 of giving the benefit of the doubt to speech,
4 what would it look like?
5 MR. MORGAN: Well, fortunately I
6 don't have to write the regulations. I don't
7 envy your position at all, your job, your
8 task.
9 But as the proposed regulations are
10 drafted, the ones that are here, we are still
11 going to be looking at the language and the
12 decision in WRTL II.
13 CHAIRMAN LENHARD: If I could
14 follow up on that. I don't know if you have
15 read it, and I was just flipping through the
16 pages to recall, but my recollection is the
17 AFL-CIO presented an alternative test rather
18 than amending either 129, or 114, but they
19 had a simpler and in some ways a more elegant
20 test and I wanted to see if you either recall
21 that or you can actually submit comments
22 later as to whether that would resolve some

1 of the concerns you were raising as to
2 whether we had cleaved close enough to
3 constitutional lines there.
4 MR. MORGAN: Yes, I didn't analyze
5 it that closely.
6 CHAIRMAN LENHARD: Mr. Trister
7 seems to recall it, though.
8 MR. TRISTER: No, not on that
9 specifically. But more relevant to this, I
10 think one of the points we make in our
11 comments is that we feel that the language
12 which you proposed for the general rule is
13 not consistent with the Roberts opinion
14 because it seems to shift the burden of proof
15 away from the Commission to the speaker.
16 And we have proposed language. It
17 is in our comments. It is not a major
18 change. It is simply a change in a few
19 words, actually. That is something you can
20 decide one way or the other if you agree with
21 us or not, but I do think on that narrow
22 point --

1 VICE CHAIRMAN MASON: Yes, I appreciate that
2 and I wanted to follow up on that as well.
3 I understand the burden of proof
4 issue. Obviously the language can suggest
5 that. I don't think there was any attempt by
6 the staff who drafted this and the
7 commissioners who were reviewing it to shift
8 the burden through.
9 And I think that might better be
10 stated, if it needs to be stated, somewhere
11 else.
12 In other words the test is one
13 thing and who bears the burden of making the
14 showing is really a separate issue. You
15 could write the test the same way and yet
16 place the burden on one side or the other.
17 So I am a little puzzled by the
18 addition or the deletion of the negative.
19 You know, "no other reasonable
20 interpretation" I think is maybe being
21 over read. I'd like to suggest that.
22 But what I want to ask is what that

1 means if, for instance, we say the Commission
2 bears the burden, so if we get a complaint we
3 would ask the Commission staff to go out and
4 look at a particular communication and
5 analyze it to see whether there is any other
6 reasonable interpretation or whether it's no
7 other reason either way.
8 But what does that mean? Does that
9 mean the staff attorney in looking at it
10 says, "Gee, it looks like express advocacy to
11 me. I can't think of anything else."
12 In other words how do we prove a
13 negative in that sense and in the real world
14 of how these things are going out how are we
15 going to avoid?
16 I mean, we can sort of try to guess
17 and surmise, but our list may not be complete
18 and in that sense that is why you cannot
19 prove a negative.
20 What is it you really mean when
21 you're talking about the burden is on us to
22 show there is no other reasonable

1 interpretation?

2 MR. TRISTER: I think it means a

3 couple of things. One is, you know, in the

4 case law there is a distinction between the

5 burden of proof or the burden of persuasion

6 and the burden of production, both of which

7 are sometimes called the burden of proof.

8 We are clearly talking about the

9 burden of persuasion here. That is to say,

10 if there is a close call, if it is not

11 entirely clear, but there are reasons

12 articulated and it's possible to read it one

13 way or two days or three case ways, that the

14 court is essentially saying, then you protect

15 speech. That the burden of proof is on you,

16 that the burden of persuasion, as it were, is

17 on the Commission.

18 That means at least in close cases

19 that the balance, as Justice Roberts said in

20 lots of colorful ways, "tips towards the

21 speaker." It at least means that.

22 VICE CHAIRMAN MASON: Yes, but doesn't that

1 mean, in the real world, when we go to court
2 in essence we go in, and say, if we think we
3 have a speech that violates this, there is no
4 other reasonable interpretation? And we may
5 discuss some things about the speech that
6 leads to us that conclusion, that it mentions
7 candidates, that it mentions voting, and
8 whatever factors are in there, but in the
9 real world isn't the response that you are
10 going to write on behalf of your client or
11 whoever it is who is representing them, well,
12 in fact, there was a bill up at that time?
13 While I understand the legal matter
14 of the burden of persuasion, I'm just
15 wondering how we actually write that in the
16 operative test as opposed to stating who has
17 the burden.
18 Because that is where you suggested
19 that we rewrite the operative test for the
20 purpose of allocating the burden. I am not
21 sure those two are precise fits.
22 MR. TRISTER: Right. I think that

1 the initial stage for the Commission will be
2 a complaint that is pending and the speaker
3 will be asked to respond to that and I think
4 that the burden of proof again comes into
5 play at that point.
6 There may be situations in which
7 the Commission is going to simply say, we're
8 not even going to request a response. We're
9 going to set up a procedure.
10 We actually suggested that there
11 might be some expedited procedure, given the
12 fact that the burden is on the Commission to
13 prove these, in which you may basically be
14 able to let people off the hook very, very
15 quickly because of the burden at that stage
16 so we do not have to deal with it.
17 Secondly, I think it's going to
18 affect the discovery and the information
19 which comes out of the enforcement people in
20 terms of what they are demanding and what
21 they are asking for.
22 And that's one reason we asked in

1 addition to that slight change to reflect the
2 burden, and again we suggested specific
3 language, we asked that you include some of
4 the warnings, if you will, that Justice
5 Roberts put into his opinion about the test
6 does not require affect or intent, for
7 example.
8 We would like to see that as a
9 message to enforcement to basically be saying
10 to the enforcement staff, don't be asking
11 about intent. Don't be asking about these
12 various kinds of things. Don't be asking
13 about context.
14 We would like to see language along
15 that line as well.
16 It comes into play at that stage in
17 terms of how you have to respond, what you
18 have to respond to, and indeed, whether you
19 respond to a complaint.
20 And at that point, if a group
21 decides not to respond, that doesn't mean
22 they lose the case. That doesn't mean that

1 you go forward with an investigation. I
2 think the burden means that. That's another
3 way in which the burden kicks in.
4 As somebody who represents a lot of
5 respondents in a lot of cases I first look at
6 it at that stage of the process. This is in
7 many ways where these questions of burden
8 really play out in important ways, in terms
9 of what can be asked.
10 If you do open an investigation,
11 are you going to ask us all these questions
12 about context and all the kinds of things
13 that the court rejected and said were not
14 relevant.
15 We would like to see a regulation
16 which makes it clear that those issues are
17 not relevant throughout the enforcement
18 process. That is also part of what we were
19 striving for in our proposed language.
20 CHAIRMAN LENHARD: Commissioner
21 Weintraub.
22 MS. WEINTRAUB: My views on

1 enforcement are probably the least relevant
2 of anybody on this panel since I won't be
3 here by the time these enforcement cases come
4 around.
5 My personal view, just to respond
6 on my part, is that most of these would fall
7 out at the RTB stage, that we wouldn't get
8 into discovery, that we would be making a
9 determination based on the complaint.
10 I guess there could be
11 circumstances if we don't actually have the
12 text, where we might have to get the text in
13 order to make that determination, but the
14 kind of context that I hear the court talking
15 about is the sort of thing that kind of know
16 anyway.
17 Oh, there's a comparative ad
18 between these two candidates who I happen to
19 know are running against each other. Why
20 else would they be discussed in the same ad?
21 Without predicting whether that in and of
22 itself would be an important factor, it's

1 just the sort of stuff that you know off the
2 top of your head.
3 But I would assume that it would be
4 for the most part a determination based on
5 what is in the complaint.
6 Now, having said that, I will just
7 tell you that in my experience I think it is
8 usually helpful when people respond to
9 complaints, and when they don't -- I have
10 seldom seen anybody hurt themselves by
11 responding to a complaint, but I frequently
12 have seen situations where we end up saying,
13 we just don't know about this, so we end up
14 moving to RTB and then asking some questions.
15 So my advice to you as a
16 practitioner is, yes, please respond.
17 MR. TRISTER: I don't think I have
18 ever not responded.
19 MS. WEINTRAUB: Yes, but let me ask
20 you guys a question, because I think I'm
21 probably somewhere in between Brian and Mike
22 in that I would like to do as little as

1 possible. I am in what Allison Hayward
2 called the humble regulator mode here and I
3 hear what you're saying about not upsetting
4 the applecart and not creating uncertainty.
5 That is important, but I also agree
6 with some of what Michael was saying about
7 what did Congress mean? Did Congress intend
8 that these groups have to do disclosure?
9 The comment that was most
10 persuasive to me on this point was the one
11 the labor unions filed, because it seems to
12 me you would not even get very useful
13 information out of making a labor union
14 disclose the names of all its members,
15 anybody who has paid membership dues in the
16 last year, if they were to file something
17 with the FEC.
18 Even Don Simon could not come up
19 yesterday with any policy reason of why you
20 would want that kind of disclosure.
21 By the way, I gave take home tests
22 yesterday, so if you want to think about this

1 and then submit comments later that's fine
2 too.
3 Now is there some way that we could
4 preserve the disclosure piece of it, because
5 I think it's still on the books and we kind
6 of have an obligation to do that, and yet,
7 define donation perhaps in some way to
8 exclude union dues, and my sense is it's kind
9 of an over the top disclosure, and yet not
10 open the door to, you know, Republicans for
11 Clean Air or others of those sort of
12 organizations that are always described as
13 shady or shadowy because we do not know who
14 the donors are behind them?
15 That's the sort of disclosure that
16 I think Congress actually has historically
17 been concerned about. Is there some way to
18 catch one and not the other?
19 MR. SVOBODA: Commissioner, there
20 might be. I was thinking about the issue of
21 Congress and what they may have thought of
22 when going back to the legislative history,

1 and if you look back far enough there is
2 maybe one moment when the bill was on the
3 floor of the Senate when it looked like this
4 issue might come up.
5 It was before the Wellstone
6 amendment was passed. There was a moment
7 when it was contemplated that certain types
8 of corporations or certain types of
9 incorporated 527s might sponsor
10 electioneering communications and the way
11 Congress proposed out at that point was a
12 segregated account provision.
13 In other words, the option that was
14 presented, which is the basic option that
15 remains in the statute for electioneering
16 communications sponsors, is, and we recognize
17 disclosure of a large number of shareholders
18 or a large number of members is going to be
19 burdensome for some organizations, so can we
20 present an option to limit that, whereby the
21 electioneering communications are paid out of
22 a segregated account and the funds from that

1 account that trigger the thresholds of the
2 statute, which actually are relatively high
3 relative to independent expenditure
4 definitions.
5 I don't know whether they relate in
6 terms of people paying union dues on an
7 annual basis so I will leave that up to Mike,
8 but you can limit your disclosure by
9 following that step.
10 Now is that something that Congress
11 would have necessarily envisioned or intended
12 for this particular situation? I don't think
13 any of us could say that.
14 But is it an indication of at least
15 the direction in which Congress was thinking
16 when it wanted to provide opportunities to
17 limit disclosure? Perhaps so.
18 MS. WEINTRAUB: So is your answer
19 basically, if the unions want to avoid
20 disclosing their members, they can just make
21 the EC out of their separate segregated fund?
22 MR. SVOBODA: That is one possible

1 option based on how Congress thought about
2 this to the extent they were thinking about
3 this.
4 CHAIRMAN LENHARD: Mr. Trister also
5 suggested that 501(c) organizations that were
6 not 501(c)(5) organizations, labor unions,
7 that we rely on line one of the IRS form 990.
8 So can you describe for us what gets put on
9 line 1?
10 MR. TRISTER: Line 1 of the form
11 990, which is the annual tax return which all
12 501(c)s file, is essentially gifts, grants,
13 and contributions.
14 It is not interest. It is not
15 investment income which is reported out
16 separately. It is not what is called program
17 serve as revenue which is if you go out and
18 you sell your services of one kind or
19 another. That is reported on line 2. And it
20 is not rents. It is not all the things of
21 that kind.
22 What we were getting into and

1 really is an issue which is not so important
2 for the unions, but more for the 501(c)(4)s
3 and the (c)(3)s that are involved, is the
4 distinction between a general support grant,
5 a grant that is given to an organization and
6 they do what they want with it as long as
7 they are within their tax exempt purposes,
8 and what the tax people call an "earmarked
9 grant" or a special project grant, a grant
10 that is designated for a specific purpose.
11 What we were attempting to raise in
12 our comments was the notion that general
13 support grants, even though they are reported
14 on line 1, that they should not be reported
15 as a donation, that they shouldn't be
16 included within the definition of donation
17 for at least this purpose.
18 That's a question really which did
19 not exist until Wisconsin Right of Life
20 essentially put this to these new kinds of
21 entities. I don't think you had to worry
22 about that terribly much.

1 But now I think it's a critical
2 question and the reason we think that that is
3 a reasonable distinction, is first of all
4 that the reporting requirement is so broad.
5 The reporting requirement requires
6 that you report anybody who gave $1,000 at
7 any time over the current fiscal year or the
8 previous fiscal year. And to draw a
9 connection between the person who gives
10 $1,000, or $2,000, for broadcast ads -- and
11 remember, we are talking of big expenditures
12 here -- over a 22 month period essentially
13 and suggest to the public that they had
14 something to do with funding that ad, seems
15 to me to be misleading the public.
16 It seems to me to be unfair to the
17 donors and particularly if they did not
18 earmark it. If they gave it whenever they
19 gave it and said, "Here's $1,000 and I want
20 to you run an ad," then they ought to report
21 that.
22 But if they give them $1,000 and

1 say, "Here's $1,000. I like your
2 organization. Keep up the good work," which
3 is essentially a general support grant, then
4 it is unfair and it misleading to the public
5 to suggest that that person was connected to
6 the ad in some way, that they paid for the
7 ad.
8 What we argue is that the
9 distinction ought to be made between
10 earmarked and non-earmarked. That is exactly
11 what Congress did on reporting IE's.
12 The language of the statute says,
13 "You do not report all donations. You report
14 donations that" -- I cannot remember the
15 exact words, but they are in our comments --
16 but it basically says that were given for the
17 purpose of the ad. It seemed to us that it
18 is reasonable to follow the same approach in
19 this context for a number of reasons.
20 One is, if you look at the
21 legislative history, Congress essentially
22 said, we are extending the IE reporting to

1 ECs. That is all they thought they were
2 doing. They didn't write it that way, and if
3 they had been more careful we wouldn't have
4 this issue, but they basically said, we are
5 trying to extend IE reporting to EC
6 reporting.
7 When the Commission defended that
8 reporting in McConnell it said the same thing
9 and we quote parts of your brief and the
10 McConnell opinion treats it the same way.
11 There is a footnote in the
12 McConnell opinion where they say, what's the
13 big deal about this EC reporting? It's just
14 like we already have for IE's.
15 It seemed to me that it was
16 reasonable to approach the reporting on EC's
17 in the same way. The key distinction is
18 between a grant or a gift that's given just
19 to an organization for any purpose and leaves
20 it to the organization to decide how to spend
21 is not something that needs to be reported.
22 But something that does need to be reported

1 is something which the tax lawyers call
2 earmarked for that particular purpose, to
3 support the grant, to support the ad, and
4 that's the distinction which we tried.
5 MR. SVOBODA: I agree with the
6 concern that Mr. Trister is laying out and
7 don't doubt that particularly with unions
8 there's a very difficult situation that the
9 Commission is going to have to resolve, but
10 the Commission has to be very, very careful
11 about the manner in which it revolves it,
12 particularly when it gets past those
13 situations. Because the identifies of donors
14 or organizations that sponsor electioneering
15 communications are a subject of urgent
16 political interest for the candidates who are
17 affected by those ads.
18 A candidate might have an
19 organization running an ad in their district
20 that goes up Friday night, 15 days before
21 election, and no way of knowing who the
22 donors are, and the donors, even if they

1 haven't necessarily earmarked their funds for
2 these communications, the identify of the
3 donors may be very, very essential to the
4 political response.
5 Let's assume for the moment there
6 is nothing else legally that could be done
7 about the ad. Let's assume the Commission
8 cannot go to court and get an injunction to
9 stop them. Let's assume further that the ad
10 is probably going to stay up. So the burden
11 on the candidate is going to be to have some
12 sort of a political response and the identity
13 of the donors is going to be critical to
14 that.
15 For example, for John McCain in
16 2004 the fact that Republicans for Clean Air
17 was sponsored by or the biggest donors to
18 those organizations was somebody from his
19 principal opponent's home state, neither of
20 whom had a particular record of caring about
21 clean air, was immensely important to how
22 those ads were assessed, viewed, and

1 ultimately discounted in the free media.
2 Clearly the Commission needs to do
3 something to address the particular anomaly
4 that this case has created, but it needs to
5 be very careful about how to do that.
6 You do not want a situation, for
7 example, where a Sam Wyly might send his
8 check to Republicans for Clean Air, and say,
9 this is a general grant to the organization
10 to be spent at your sole discretion.
11 MS. WEINTRAUB: You have put your
12 finger on the exact problem that I have,
13 which is it's fine for most of the members of
14 the Alliance for Justice which are ongoing
15 organizations and have other things they are
16 doing besides running ECs and it's fine for
17 labor unions for the same reason, because
18 they do other things, but an organization
19 like Republicans for Clean Air pops up and
20 its only purpose is to put out communications
21 and otherwise try and get involved to the
22 extent they can in the election so they don't

1 have to earmark anything because that's all
2 the organization is doing in the first place.
3 MR. TRISTER: Remember, if they are
4 in fact a political committee then they are
5 going to have to report all of that, so that
6 may in fact pick up some of these groups set
7 up just for the purpose of running ECs in a
8 particular election.
9 Given the way the Commission has
10 been enforcing that, in terms of how they
11 raise the money and so on, this money doesn't
12 just show up out of nowhere.
13 It's very possible that some these
14 groups that you're concerned about will in
15 fact be political committees and should be
16 registered as such and should be reporting as
17 such which means reporting all their donors.
18 It does not make that distinction.
19 MR. SVOBODA: Although more
20 realistically the Commission will decide
21 three years later that they should have been
22 a political committee while our candidates

1 are going to crocheting classes.
2 MR. TRISTER: But it's not a
3 problem of your making. If Congress had
4 written a reporting rule which was limited
5 and narrow then I think you'd have a
6 different kind of question.
7 The problem we have is that on the
8 one hand, as Mr. Svoboda is worried, and
9 you're concerned about somebody who gives
10 $100,000 or $200,000 two weeks before the
11 election, but we've got a reporting
12 requirement which picks up anybody who gives
13 $1,000 or more over a 22-month period. It
14 could be January of the calendar year before,
15 somebody writes a check for $1,000 to the
16 group.
17 You didn't write that rule, but
18 that's the rule and that's the reporting
19 we're going to have to do unless you make
20 that distinction.
21 So to some extent I think you are
22 between a rock and a hard place on this issue

1 and I don't envy you that.

2 But I think you've got to be aware,

3 just as Mr. Svoboda wants you to be aware of

4 this situation where somebody comes in and

5 writes a big check, and says, "By the way."

6 To some extent it is factual and

7 you do get into exactly these kinds of

8 questions in lots different areas that you

9 enforce.

10 Was there an earmarking? Was there

11 something? That is a factual inquiry. If

12 you really think, although they never said

13 the word "earmark," that it was in fact

14 understood, you've got the investigatory

15 authority to look into that situation and the

16 facts may well push you in that way in a

17 particular reporting situation.

18 VICE CHAIRMAN MASON: Wouldn't that require

19 exactly the kind of discovery that you told

20 us we should not engage in?

21 MR. TRISTER: No, no, this is on a

22 reporting question. This is on a question of

1 what has to be reported. This is not whether
2 you can run an ad or not.
3 CHAIRMAN LENHARD: But that just
4 pushes the problem one step back, right?
5 Because if there is no reporting and somebody
6 files something saying these people should
7 have reported donors, then we begin to go
8 down the discovery path.
9 I guess my question is more to Mr.
10 Svoboda. Do your concerns fall away if the
11 test turns on whether the funds were the
12 product of a solicitation to run these sorts
13 of ads? An approach we've started taking in
14 determining whether people solicited
15 contributions or funds for use in federal
16 elections.
17 MR. SVOBODA: Taking the most
18 extreme set of circumstances we might face
19 like Republicans for Clean Air running ads
20 that they are arguing are WRTL-qualified, I
21 am not sure it does, only because of the
22 circumstances in which the funds are raised.

1 There may be an organization set up
2 by one guy who decides that he is going to
3 fund it. There may be no solicitation.
4 Solicitation may be in his head and then the
5 question is what is the proper level of
6 disclosure?
7 And in that situation our clients
8 need some level of disclosure. Again, it is
9 essential to their political response to the
10 ad.
11 VICE CHAIRMAN MASON: I want to hone in on
12 that question. As I understand it from going
13 back to Buckley, the purposes of disclosure,
14 paraphrasing, informing the public about a
15 candidate's supporters or opponents,
16 preventing corruption or aiding law
17 enforcement, and what you said in your
18 written comments was that this was essential
19 to strategic decision making. And you said
20 something related here today.
21 First a comment. We have to
22 realize that there is an element here of a

1 potential threat to someone who is
2 criticizing an officeholder.
3 I understand what you're saying
4 from your client's perspective, but from the
5 perspective of the clients of the people
6 sitting on the either side of you, the fact
7 that an incumbent officeholder wants to know,
8 who is behind this attack on me, that's a
9 threatening question.
10 That is why all of a sudden we are
11 into this First Amendment protected area. So
12 I want you to define a little better why the
13 necessity to make a political response
14 related to the identity of the speaker or the
15 necessity to make strategic decisions is a
16 valid purpose for acquiring disclosure.
17 MR. SVOBODA: It relates back,
18 Commissioner, to the prong you cited about
19 knowledge of who a candidate's supporters or
20 opponents are.
21 This is ground that the Supreme
22 Court plowed in the McConnell case, when they

1 reviewed whether the disclosure requirements
2 could be applied generally.
3 I think there was the presumption
4 by the court certainly as there was by
5 Congress that people who were sponsoring ads
6 within the 30 and 60 day windows were apt to
7 be supporters of a candidate. And they
8 assessed in turn the concern you raised, and
9 a very valid concern, which is in what
10 circumstances does the forced identification
11 of a donor creates circumstances for that
12 donor that might be injurious to his or her
13 own interests?
14 They went back, for example, to
15 NAACP vs. Alabama which was the core
16 authority that they were reviewing and
17 assessing the question and they concluded
18 that it provided no bar to disclosure in that
19 instance.
20 There was a difference, for
21 example, between being somebody in 2007
22 making a donation to a political organization

1 sponsoring advertisements with the
2 possibility that there might be people who
3 disapprove or approve of that transaction and
4 being a member of the NAACP in Alabama where
5 people were afraid even to meet with Thurgood
6 Marshall to discuss whether to participate in
7 these lawsuits or not and where there were
8 threats of retribution or even in some
9 instances violence.
10 That is what led the court in
11 McConnell to determine that the disclosure
12 requirements were constitutional and we
13 haven't seen anything in WRTL II that
14 disturbs that analysis.
15 They didn't talk about it. They
16 did not speak disapprovingly about it and, as
17 I said in my opening statement, the
18 constitutional analysis for whether a
19 corporation or a union could be prohibited
20 from making electioneering communications is
21 a different analysis from whether some
22 information about the identity of the

1 financial supporters, the principal financial
2 supporters, could be placed on the public
3 record.
4 CHAIRMAN LENHARD: Commissioner von
5 Spakovsky.
6 MR. von SPAKOVSKY: I keep hearing
7 this and Brian, you just repeated it, that
8 they didn't deal with disclosure requirement,
9 but there's language in the case at page
10 2672, in which Justice Roberts says, "but to
11 justify regulation of WRTL's ads this
12 interest must be stretched yet another step
13 to ads that are not the functional equivalent
14 of express advocacy. Enough is enough.
15 Issue ads like WRTL's are by no means
16 equivalent to contributions and the quid pro
17 quo corruption interests cannot justify
18 regulating that."
19 The justice is saying that one of
20 the reasons laid out for the substantial
21 government interest in the Buckley case,
22 which is the corruption interest, that that

1 doesn't justify regulating it. And he
2 doesn't say anywhere in there that any of the
3 other two reasons, which the Vice Chairman
4 talked about that they laid out in Buckley,
5 justify regulating them. And yet, everyone
6 seems to be saying to us, well, you should
7 ignore his language where he says that they
8 can't justify regulating WRTL's ads.
9 Yes, you shouldn't regulate them in
10 terms of prohibiting them, but yes, you
11 should regulate them in terms of requiring
12 them to make contributions.
13 I have a hard time understanding
14 that dichotomy when you have the Chief
15 Justice saying that they cannot justify
16 regulating issue ads.
17 I want to ask you about that, but I
18 also want to ask you, you're, on behalf of
19 your clients, saying that we should require
20 disclosure, something that we would have to
21 extend to that.
22 They have been prohibited from

1 making these kinds of communications, so
2 there has never been any disclosure. So we
3 would, in adopting Alternative 1, not only
4 have to now allow them to do genuine issue
5 ads, but we also have to extend the
6 disclosure requirements to them.
7 I don't quite understand how it is
8 that we would have the authority to do that
9 and not also, for example, if we have the
10 authority to require disclosure of
11 contributions that are used to do genuine
12 issue ads that are broadcast on TV, or
13 satellites, does that also mean that we have
14 the authority to require contributions that
15 are used to produce genuine issue ads in
16 newspapers?
17 Or when Wisconsin Right to Life, or
18 maybe the Alliance for Justice, if they are
19 going to spend money to fly in their members
20 and they are going to go in and lobby
21 congressmen and senators on a particular
22 issue for something that they have run a TV

1 ad on, or for something where they have run a
2 newspaper ad on, do we have the authority in
3 this statute code to require disclosure of
4 those contributions?
5 I don't understand how we can
6 differentiate. Because if we have the
7 ability to require disclosure of broadcast
8 ads that are genuine issue ads -- and I am
9 not talking about political ads -- if we have
10 the authority, then why should we not extend
11 it to disclosure of all of their other issue
12 activities?
13 MR. SVOBODA: First, Commissioner,
14 you had me at "enough is enough." I was with
15 you there.
16 The answer to that is you have to
17 look at architect of the statute that
18 Congress passed. The real question is what
19 can the Commission do now in response to WRTL
20 II.
21 You have a statute that is written
22 to define electioneering communications

1 without a WRTL exception, as yet, that
2 requires their disclosure regardless of the
3 character of the sponsor.
4 If you want to get real dirty and
5 theoretical about it, I mean theoretically a
6 corporation that was illegally spending
7 treasury funds on electioneering
8 communications nonetheless would be subject
9 to the disclosure requirements of Section
10 201.
11 It would be an independent basis of
12 liability in the complaint that you would
13 have initiated against them in federal
14 district court. So that requirement is
15 there.
16 The question is, given that the
17 requirement is there and the Congress has put
18 it there, and I think we can all stipulate
19 that there is at least raised in all of our
20 minds some doubt in some circumstances about
21 its application, what is the Commission's
22 proper response to that situation?

1 What the Commission is faced with,
2 frankly, right now is a choice between the
3 statute which its bound by the statute and
4 the administrative law to interpret and
5 enforce, and the footnote in Chief Justice
6 Roberts's opinion which the Commission might
7 take or might not take to read a particular
8 way.
9 And I guess my answer to that is
10 the Commission has got to go with the
11 statute.
12 If the Commission goes with Chief
13 Justice Roberts's footnote, then, as we
14 talked about earlier, the Commission is in a
15 very weak situation in the litigation posture
16 in court.
17 Another court might say, well,
18 that's not what Chief Justice Roberts meant.
19 Chief Justice Roberts might say that's not
20 what I meant.
21 And in any event however, their
22 opinion of that statute or of that opinion

1 and how it should be interpreted is going to
2 be superior to yours or ours.
3 So I guess my answer to the
4 question really boils down to the statute
5 actually does require that disclosure and it
6 is the Commission's obligation to see to it.
7 MR. von SPAKOVSKY: Where does it
8 require disclosure of independent groups and
9 individuals for non-electoral activities?
10 I mean, are you saying that you
11 disagree that the Wisconsin Right to Life
12 decision said that the Wisconsin Right to
13 Life ads were non-electoral ads?
14 MR. SVOBODA: No, I don't disagree.
15 MR. von SPAKOVSKY: Then where in
16 the statute does it say that independent
17 groups and individuals have to report on
18 electoral activity?
19 Anybody who engages in independent
20 activity, an individual, for example, who
21 sets out and puts up an ad, you know, buys a
22 billboard and puts up an ad, they only have

1 to register with us and report that if the ad
2 is an election message, an attempt to
3 influence the election.
4 If they put up an ad about an
5 issue, they don't have to register with us.
6 They don't have to report their activity.
7 Where in here do we have the authority to
8 require disclosure of non-electoral
9 activities?
10 MR. SVOBODA: Section 201 of BCRA
11 until I guess July 29 of this year, or
12 whenever WRTL II came out, they definitely
13 had to disclose.
14 We can argue about whether they
15 should have or should not have as a matter of
16 constitutional law or as a matter of
17 prudential legislative judgment, but that's
18 in fact what the statute in most instances
19 said.
20 The question is, given what the
21 court said in WRTL II, are you still bound to
22 enforce those disclosure requirements in the

1 statute? And I think you probably are.
2 Somebody may yet challenge them. I
3 think that is actually one of the top ten
4 reasons why you're probably going to get sued
5 in the next twelve months because I think
6 somebody is going to challenge it and say
7 that they shouldn't be applied to us.
8 And they may win or they may lose.
9 But the question is what you do today in the
10 absence of --
11 MS. WEINTRAUB: Somebody with the
12 initials JB, maybe?
13 MR. von SPAKOVSKY: May I follow
14 up?
15 CHAIRMAN LENHARD: Please.
16 MR. von SPAKOVSKY: Let's talk
17 about Buckley again, the three requirements
18 that they gave for justifying disclosure
19 requirements.
20 One was the corruption argument.
21 Well, I think Justice Roberts's statement
22 that it's not corruption throws that out.

1 The third reason they gave for
2 justifying disclosure is to serve as an
3 essential means of gathering the data
4 necessary to protect violations of funding
5 limitations. There are no funding
6 limitations.
7 If a donor wants to give $1 million
8 to the Alliance for Justice and a corporation
9 wants to give them $1 million to run ads to
10 convince Congress not to pass a particular
11 piece of legislation, that is not a violation
12 of the law. The $2,300 limit doesn't apply.
13 So obviously that provision doesn't apply.
14 That only leaves the one that the
15 Supreme Court said about providing the
16 electorate with information as to where
17 political money comes from that is spent by
18 the candidate, but since the court has said
19 this is not an electoral message, it is an
20 issue ad, the third justification for
21 disclosure again goes out the window.
22 So how could what we do be

1 constitutional if we adopted Alternative 1?
2 MR. SVOBODA: Maybe Mr. Trister can
3 speak to that after I have. My answer to
4 that would be, you laid out the brief for the
5 petitioner that I would write if I were
6 representing the Alliance for Justice in
7 seeking an injunction against the application
8 of Section 201.
9 But it is a conclusion, and while I
10 think it is an argument that could be made,
11 while it is an argument that you will face,
12 it is not I think a sufficient basis for the
13 Commission at this point, with the opinion
14 having reviewed what it did and done what it
15 did, to say, we are going to set aside and
16 ignore the entire section of the regulations
17 that was not under review in WRTL and in
18 contravention of congressional intent.
19 That's the problem. The problem is
20 that the agency that takes this position now
21 and writes it into its rules now is
22 vulnerable to a challenge that it is acting

1 in contravention to the plain language of the
2 statute which requires it.
3 Then the agency has got troubles if
4 these rules are being challenged unless
5 somebody else seeks an injunction and gets an
6 order enjoining the enforcement of Section
7 201.
8 CHAIRMAN LENHARD: Let me touch on
9 another argument which you raised earlier on
10 the same theme that we should approach this,
11 our task, humbly and conservatively or
12 whatever the term or phrase was.
13 You have said in both your papers
14 and in your opening statement that there was
15 an interest in stability of the rules as we
16 go into the electoral cycle and the word you
17 used to describe this, I think in your
18 opening, is we have to look for these changes
19 to occur and you were talking specifically at
20 that point about either amending or repealing
21 100.22(b).
22 But I wanted to see if you could

1 elaborate a little bit on why what we might
2 do could be so disruptive. There were a
3 number who have said that it would be fine
4 for the groups that are advocating for these
5 changes, but other kinds of committees are
6 going to end up really betwixt and between
7 the decision making as they go into the
8 election.
9 I do not entirely understand why
10 that is true, but certainly as it goes to
11 100.22(b) it would seem that their lives
12 would be dramatically easier and simpler to
13 sort through.
14 So I wanted to see if you could
15 elaborate for us why these changes would lead
16 to such disruptions or chaotic results.
17 MR. SVOBODA: We wrote it
18 specifically with regard to 100.22(b) and
19 it's something that party committees and
20 political committees have to be attentive to
21 in the course of their activities.
22 It's something where people needing

1 100.22(b), particularly after the experience
2 of the past several months where some of the
3 enforcement matters that you have closed out
4 and some of the other guidance, and in
5 particular with regard to McConnell, people
6 tend to have pretty good sense of what they
7 think 100.22(b) means.
8 I think a lawyer reviewing an ad
9 can tell the client with some measure of
10 certainty whether it will pass or flunk
11 100.22(b).
12 CHAIRMAN LENHARD: That is so
13 heartening.
14 MR. SVOBODA: Yes, a rare and
15 blessed event.
16 MR. TRISTER: As somebody who
17 failed in that regard, I'm not so sure.
18 MR. SVOBODA: In any event, we have
19 a rule that is on the books and we're used to
20 reviewing with the client. And if that rule
21 changes it is one more rule that is going to
22 change and it will be piled upon many, many

1 other rules that have changed and
2 contribution limits that are being indexed,
3 and coordination rules that are perhaps about
4 to change for the third time, where it's just
5 information that's difficult for the
6 regulated community to process.
7 If you wonder how it works actually
8 in a practical matter, then let me give you a
9 real world example of how it would work.
10 From time to time the party
11 committees send e-mails to supporters asking
12 them to make contributions to them. From
13 time to time they send direct mail to
14 supporters asking them for contributions to
15 them.
16 And let's say, for example, there
17 is a Democratic president in 2009.
18 Let's say further that on November
19 8, 2008, they filed their MPC form 2 to be a
20 candidate for re-election in 2012. So they
21 are a clearly identified candidate.
22 And let's assume further that my

1 clients are apt to be talking to the White
2 House Office of Political Affairs every so
3 often or the president's representatives of
4 the DNC every so often, because they are
5 attentive to their interests and that is the
6 sort of dialogue that occurs before
7 candidates.
8 So we're proposing to make a public
9 communication that is referring to a clearly
10 identified candidate and under the rules, as
11 they sit now, knock wood they don't change
12 again in the next twelve months, we have to
13 avoid making a coordinated communication
14 under 109.21. So we look at the content.
15 Does it republish campaign
16 materials? No. We are not going to do that.
17 Is it going to be electioneering
18 communication? Unless you do something
19 really strange in this rulemaking, we are not
20 going to do that.
21 Is it going to expressly advocate a
22 candidate's election or defeat? Well, that

1 depends on what the definition of express
2 advocacy means.
3 Right now I know how to answer that
4 question. I look to 100.22(a) and (b), but
5 if you rewrite 100.122(b), then my answer to
6 that question might be different.
7 And so the guidance I have to give
8 to my Internet providers when they send
9 e-mail on a bulk mail basis, paid
10 communications, that is going to change.
11 My advice to the direct mail house
12 when they send the snail mail is going to
13 have to change and it's going to be just one
14 more thing that's going to have to change
15 over a period of now, you know, seven years
16 where seemingly everything has changed.
17 And so that's why our plea, if you
18 will, is if the Commission is facing a
19 modular problem, however difficult it is to
20 solve here and now with regard to a class of
21 communications that my clients in fact do not
22 sponsor, faced with that problem, we would

1 very much like a solution limited to that
2 problem and not otherwise to intrude on the
3 manner in which we would otherwise do
4 business.
5 MR. TRISTER: I am not sure I
6 understand the concerns about changing the
7 rules of the game.
8 First of all, in terms of
9 100.22(b), the status of that regulation even
10 now as we sit here is a bit unclear.
11 There are two courts and two
12 circuits that have enjoined you from
13 enforcing it and you never done anything to
14 remove those injunctions. So there is, at
15 least for those of us who are advising people
16 in those circuits, certain uncertainty, at
17 least, about the application of 100.22(b) to
18 our clients in those jurisdictions.
19 Secondly, it is only recently -- by
20 which I mean the last two, three, four years
21 at most -- that the Commission has started to
22 apply 100.22(b) at all.

1 Until then I am remembering the
2 Keen case and some of the other cases in
3 which the Commission was split right down the
4 middle in a series of cases about whether
5 100.22(b) was applicable or not.
6 So the notion that this is all
7 clear and we all know what the rules are and
8 now they are going to change on us doesn't
9 ring true to me.
10 What I do think has happened with
11 respect to express advocacy is that the
12 Commission now has a situation in which the
13 Supreme Court is pushing electioneering
14 communications much more in the direction of
15 looking like ECs under 100.22(b). Whether
16 there are differences or not between express
17 advocacy under 100.22(b) and the Supreme
18 Court's test for electioneering
19 communications we can discuss and debate and
20 so on, but they are clearly moving much
21 closer together.
22 And it seems to me that raises a

1 variety of problems which the Commission
2 needs to resolve, like, how do you report?
3 You may have a communication that you report
4 as 48-hour reporting as IE's or do you report
5 as EC's and the 24-hour reporting?
6 So there are a variety of questions
7 that I think are now put to the Commission as
8 a result of this and where it leads us, and
9 of course we argued this in our comments, is
10 essentially the only distinction that makes
11 sense and is raised very clearly as a
12 statutory matter, ECs are magic words. And
13 Justice Roberts' opinion uses that just as
14 McConnell did and just as all the other cases
15 that are recent Supreme Court cases.
16 And I think that issue has to be
17 revisited, whether as a statutory matter,
18 whether there is room for a 100.22(b) as
19 distinct from the magic words test for IE's.
20 We agree with Brian in one respect
21 which is I think that's biting off too much
22 for this ruling. Those issues were touched

1 on in the NPRM, but trying to decide those
2 issues by December 3rd, or whatever your date
3 is going to be, strikes me as really biting
4 off much too much.
5 But we urge the Commission to get
6 into those issues because I think we are all
7 going to face them.
8 The brew has been mixed up again by
9 the court in terms of what fits where and we
10 do need answers to those questions. I just
11 don't see how you can do it in this
12 rulemaking.
13 CHAIRMAN LENHARD: Commissioner von
14 Spakovsky.
15 MR. von SPAKOVSKY: Mr. Trister, in
16 your comments you said that the safe harbor
17 is so narrowly written that it would in most
18 cases simply shift the focus of the inquiry
19 back to the general rule.
20 By that I take it you think that
21 the factors are unrepresentative of most
22 actual issue ads?

1 MR. TRISTER: Well, yes. That
2 comment is based on what I said right at the
3 beginning, which is my assumption is that if
4 you don't fit within the safe harbor then you
5 go off into the general rule.
6 The safe harbor, it seems to me,
7 serves a very important purpose both for the
8 Commission and for the regulated community,
9 but it will not serve that purpose if it is
10 so detailed and so difficult to satisfy that
11 nobody can satisfy it or almost nobody can
12 satisfy it.
13 If it's going to be a true safe
14 harbor then it needs to be clear and
15 relatively simple, and an example would be
16 the notion of "pending," for example. We
17 argue that "pending" shouldn't be in there.
18 You can find support or at least
19 some language in the Roberts opinion for
20 that, but as a safe harbor if you're going to
21 put in "pending" you will just narrow the
22 scope of who can rely on the application of

1 the safe harbor in ways that are difficult.
2 So that we argue and urge you not
3 to include "pending" as one of the elements.
4 We have argued to some extent each
5 one of the prongs in our comments in trying
6 to argue for a safe harbor that will truly be
7 a useful safe harbor, a safe harbor that
8 benefits the Commission and benefits us by
9 allowing us to apply it easily, and "pending"
10 is one example.
11 Another issue that comes up, and I
12 know Commissioner Weintraub raised this
13 specifically in her opening comments, is this
14 issue of condemnation.
15 Can you talk about a candidate's
16 record in some way? The voting record and
17 the positions they have taken at all?
18 If you say, no, you can't discuss
19 them at all, the safe harbor is not going to
20 be very useful because there are many, many
21 legitimate -- everybody would agree -- issue
22 ads that condemn, speak about and criticize

1 people's votes.
2 You have Congress yesterday
3 deciding on whether or not to vote and
4 override the president's veto on SCHIP.
5 People are running ads, clearly legislative
6 ads saying, these members of Congress when
7 the issue was before them six weeks ago voted
8 against SCHIP. Context.
9 So you're telling them what their
10 position is and you're telling them you don't
11 like it. So you're criticizing them. Are
12 you condemning them? Maybe, maybe not. But
13 you are at least criticizing them and you may
14 even be criticizing them strongly and that is
15 clearly a legitimate lobbying ad.
16 So if you say you can't talk about
17 positions and records and prior positions, if
18 you take them out of the safe harbor, the
19 safe harbor just becomes a nice thing in the
20 regulation, but your cases and our cases will
21 not be involved.
22 So we argue that shouldn't be in

1 there and that you should be in the safe
2 harbor even if you talk about a person's
3 record, and so on.
4 Now there will be some cases that
5 may make you squeamish about approving if you
6 allow that, but that's the nature of a safe
7 harbor.
8 The nature of a safe harbor is that
9 it allows some things because of the
10 administrative convenience, because of the
11 need for clear rules that allow people to
12 operate, that you would allow people to pick
13 up something which maybe if you reach the
14 question of the general rule you might
15 conclude otherwise, but I think that's the
16 nature of a safe harbor and I think it's a
17 very important way to operate.
18 MR. von SPAKOVSKY: Let me ask you
19 another question about the safe harbor
20 language.
21 When you talk about the main number
22 one prong which right now reads "exclusively

1 discusses a pending legislative or executive
2 matter at issue."
3 Now, we have had some commenters
4 say, well, that in itself is too limiting
5 because you say legislative or executive
6 matters. In the example that was given, and
7 I forget who it was that said it, but you
8 need to add judicial in there because for
9 example people ran ads after the Supreme
10 Court issued its decision in the Kilo case
11 urging federal legislation to reverse that
12 decision.
13 There are others who have said that
14 instead of saying, "discusses a judicial,
15 legislative, or executive matter," it ought
16 to just say, "discusses a public policy
17 matter or issue."
18 If you had the choice between those
19 two or a combination of that, what do you
20 think would be best for the safe harbor?
21 MR. TRISTER: You have to pick up
22 public issues of some kind and that goes in

1 part to my comments on "pending." If you
2 eliminate the notion of "pending legislation"
3 and "pending executive" then you are almost
4 there anyway.
5 But the fact that an issue may or
6 may not be pending, you may be wanting to get
7 candidates to take a position on some issue
8 and you may do it in a way which is
9 completely non-directive. You may simply say
10 as an organization, and C3's do this all the
11 time and they are covered by these rules, is
12 to say, "We care about Social Security
13 reform. Ask your candidates. Ask Candidate
14 X and Candidate Y where they stand on that."
15 Nobody can suggest that that is
16 express advocacy, that that is the functional
17 equivalent of express advocacy, but is it a
18 "pending legislative" matter? Maybe it is.
19 Maybe it is not.
20 It's clearly an important economic
21 issue in this country and I think you have to
22 be able to do that.

1 Now, whether you do it within the
2 safe harbor or you do it within the general
3 rule, I think becomes a question for the
4 Commission in terms of how it wants to
5 administer the statute.
6 We would argue for allowing that
7 under safe harbor because it gives us more
8 certainty and more ability to know in advance
9 what we can do.
10 CHAIRMAN LENHARD: The problem we
11 obviously struggled with in drafting this,
12 and as I look to the comments it becomes
13 apparent, is to the degree that you expand,
14 and expand the safe harbor, one can find
15 oneself with a safe harbor that is broader
16 than the rule, where ads are protected under
17 the safe harbor even though they can
18 reasonably be construed as nothing other than
19 a call to vote for or against, and that
20 obviously was the bounds we were struggling
21 with.
22 Commissioner Weintraub.

1 MS. WEINTRAUB: Following up on
2 what you were just saying, Mr. Chairman.
3 There was something that you said,
4 Michael, that was very interesting. You seem
5 to think that it would be okay for us to
6 write a safe harbor that could in some
7 circumstances be broader than the rule itself
8 and that was not our view of it in drafting
9 this and certainly it was not my view.
10 And in fact I don't think that
11 would be an appropriate view to take of it.
12 The safe harbor should be for the things that
13 are safe, that we know this is okay and then
14 we can put in some examples and that will
15 give people a little bit more guidance.
16 By the way, yesterday we asked a
17 number of witnesses who had not done so in
18 their written comments if they would submit
19 supplemental comments that opine on the
20 particular seven ads that we put in our NPRM,
21 and I think, Brian, you're off the hook on
22 this because I already asked Mark and you are

1 on the same set of comments.
2 I suspect I know what your answer
3 would be, Mr. Morgan, but feel free. I am
4 not 100 percent sure I know where your
5 answers would be, Michael, but I would
6 interested in hearing because we did see some
7 diversity on that where, on the Ganske ad in
8 particular, Marc Elias thought it was not
9 even close to something that ought to be
10 covered and Paul Ryan sat there and looked us
11 in the face, and said, absolutely, there is
12 no other reasonable interpretation other than
13 an urging to vote for or against.
14 So I thought, gee, I guess one of
15 them is not reasonable and I will have to
16 figure out which one.
17 But I think that the safe harbor
18 has to be narrower than the rule. And on the
19 particular example you brought up, I find it
20 hard to believe that you would have one
21 qualm, whether it is in the safe harbor or
22 not, that on reading the Roberts test and

1 knowing that that is the general rule, the
2 umbrella rule that we would be putting in, I
3 just find it hard to believe that you would
4 actually tell your client that there is some
5 doubt about the ad that you described, "ask
6 Candidate X and Candidate Y what their
7 positions are on Social Security reform," or
8 on whatever the issue is.
9 Would you hesitate for one second
10 to think that we might say that that was
11 express advocacy or an electioneering
12 communication?
13 MR. TRISTER: No.
14 MS. WEINTRAUB: No. So you don't
15 need it in a safe harbor.
16 MR. TRISTER: No, I don't need that
17 one in safe harbor, but there are issues of
18 the kind we are talking about like when you
19 get into issues about condemnation and you
20 ask us to make distinctions between
21 condemnation and strong criticism and weak
22 criticism and any criticism.

1 MS. WEINTRAUB: I'm not asking you
2 to do that. I am trying to make sense of
3 this footnote in the Chief Justice's opinion
4 which seems to distinguish ads that condemn
5 from ads that do not and I'd be happy to have
6 some --
7 MR. TRISTER: I think too much has
8 been made of that particular footnote.
9 First of all, there is no Jane Doe
10 ad. There never was a Jane Doe ad. And we
11 all need to remember that.
12 What was in McConnell, it was a
13 hypothetical, and it said, if you say "vote
14 against Jane Doe," that's express advocacy.
15 If you instead condemn Jane Doe's record on a
16 particular issue, then it is not.
17 And that was it. That was the
18 extent of the discussion in McConnell. It
19 never gets into the key question, which is,
20 what does it mean to condemn? And it takes
21 that as a given.
22 Justice Roberts's footnote is

1 responding to a point. It was essentially
2 saying, we don't have to get into that in
3 this case. This is an "as applied challenge"
4 of an ad that doesn't condemn and it doesn't
5 even talk about their record. So he was
6 basically saying, we don't have to get into
7 that in that case.
8 I don't think you can read into
9 that footnote a notion that either Justice
10 Roberts, or the court as a whole, would say
11 that any ad which refers to a candidate's
12 record or position on an issue is not
13 protected.
14 I don't think you can find that in
15 that footnote, particularly given its history
16 and what it is.
17 You are faced with having to make a
18 decision here about how far you are going to
19 do it. It is not up to us.
20 When you say, can the safe harbor
21 be broader than the basic rule, I think it's
22 a question of any rule you write as a safe

1 harbor is going to have language, it's going
2 to have elements, it's going to have
3 terminology, and any one of those I think one
4 could dream up a hypothetical that would
5 violate the general rule or might violate the
6 general rule.
7 It's in the nature of writing
8 regulations, really, that you're going to
9 come up with rules and someone might argue
10 and maybe that ends up with no safe harbor,
11 you don't have safe harbor or we just go with
12 the general rule.
13 But I think the notion of safe
14 harbors is a very valuable approach to giving
15 certainty and you should go as far as you
16 feel comfortable going in that regard.
17 MS. WEINTRAUB: I probably do not
18 feel as comfortable going as far as you do.
19 But I want to see if Brian has any guidance
20 for me on Jane Doe.
21 MR. SVOBODA: Michael's point is
22 good one. It's not a real ad. And I think

1 the point about the footnote is correct. It
2 is important to note that when Chief Justice
3 Roberts was making that point, it was a way
4 of tacitly trying to limit the scope or at
5 least limiting the impression of people
6 reading the opinion of the scope of what he
7 wanted people to think the court was actually
8 doing.
9 The question being that since that
10 was a subject into which the court did not
11 feel the need to go with that opinion, is it
12 a subject into which the Commission needs to
13 go in this rulemaking when its sole purpose
14 for being here is to conform its regulations
15 to the court's decision? So it weighs
16 further towards a careful approach by the
17 Commission, I think.
18 MS. WEINTRAUB: Let me ask
19 particularly you, Michael, one question. I
20 hear what you are saying about pending issues
21 versus current issues versus legislative and
22 executive issues versus the public policy

1 issues, but if we do not say something about
2 the issues, is it worth actually having
3 anything in the safe harbor that says that
4 there has to be an issue in the ad?
5 Wouldn't there always be an issue
6 in the ad? It might be sort of a back door
7 way of getting at an ad that is purely an
8 attack on character, qualifications, and
9 fitness for office, but if we have that in
10 there anyway that it cannot be that and all
11 we are going to say is there has to be some
12 issue in the ad, does that add anything?
13 Does that give you any more guidance?
14 MR. TRISTER: I'm trying to think
15 of an example that would not fall within the
16 character of fitness, et cetera prong, that
17 might still fit within a broader issue prong.
18 I wonder about voter guides -- I'm
19 thinking out loud here -- where you're
20 comparing two or more candidates' positions
21 on issues. They would not fall under the
22 other one. I'm not sure actually.

1 The other question is about a fund
2 raising ad, maybe, that said, "Give us a lot
3 of money," and then it said something
4 suggesting character. I don't know. I'm
5 just not sure.
6 CHAIRMAN LENHARD: Commissioner
7 Walther.
8 MR. WALTHER: Just in keeping with
9 the issue of discovery, it seems to me if we
10 are talking about a pending issue, I agree,
11 you're talking about discovery, you're
12 talking about condemnation, you're talking
13 about discovery and the idea behind the safe
14 harbor is to make it a quick and dirty
15 analysis of where you want to go and if you
16 want to go beyond that you then have to weigh
17 the risk. Is it outside the safe harbor, but
18 do you still think it is something we can do?
19 It seems to me if you want to have
20 a safe harbor like you say, it needs to be
21 restrictive enough so you know you are not
22 falling outside it.

1 On the issue aspect, I'm not sure
2 where that line could reasonably be drawn
3 because I am not sure that there should be a
4 restriction on anybody who is saying darn
5 near anything that they want.
6 They can kind of pick their issues,
7 it seems to me. It doesn't have to be a
8 pending issue. It may be something they want
9 to create or it is something they are
10 thinking about that nobody else is thinking
11 about and would never become an issue, but
12 they want to say something about it.
13 MR. TRISTER: You want it to become
14 an issue.
15 MR. WALTHER: You want it to become
16 an issue, so in that regard, do you have any
17 suggestions on the ambit of what might be
18 said in a safe harbor on the issue matter?
19 MR. TRISTER: Your question goes
20 beyond that. Clearly the pending element is
21 too narrow.
22 Whether you need it at all I am

1 just not sure, actually. It does in some
2 ways serve to set up a contrast between the
3 first prong and the fourth prong and in that
4 sense it may be, if you say, well, you cannot
5 do character fitness in such and such, and
6 then somebody says, then what can you do,
7 you're going to say, talk about issues.
8 That is what your response is going
9 to be and so I'm not troubled by it being in
10 the prong. Whether it adds very much, I'm
11 not sure. I'm really not sure.
12 CHAIRMAN LENHARD: Vice Chairman
13 Mason.
14 VICE CHAIRMAN MASON: I wanted to remind us
15 of why we are in this quandary. Mr. Bopp's
16 brief to the Supreme Court posed a standard
17 and focuses on a current legislative branch
18 matter -- he didn't throw in the executive
19 branch -- takes a position on the matter and
20 urges the public to ask a legislator to take
21 a particular position or action with respect
22 to the matter in his or her official

1 capacity, does not mention any election,
2 candidacy, political party, or challenger --
3 and that's the issue by the way that brings
4 in the question of when you're comparing two
5 candidates for the same office, you just
6 mentioned the challenger, you may not
7 describe him as such, or the official's
8 character, qualifications, or fitness for
9 office.
10 That is what Mr. Bopp said ought to
11 be the standard.
12 And then Justice Roberts, when he
13 said, you know, this context stuff is out,
14 except, he says, we can look at context such
15 as whether an ad describes a legislative
16 issue that is either currently the subject of
17 legislative scrutiny or likely to be the
18 subject of such scrutiny in the near future.
19 This is why we are in that
20 quandary. And I just want to point out, we
21 didn't make this stuff up. This was not the
22 fevered imaginings of some bureaucrats who

1 want to clamp down on speech. This is the
2 raw material that we were given by the
3 plaintiff and the court here. And it was not
4 of our choosing.
5 Now, I want to switch gears a
6 little bit, Mr. Svoboda, on this issue of
7 disclosure. Your clients when they are
8 disclosing particular behind donors, behind
9 what the committees spend, use the earmarking
10 rule.
11 And Mr. Trister had referred to an
12 earmarking rule in the Internal Revenue
13 Service code, and the sort of the rubric of
14 using tools we already have, that people are
15 already familiar with, why wouldn't we use
16 our existing earmarking rule to determine
17 when a person making an electioneering
18 communication has to disclose somebody who
19 has donated for that purpose?
20 MR. SVOBODA: There might very well
21 be a basis for doing that if you look by
22 analogy, for example, to the independent

1 expenditure rules and how you treat them
2 there, and you do have the opinion in
3 McConnell where they try to point out that
4 the level of disclosure being called for by
5 Section 201 was narrower in a way than what
6 you're calling for the independent
7 expenditure disclosure so that may weigh
8 towards that.
9 Further, as we talked about
10 earlier, Congress did when it first wrote
11 Section 201 try to give certain types of
12 organizations the option of basically
13 limiting their disclosure by basically
14 limiting disclosure to the universe of people
15 who were giving to the account from which the
16 ad would be paid. Again, that was first
17 drafted before there was a Wellstone
18 amendment.
19 VICE CHAIRMAN MASON: I understand that, and
20 the trouble is that sort of runs the other
21 way, because that gives you the choice of
22 either disclosing everybody or disclosing

1 some people who give to a particular account.
2 I was asking sort of the flip side
3 as we already have this earmarking rule out
4 there and it's applied in a variety of
5 contexts, so why wouldn't we use that to
6 determine when the organization paying for an
7 electioneering communication has to disclose
8 beyond its own funds who else may have
9 funded.
10 MR. SVOBODA: The only reason I
11 might see where that might be a problem is
12 because of the separate account structure
13 that Congress proposed as an alternative to
14 complete organization-wide disclosure.
15 In other words there is a way to
16 conclude, based on the statute, that Congress
17 imagined one method by which you might limit
18 disclosure but that would be it. And that in
19 way is broader than simply an earmarking
20 standard, for the reason we talked about a
21 moment ago with the Sam Wyly hypothetical,
22 you know, with the check saying, "This is

1 being provided for use at your sole
2 discretion" without any indicia of
3 earmarking, but under circumstances where in
4 effect it is the sole funds, if you will,
5 behind the ad.
6 So that I guess might be the only
7 reason why you might have difficulty doing it
8 and it is because the statute generally
9 provides for that sort of broad disclosure
10 and provides the segregated account as the
11 indicia way out of it and not an earmarking
12 way out of it.
13 CHAIRMAN LENHARD: That argument
14 leads me to the opposite conclusion, which is
15 the earmarking provision would seem to be
16 analogous provision if you didn't use a
17 segregated account, to the degree that
18 Congress created the segregated account model
19 whereby you could take funds specifically
20 designated for that and put that in the
21 account.
22 The earmarking adoption, the

1 earmarking rule, would achieve that identical
2 result if you simply used your general
3 treasury account. And it would also seem to
4 be bolstered by your argument for stability
5 of rules and that this is already something
6 that people are used to using and therefore
7 it would be less difficult to implement.
8 MR. TRISTER: On the segregated
9 account I was going to make the same point,
10 but in addition as a practical matter for
11 both unions and for many 501(c) organizations
12 the money is coming out of the general
13 treasury.
14 They don't have that kind of money,
15 they can't raise individual money, they have
16 to use their general support money.
17 And so for tax reasons then they
18 already set up segregated funds, 527, not
19 political committees, but 527 accounts, and
20 they transfer the money over to that for tax
21 reasons, but they report that as a single
22 contribution from the organization.

1 If you allow that, then that's
2 fine, but that doesn't do much for disclosure
3 if you require that the money that came into
4 the treasury you still have to report in the
5 same way, then you are back to where you
6 started.
7 So I think that as a practical
8 matter, these organizations have to use
9 treasury money and the question is how much
10 or what kind of treasury money are they going
11 to have to report?
12 As you heard earlier, the
13 earmarking line is the line that is both in
14 the statute for IEs and is a workable if not
15 perfect line to draw in that regard.
16 CHAIRMAN LENHARD: Any further
17 questions? Are there questions from counsel
18 or from staff members?
19 I would like to end a little bit
20 where we began because at the very beginning
21 Mr. Morgan in your opening statement one of
22 the first things you said was that there is a

1 national inclination on the part of
2 organizations when they lose litigation to
3 try to minimize their losses and set up a
4 regulatory rulemaking process, and certainly
5 from my conversations among the commissioners
6 individually when we have met in private to
7 discuss this and I think is reflected by the
8 conversation here, that is not a concern of
9 ours whatsoever.
10 Instead, what we are struggling
11 with is how we reconcile our statutory duties
12 with a constitutional guidance from the
13 Supreme Court in a range of different
14 decisions over multiple decades not all of
15 which neatly fit together.
16 It is that struggle which has
17 animated our thinking so far and will animate
18 our final resolution of this issue.
19 So with that I am going to recess
20 our proceedings until 1:00, at which point we
21 will reconvene with our afternoon panel.
22 Thank you very much.

1 (Recess)
2 CHAIRMAN LENHARD: Good afternoon,
3 I would like to reconvene the Federal
4 Election Commission's meeting of October 18,
5 2007.
6 We are conducting a hearing on the
7 implications of the Supreme Court's Wisconsin
8 Right to Life decision.
9 We have reached our afternoon panel
10 today and we have four people who have come
11 to testify before us.
12 We have Stephen Hoersting from the
13 Center for Competitive Politics, John
14 Sullivan from the Service Employees
15 International Union, Heidi Abegg representing
16 the American Taxpayers Association, and
17 Michael Boos from Citizens United.
18 Welcome all.
19 The procedure we have been
20 following here has been to permit each of you
21 a five-minute opening statement. There is a
22 light display box in front of you.

1 The green light will be on at the
2 beginning of your comments and with one
3 minute left the green light will begin to
4 flash and with 30 seconds left the yellow
5 light come on and the red light appears at
6 the point at which your five minutes have
7 expired.
8 After that we will turn to
9 questions from the commissioners. We are not
10 following any particular order up here.
11 Commissioners will simply seek recognition
12 and ask questions and may ask follow up
13 questions as well, which has produced a very
14 good dialogue with our previous panels.
15 In terms of your presentation we
16 have generally followed the practice having
17 our speakers present their opening statements
18 alphabetically, which means, Ms. Abegg, you
19 will be the first to go, followed by Mr.
20 Boos, Mr. Hoersting and unfortunately, Mr.
21 Sullivan, you will be the last, although that
22 may be to your advantage in the end. And so,

1 unless you have worked out an arrangement
2 among yourselves otherwise, that is how we
3 suggest proceeding.
4 Certainly also, just to be clear,
5 general counsel and staff will be free to ask
6 questions as we continue with these
7 proceedings.
8 All this having been said, Ms.
9 Abegg, please proceed at your convenience.
10 MS. ABEGG: Thank you, Mr.
11 Chairman, Mr. Vice Chairman, and members of
12 the commission.
13 I appreciate the opportunity to
14 testify today on behalf of both the American
15 Taxpayers Alliance and Americans for Limited
16 Government.
17 As noted in the written comments,
18 both ATA and ALG are Section 501(c)(4)
19 organizations. Both organizations educate
20 the public and take positions on issues that
21 generate strong and often adverse reactions
22 from the government and the public.

1 Donors to both organizations highly
2 value the ability to contribute to an
3 organization that espouses positions and
4 advocates change on controversial issues
5 while remaining free from disclosure with its
6 attendant risk of threats, harassment, and
7 reprisal from those who disagree with its
8 position on issues.
9 ATA and ALG submit that there are
10 two principles that the Commission should
11 have in mind when promulgating final
12 regulations.
13 One, my clients want to stress that
14 attacking or condemning ideas or issues is
15 not the same thing as commenting on or
16 attacking a candidate.
17 Issues and candidates are not so
18 intertwined and synonymous that an attack on
19 one per se becomes an attack on the other.
20 Without the ability to condemn an
21 officeholder's position on an issue citizens
22 lose the right to hold their officials

1 accountable for their actions.
2 The good old days of Congress
3 adjourning long before an election seem to be
4 over. Thus citizens need to be able to
5 condemn their officeholders precisely when
6 they are taking votes that affect them, even
7 if it is shortly before an election.
8 As the Supreme Court has stated, in
9 a representative democracy such as this these
10 branches of government act on behalf of the
11 people and to a very large extent the whole
12 concept of representation depends upon the
13 ability of the people to make their wishes
14 known to their representatives.
15 Two, the Commission should be as
16 mindful of the right to privacy as it is of
17 the public's right to know, through
18 disclosure.
19 How is an exempt electioneering
20 communication ad any different than an
21 anonymous pamphleteer speaking using a
22 megaphone?

1 There has been little talk about
2 McIntyre, NAACP vs. Alabama, and other cases
3 upholding the right to privacy and one's
4 political associations and beliefs.
5 While it may be easy for the
6 Commission to simply say "disclose," it turns
7 Wisconsin Right to Life into a hollow victory
8 for many nonprofits.
9 Many donors to my clients value
10 their anonymity and will not give if they
11 know that their identities will be disclosed
12 because they have been subjected in the past
13 to reprisal and other manifestations of
14 public hostility, and like in the cases I
15 just cited, there is no compelling interest
16 here requiring disclosure.
17 Disclosure here has been likened to
18 disclosure under the lobbying statute, but
19 the interests are different.
20 The Supreme Court upheld the
21 reporting requirements under the Federal
22 Regulation of Lobbying Act in US vs. Harris.

1 The court said that the compelling interest
2 was to maintain the integrity of a basic
3 governmental process and to allow Congress
4 the power of self protection.
5 I think that both Harris and
6 Buckley can be read to distinguish reporting
7 requirements from those directly involved in
8 or impacting the governmental processes as
9 opposed to regulating those who are
10 indirectly attempting to change the climate
11 of public opinion.
12 Even when a federal regulation on
13 public policy advocacy involves merely
14 disclosure and not a prohibition on speech,
15 the regulation undergoes rigorous
16 constitutional scrutiny because, as the
17 Buckley court recognized, the deterrent
18 effects on the exercise of First Amendment
19 rights may arise as an unintended but
20 inevitable result of the government's conduct
21 in requiring disclosure.
22 The strict test established in

1 NAACP vs. Alabama is necessary because
2 compelled disclosure has the potential for
3 substantially infringing First Amendment
4 rights, but there has to be governmental
5 interest sufficiently important to outweigh
6 the possibility of infringement.
7 Additionally, there has been a long
8 standing tradition in our democracy of
9 anonymous public speech.
10 There is no important or compelling
11 government interest here in requiring
12 disclosure of communications that the Supreme
13 Court has said are not express advocacy or
14 its functional equivalent.
15 The types of ads which the Supreme
16 Court has stated are not electioneering
17 communications, do not have a substantial
18 connection to the governmental interest in
19 lobbying regulation recognized by the Harris
20 court, the governmental interest in
21 preventing corruption and its appearance
22 recognized by the Buckley court, or the

1 governmental interest in regulating electoral
2 speech recognized by the McConnell court.
3 Thank you.
4 MR. BOOS: Chairman Lenhard,
5 members of the Commission, my name is Michael
6 Boos and I am the vice president and general
7 counsel of Citizens United, a conservative
8 grassroots advocacy organization with more
9 than 250,000 members.
10 Citizens United is a major producer
11 and distributor of documentary films. We
12 have spent in excess of $1 million annually
13 to produce and market documentary films to
14 our members and the public at large.
15 Our films deal primarily with
16 contemporary public affairs issues and often
17 include footage, interviews, and other
18 references to public officials and
19 candidates.
20 Since the issuance of advisory
21 opinion 2004-30 Citizens United has actively
22 urged the Commission to adopt a rule

1 exempting advertising for movies, books,
2 plays, and similar works from the definition
3 of electioneering communications.
4 We have consistently sought
5 recognition for these ads under the news
6 media exemption because the underlying works
7 fall within the scope of that exemption, but
8 we were mindful that movie advertising might
9 fall under more than one exemption category.
10 Thus I am here today to urge the
11 Commission to adopt Alternative 2. We
12 believe Alternative 2 is fully consistent
13 with Chief Justice Roberts's controlling
14 opinion in Wisconsin Right to Life II and the
15 Commission's authority to promulgate rules
16 implementing the underlying statute.
17 On the other hand, we view
18 Alternative 1 as falling well short of the
19 Supreme Court's instructions. The Chief
20 Justice's opinion is far reaching. It
21 focuses on the absence of a compelling
22 justification for regulating ads that do not

1 contain express advocacy or its functional
2 equivalent.
3 Alternative 1 does not cure this
4 infirmity because it is still leaves intact
5 the burdensome disclosure and reporting
6 scheme that applies to electioneering
7 communications.
8 Alternative 2, however, cures the
9 infirmity because it exempts qualifying ads
10 from the regulatory scheme altogether.
11 While Wisconsin Right to Life II
12 dealt directly with grassroots advertising,
13 the decision has significant implications for
14 other types of ads as well, including
15 broadcast ads for products or services such
16 as documentary films.
17 We know that because, number one,
18 the Chief Justice stated explicitly in
19 footnote 10 of his opinion that the court was
20 applying the same analysis to Wisconsin Right
21 to Life's ads that it would have applied had
22 the group been a commercial entity.

1 And two, in the context of campaign
2 finance regulation the court has consistently
3 applied strict scrutiny analysis to
4 regulations of speech by commercial
5 advertisers.
6 Thus, in our view the Commission is
7 correct to include the proposed exemption for
8 ads for products and services within the
9 scope of the pending rulemaking.
10 Wisconsin Right to Life II also has
11 implications for some of the Commission's
12 other rules, especially those defining
13 express advocacy.
14 Many of us in the regulated
15 community have long believed that the
16 definition of expressly advocating is far too
17 broad to withstand First Amendment scrutiny
18 and the Chief Justice's opinion confirms our
19 position.
20 Express advocacy requires the use
21 of so-called magic words which expressly call
22 for the election or defeat of a candidate.

1 Contextual considerations are
2 irrelevant to the analysis. Citizens United
3 therefore calls on the Commission to modify
4 its definition of expressly advocating by
5 deleting those parts of the definition that
6 look beyond the four corners of the words and
7 phrases used in the communication.
8 In the past the Commission has
9 resisted requests that it define terminology,
10 "promote, support, attack or oppose," which
11 has come to be known by the acronym PASO.
12 In light of the decision in
13 Wisconsin Right to Life II, we urge the
14 Commission to revisit that issue and adopt a
15 rule that defines PASO as a communication
16 that is susceptible of no reasonable
17 interpretation other than an appeal to vote
18 for or against a specific candidate.
19 Finally, although we strongly
20 support Alternative 2, we cannot support the
21 proposed safe harbors that would apply
22 irrespective of which alternative is adopted.

1 As drafted, they are far too narrow
2 to be of any significant benefit to the
3 regulated community. We are especially
4 concerned with the ordinary course of
5 business prong that would cover ads for
6 products and services, but we also have
7 strong reservations over the third and fourth
8 prongs of the safe harbor test as well.
9 With respect to the ordinary course
10 of business standard, it is an inherently
11 subjective standard. It is one that we run
12 afoul of with respect to advisory opinion
13 2004-30. It is one that stopped us from
14 being able to run legitimate ads for our
15 film, Celsius 4111.
16 Our concern is that that standard
17 is inherently subjective and can easily be
18 manipulated to obtain a desired result.
19 And second, such a standard is
20 inconsistent with the Chief Justice's
21 admonition that the lawfulness of an
22 advertisement cannot turn on factors outside

1 the four corners of advertisement itself.
2 Once again, I thank you for the
3 opportunity to speak before the Commission on
4 these important issues and I look forward to
5 answering any questions that you might care
6 to ask.
7 MR. HOERSTING: Chairman Lenhard,
8 Vice Chairman Mason, and commissioners.
9 Thank you for the opportunity to
10 testify on your electioneering communications
11 hearing.
12 Before I begin, let me commend the
13 staff for what I just have to know is a very
14 difficult NPRM. I looked at that thing and I
15 can only imagine the number of hours that
16 went into that, so it's really impressive.
17 My colleagues on this panel say
18 that Chief Justice Roberts was more amending
19 a definition than construing a prohibition.
20 They also say that once we concede that the
21 ad in question is a genuine issue ad there is
22 no governmental interest or a jurisprudential

1 basis for compelling its
2 disclosure.
3 They also say that it would be
4 absurd to have organizations Congress never
5 intended to run ECs all of a sudden have to
6 start reporting their electioneering
7 communications, and of course, my colleagues
8 are absolutely right on each of those points.
9 But, correct as they are, it would
10 be untenable for the Commission to invoke its
11 administrative authority to stay application
12 of Section 201, a facially valid provision,
13 without some organization asserting the
14 application of 201 violates the rights of
15 speech and association.
16 It would be unseemly for that
17 question to be litigated in the posture of an
18 agency defending its administrative
19 prerogatives -- I say this respectfully --
20 with no factual background of a speaker who
21 is actually chilled.
22 The Commission should therefore

1 hold its nose and apply Section 201 to issue
2 advocates even as doing so is a back door to
3 some of the grassroots lobbying disclosure
4 measures Congress recently rejected.
5 For the record, I am very much
6 against those measures and if you Google me
7 you will find that out.
8 The word "contributes," by the way,
9 in Section 201 sub part (f) should guide the
10 Commission in crafting disclosure
11 requirements even if disclosure comes down
12 harder on nonprofit organizations whose ads
13 are funded by contributors than it would for
14 for-profit corporations.
15 Hopefully, some organization will
16 sue you for applying Section 201 to their
17 speech activities and we can once and for all
18 resolve what could have been a companion
19 issue in WRTL II.
20 I don't say that lightly. I know
21 the chill is real and I know that suing the
22 government is very expensive and difficult.

1 Expenditures and electioneering
2 communications are mutually exclusive
3 concepts in federal campaign law for the most
4 part. So it is imperative, as you have heard
5 before, that the Commission not conflate
6 express advocacy with its functional
7 equivalent.
8 Therefore, the Commission should
9 repeal its definition of express advocacy at
10 100.22(b) and remove references to
11 reasonableness in part (a). Some may suggest
12 I am urging restraint in one area and
13 activism in another. Not at all. The unity
14 in my testimony is the case or controversy
15 doctrine.
16 Section 202 remains facially valid,
17 it was not challenged in WRTL II, and
18 similarly revisiting the gloss on core FECA
19 terms like "expenditure" or "political
20 committee" was not before the court in
21 McConnell.
22 In fact the McConnell court said

1 that the gloss on FECA is and remains the
2 gloss of Buckley even if that gloss is not
3 constitutionally required for new
4 congressional enactments and even if that
5 gloss struck the McConnell court as
6 functionally meaningless.
7 The line of cases from Buckley,
8 MCFL, through McConnell shows that express
9 advocacy is and always was a magic words
10 test.
11 This issue is res judicata and
12 repealing 100.22(b) is an administrative
13 decision that almost no district judge would
14 overturn.
15 By the way, the McConnell court
16 itself --
17 CHAIRMAN LENHARD: And to the
18 degree that such a judge exists they are
19 probably in the D.C. Circuit.
20 MR. HOERSTING: Precisely. A
21 footnote. The McConnell court itself
22 recognized, then denigrated the magic words

1 strictures of express advocacy to justify
2 Congress's needs for electioneering
3 communications.
4 So reasonableness is out with
5 regard to express advocacy. Unfortunately,
6 it remains for its functional equivalent.
7 The Chief Justice's use of the term
8 charges you at some point in the analysis
9 chain to make a hard judgment call about
10 which ads are in and which ads are out. I
11 regret that is the case but it is.
12 In that event, please confine your
13 analysis to the text of the ad, as the
14 opinion mentions, and if at all possible
15 recognize that "the tie goes to the speaker,"
16 as you have heard several times this week.
17 By the way, a couple of other
18 issues. A non-exhaustive list of examples in
19 safe harbors is a good thing in our opinion.
20 And I believe that while none of the sample
21 ads mentioned in the NPRM are express
22 advocacy, the Yellowtail ad and the Keen ads

1 are the functional equivalents.
2 I look forward to taking your
3 questions. Thank you.
4 CHAIRMAN LENHARD: Thank you very
5 much. Mr. Sullivan?
6 MR. SULLIVAN: Mr. Chairman,
7 members of the Commission, I am a participant
8 in a joint project along with counsel for the
9 AFL, NEA and ASFCME in presenting comments to
10 you on this issue.
11 All of our organization are very
12 active in the area of issue advocacy. We
13 spend a tremendous amount of resources on
14 federal legislative activity and on state
15 legislative activity. We also spend a
16 tremendous amount of our members' voluntary
17 contributions on political activities, so the
18 issues raised in these rulemakings are
19 critical to us and our members.
20 Yesterday the chairman commented
21 that Mr. Bopp observed in his presentation
22 that he filed a lawsuit to get an exemption

1 from the electioneering communications ban
2 for a group of ads and ended up getting a
3 redefinition of electioneering
4 communications.
5 We would submit that the court did
6 not simply redefine what constitutes
7 electioneering communications, but rather it
8 redefined or perhaps clarified the
9 constitutional limits on the Commission's
10 ability to limit or, in the court's view,
11 criminalize speech.
12 Last year a number of the
13 commenters in this rulemaking, including the
14 unions who are a part of this joint comment,
15 filed a petition with the Commission seeking
16 a rule crafting a narrower exception for
17 their grassroots lobbying efforts from the
18 Commission's regulations concerning
19 electioneering communications.
20 We have returned to the Commission
21 not to ask again for that exception, but to
22 argue that the controlling opinion in

1 Wisconsin Right to Life II requires the
2 Commission to revise its regulations in light
3 of the redefinition of the boundaries
4 limiting the Commission's power to ban and
5 punish speech.
6 Such provisions not only require
7 examination of the electioneering
8 communications regulations, which is the
9 subject of this proceedings, but must also
10 include the definition of express advocacy
11 itself as well as other regulations which
12 have a direct impact on speech, including the
13 Commission's coordinated communication
14 regulations and allocation regulations.
15 As the last speaker I have the
16 advantage of relying upon the presentations
17 of numerous commenters who have outlined the
18 issues and share our belief that the decision
19 in Wisconsin Right to Life II changes in a
20 fundamental way how the Commission must
21 recognize and accommodate protected speech.
22 Let me just take a few moments

1 however to reiterate points made in Larry
2 Gold's and Jessica Robinson's presentations.
3 Larry Gold emphasized that the
4 Commission should adopt Option 2 as an
5 approach which best accommodates the decision
6 in Wisconsin Right to Life with the existing
7 regulatory regime on electioneering
8 communications.
9 Larry also discussed the potential
10 application of Option 1 to labor unions,
11 particularly with respect to the reporting
12 and disclosure requirements.
13 Now he began from the analysis that
14 it's important to make a distinction between
15 a donation and dues. And this is a very
16 important point for unions.
17 Members pay dues to unions not to
18 finance electioneering communications, but to
19 finance and support the full range of
20 activities that the union engages in, from
21 collected bargaining representation, to
22 servicing members, to engaging in advocacy

1 both with their employers and with state and
2 local officials around the country.
3 And it would be, if not
4 counterproductive, at least serving no
5 particular purpose to report or disclose the
6 names of people who did in fact not
7 contribute to the financing of a particular
8 electioneering communication.
9 And I think several commenters
10 talked about the lack of a public policy
11 benefit for having a list of members whose
12 dues were used or may have been used to
13 finance these communications.
14 Jessica in her comments talked
15 about the proposed safe harbor and expressed
16 our concerns both with respect to the
17 narrowness of the safe harbor, but also with
18 respect to our concern that an individual or
19 group failing to meet the requirements of the
20 safe harbor may suffer from a presumption
21 that their speech is in fact not protected.
22 She argued and I think the

1 Commission acknowledges that when you don't
2 need the safe harbor the Commission is then
3 obligated to demonstrate that the
4 communication in question is susceptible of
5 no reasonable interpretation other than as
6 appeal to vote for or against a specific
7 candidate.
8 Now, in response to that, I think
9 it was Chairman Lenhard who raised the
10 troubling question of how do you prove a
11 negative? And in fact the constitutional
12 safeguard itself is framed in the negative.
13 And the question really is, who
14 better to put the burden on? The speaker,
15 who may be forced to tailor the scope of
16 their communication because of a fear of
17 going over a line, or the Commission, which
18 has the burden to demonstrate that in fact
19 the speech in question falls outside the
20 protections of the First Amendment?
21 I see that my time has expired but
22 I will be happy to answer any questions.

1 CHAIRMAN LENHARD: Questions?
2 Commissioner von Spakovsky.
3 MR. von SPAKOVSKY: Mr. Hoersting,
4 you said that we should do Alternative 1 and
5 require disclosure because the disclosure
6 provision is on the books and was not
7 affected by the decision and disclosure
8 requirements have been upheld in the
9 McConnell case.
10 But didn't the McConnell case
11 uphold the disclosure requirements for ads
12 which were the functional equivalent of
13 express advocacy and therefore when the
14 Supreme Court now in a subsequent decision
15 has said that issue ads are not the
16 functional equivalent of express advocacy,
17 isn't that a clear indication to us that the
18 disclosure requirements do not apply?
19 MR. HOERSTING: The first two
20 predicates of your question are absolutely
21 true.
22 Yes, the McConnell court said that

1 ads can be subject to disclosure to the
2 extent that they are the functional
3 equivalent. That's what I take to be the
4 opinion, anyway.
5 But in terms of the next case --
6 and I think there has to be a next case -- it
7 is my opinion, I'll just speak frankly,
8 you're going to be sued by somebody. And I
9 think it is better that you not go in as an
10 administrative agency defending its
11 administrative authority in the posture of
12 this case.
13 I think it is against a reformer
14 who would urge you to be even be more
15 regulatory or against potential plaintiffs on
16 the Hill, former sponsors of the legislation,
17 who would urge you to go even further.
18 I think it is important that the
19 case have an actual plaintiff who is saying
20 "I am chilled in my rights of speech and
21 association," and that's a far better basis
22 for the case to go forward.

1 Under administrative procedures you
2 have a very high burden and immediately a
3 judge is going to say, especially an
4 unfriendly one, "Wait a second. I thought
5 the McConnell court said that 201 is facially
6 valid, so under administrative authority why
7 are you carving this out? Because of some
8 future 'as applied' challenge, you are
9 prognosticating?"
10 The first line in WRTL II is
11 "Section 203 says." And then here is another
12 interesting point. After WRTL II you have
13 from plaintiff, Wisconsin Right to Life, same
14 counsel, Mr. James Bopp, who settled WRTL III
15 and also settled Christian Civic League of
16 Maine, and my understanding of those
17 opinions, but I do not have them entirely
18 committed to memory, he said the prohibition
19 is unconstitutional, that the prohibition is
20 unconstitutional in both of those cases.
21 So that's my take on this and that
22 is my position on this. I won't waste much

1 breath on this, but do I think there is any
2 constitutional basis for compelling
3 disclosure of genuine issue advocacy? No,
4 not for a minute. That is why I work for
5 CCP.
6 CHAIRMAN LENHARD: Other thoughts,
7 questions? Commissioner von Spakovsky.
8 MR. von SPAKOVSKY: Mr. Boos, to go
9 from constitutional theories down to
10 practicalities for you.
11 When you're looking at the language
12 that we have set out in NPRM for this
13 business of commercial exemption which would
14 apply to what Citizen United does, you made
15 it pretty clear that you think the second
16 prong, which is "made in the ordinary course
17 of business," needs to come out because that
18 did not fit your organization when it was
19 first putting together these documentaries.
20 But on the third prong about not
21 mentioning any election candidacy, political
22 party, et cetera, how do you think that needs

1 to be changed?
2 My understanding is that that also
3 would be a problem for you, because of the
4 fact that you might produce a documentary or
5 a film that does mention candidates or has
6 information about candidates.
7 Does that just need to come out
8 entirely, in your opinion, or is there a way
9 of changing that language to bring the kind
10 of work that your organization does within
11 the safe harbor?
12 MR. BOOS: Actually our
13 organizational position is that safe harbors
14 would be unnecessary if the appropriate
15 action were to be taken to redefine express
16 advocacy and to define PASO. Because the way
17 we look at it, safe harbors really do not
18 provide anyone with much of anything.
19 As they are currently constituted
20 only the ads that are most obviously not
21 electioneering communications would fall
22 within the safe harbor.

1 Well, they're obvious to begin
2 with, even without the safe harbor. We think
3 that that particular provision that prohibits
4 the mention of elections or political
5 parties, et cetera, that ought to come out
6 completely.
7 If you were to adopt the safe
8 harbor you are only looking at perhaps the
9 first prong of the safe harbor as being
10 something that would be acceptable and that
11 would essentially be that it would be
12 exclusively devoted to advertising the
13 product or the service.
14 That is not much of a definition of
15 safe harbor either and we think that if that
16 is the only definition that you are left
17 with, you might as well have no definition
18 whatsoever, with respect to a safe harbor.
19 It is just unnecessary we think if,
20 one, you define express advocacy to only
21 encompass magic words. You define
22 "functional equivalent" as basically being

1 that language that is not susceptible of any
2 other reasonable interpretation except aimed
3 at influencing an election.
4 Independent expenditures fall under
5 express advocacy standard.
6 Electioneering communications
7 encompass the functional equivalent of
8 express advocacy, and when you have that
9 standard there and when you set it there at
10 that point, it then becomes clear that if
11 you're advertising a product or service and
12 that product or service might be a book about
13 a political candidate, that that ad is in
14 fact not an electioneering communication.
15 Let me give you a good example. If
16 you recall during the last election cycle
17 Michael Moore had these advertisements for
18 Fahrenheit 911 that really made President Bush
19 look ridiculous when he was on the golf
20 course.
21 I am concerned that under the safe
22 harbor standards that have been set forth

1 here that ad would be illegal or at least it
2 would not fall within the safe harbor, even
3 though it was a legitimate ad that convinced
4 a lot of people to go see his movie.
5 I mean, it performed the task at
6 hand, which was to get people to see the
7 movie. It may have had some effects on the
8 election, but you can't look at the cause and
9 effects standards because the Supreme Court
10 has said you can't look at that.
11 By the same token, we had some
12 advertisements for Celsius 4111 that really
13 had some very bland references in our ads to
14 President Bush and Senator Kerry.
15 The two of them were speaking on
16 how they would react to terrorist attacks on
17 the United States, and the distinction
18 between their statements was very subtle.
19 One said they would be proactive
20 and one said they would be reactive. We had
21 those two statements in our ads as initially
22 put together. We had to take them out

1 because they made references to the
2 candidates, period.
3 And so trying to draw those
4 distinctions is very, very difficult and I
5 don't think it is possible to set forth a
6 safe harbor.
7 We think under a legitimate rule
8 that our ads would have been permissible back
9 in 2004, Michael Moore's ads would have been
10 permissible back in 2004, and if you redefine
11 PASO, or if you actually define PASO with the
12 definition set forth in the Supreme Court's
13 ruling of the functional equivalent of
14 express advocacy and then narrow that
15 definition of express advocacy, you have
16 taken care of the problem with respect to the
17 need for safe harbors.
18 VICE CHAIRMAN MASON: I wanted to follow up
19 on the safe harbors as well. And first, just
20 to note, Ms. Abegg, in your testimony I
21 appreciate that you brought out the series of
22 questions about character qualifications and

1 fitness for office.
2 It seems to have bothered you, all
3 those questions. Is that right?
4 MS. ABEGG: It did, and probably
5 because I can imagine my clients calling me
6 with exactly those questions. "Why can't we
7 say that?" Because a lot of them want to
8 criticize or praise an officeholder.
9 VICE CHAIRMAN MASON: Well, it bothered me
10 too, and I am the one who wrote those
11 questions and suggested they be put in the
12 NPRM because I thought those questions were
13 implicated if we were talking about character
14 qualifications and fitness for office. It
15 was exactly that kind of thing.
16 And I read this morning from the
17 brief of your former boss, Mr. Bopp, where he
18 proposed that standard to the court and where
19 the court repeated that back in its opinion.
20 So, just one point about this is
21 that this standard wasn't invented by us. It
22 wasn't proposed by us, but rather it was

1 proposed by Mr. Bopp and was adopted or at
2 least was incorporated in the language of the
3 opinion, and that, frankly, is why we have
4 the problem that we have.
5 Now given that, that we would look
6 at things like that for the safe harbor, I
7 understand Mr. Boos's position on the safe
8 harbor, but you and Mr. Sullivan both
9 criticize the safe harbor as being too
10 narrow.
11 And I wonder if either of you have
12 a suggestion about a way it could be
13 rewritten to make it useful.
14 MS. ABEGG: The suggestion that I
15 made in our comments was just to make sure
16 that it was clear to the regulated community
17 that those safe harbor provisions are not
18 exclusive.
19 They still meet the safe harbor
20 even if your ad doesn't fall within that, and
21 I didn't think the language in the proposed
22 draft was strong enough or made that clear

1 enough.
2 CHAIRMAN LENHARD: You were not
3 alone in that. It was certainly our
4 intention that we would have an overarching
5 rule and then there would be within that rule
6 a safe harbor which would provide a greater
7 degree of clarity as to how we were
8 interpreting that rule.
9 And obviously we were not clear
10 enough, but that was analytically how we were
11 approaching the problem, but we will try to
12 fix that.
13 MS. ABEGG: Because I realize there
14 is no way probably to draft a safe harbor
15 that incorporates all of those concerns I
16 listed in my comments.
17 CHAIRMAN LENHARD: The other side
18 of the coin, as I mentioned a little earlier
19 today with the other panel, was that we
20 didn't want to end up with a safe harbor that
21 was broader than the rule in certain
22 circumstances where there were communications

1 that met the safe harbor, but also could be
2 interpreted only as a call to vote for or
3 against a candidate. That would obviously
4 produce a nonsensical result, and so we have
5 had to struggle our through those choices.
6 MR. SULLIVAN: I sort of began the
7 process of thinking about a response to the
8 proposed rulemaking, particularly on the
9 issue of safe harbor, wondering, well,
10 doesn't a safe harbor in a sense turn the
11 court's analysis on its head?
12 Does a safe harbor say, okay, you
13 can speak if you satisfy these requirements?
14 I was wondering, just as a point of
15 departure for the Commission, whether or not
16 it served a better purpose to have the
17 Commission identify those factors it would
18 consider in terms of whether it was protected
19 or not protected?
20 Ultimately the Commission has the
21 burden of demonstrating that the speech in
22 question is not protected and therefore

1 subject to its regulations. And in making
2 that analysis it can legitimately look at
3 certain factors and in our comments we tried
4 to outline what those factors were.
5 So rather than articulating a safe
6 harbor, which imposes the burden upon the
7 speaker, we thought that the best approach
8 would be to outline those factors in which
9 the board could consider in making a
10 determination regarding the speech, whether
11 or not we outlined them in our comments.
12 But the concept of the safe harbor
13 I think itself raised some concerns. In
14 looking at the actual safe harbor articulated
15 by the Commission in its notice we felt that
16 it was entirely too restrictive in terms of
17 the kinds of speech that we believe is
18 protected by the court's decision.
19 VICE CHAIRMAN MASON: I have one follow-up on
20 the factor issue, because one of the other
21 things that bothers me about the opinion is
22 that it says at one point, "We have to avoid

1 the hurley-burly of factors."
2 It then goes on in the next
3 paragraph and it lays out a four-prong,
4 eleven-factor test for how we are to do this.
5 I don't quite understand. It is
6 either a Bright Line test or it's a
7 multifactor balancing test and those two
8 really are not the same.
9 While the desire for clarity in
10 terms of being able to look down and tick off
11 a list, or whatever, to advise a client, I
12 understand. But that is a very different
13 kind of test for an issue than a Bright Line
14 test and I particularly am concerned or I
15 just have a question. If we start listing
16 factors, what does that mean?
17 In other words, does it mean that
18 you have to meet all the factors or any one
19 of them and if it is not one of those
20 extremes then we are into one of these
21 multifactor balancing tests that just isn't a
22 Bright Line under anybody's standard.

1 So how do we reconcile that?
2 MR. SULLIVAN: The list of factors,
3 I think, would not be exclusive. I would
4 imagine through adjudications the Commission
5 would add to those factors in going forward.
6 So I think the listing of factors
7 or what you are describing as factors, that
8 the Commission will say, well, we will not
9 base a decision that this speech is not
10 protected on the fact that the speaker is a
11 supporter or an opponent of the candidate.
12 We will not base a decision on the nature of
13 this communication based on its timing with
14 respect to an election or a legislative
15 session or the scheduling of a vote on that
16 issue. We will not base a finding that it is
17 not protected on the basis of whether the
18 communication is a reference to a website
19 which may itself contain express advocacy.
20 These are all very useful items for
21 a person crafting a communication to
22 consider.

1 So if, they say, it's okay for me
2 to issue this communication even though the
3 vote was held last week or that the motion or
4 the legislation has been tabled or has been
5 sent back to committee, I can still talk
6 about it because the Commission has told me
7 that the pendency of the vote is not a factor
8 they will consider in determining whether or
9 not this communication is subject to its
10 rules.
11 And I think that's a helpful
12 exercise and essentially that's what an
13 advocate does when they look at a body of
14 case law. They look at the factors. They
15 will try advise their client.
16 Given that we are in the middle of
17 a rulemaking, I think the Commission has the
18 opportunity to sort of catalogue for the
19 regulated community those factors it will
20 consider and will not consider in making its
21 determination on whether or not the speech is
22 protected.

1 CHAIRMAN LENHARD: If I can follow
2 up on that, this is a struggle for me. As I
3 see it there are at least three choices.
4 One is we can simply promulgate
5 Chief Justice Roberts's test on the regs and
6 say no more. My sense is that some of you
7 think that that would be the best path and
8 lawyers can make whatever judgments they want
9 from it and at a minimum it will convey to
10 the outside world that we have read the
11 Supreme Court's decision and we are aware it
12 exists.
13 The second thing we can do is do
14 one of these factor analyses, and in some
15 cases say we will never ever in enforcement
16 consider relevant some number of things. And
17 that would provide some comfort for people,
18 because they know can put those things in
19 their ads and it won't harm them.
20 The other side of it is what we
21 would consider relevant, and that's harder
22 because there will presumably be some ads

1 which could include one of those factors that
2 could be construed as something other than a
3 call to vote for or against a candidate.
4 So we will have to have some
5 vagueness in the weight, relevance and
6 importance of it, but we would tell you,
7 these are the kinds of things we might be
8 thinking about as we read your ads.
9 But this will not provide much in
10 the way of real clarity or comfort and you
11 will, again, be left with sort of trying to
12 guess where we are.
13 And the third choice is to provide
14 a safe harbor where we sort of say if the ad
15 says this we will not enforce.
16 Right now you can say other things
17 and maybe we won't enforce too, but we can
18 assure you that there is at least somewhere
19 between four, five or six commissioners who
20 believe that this is entirely protected
21 speech -- not as broad as all the protected
22 speech, but for people who want to be

1 completely safe, they at least know if we say
2 this or something like this, well, they're
3 off scot free, and then if they have more
4 risk they can say other things that their
5 lawyers can try to guess where the FEC is.
6 And that's sort my conception of
7 what the safe harbor does, that it provides a
8 certain zone of complete protection from
9 enforcement.
10 From what I understand, there are a
11 number of people here saying that it is far
12 better that we do the first, which is the
13 vaguest of articulations of what we intend to
14 enforce against, or the second, which
15 provides a little bit of clarity but not much
16 real clarity about what we are enforcing and
17 what we are not.
18 Probably the worst choice for us to
19 do would be to choose the third choice,
20 unless it really came pretty close to being
21 as expansive a safe harbor as the rule itself
22 so that people really knew the outer

1 boundaries of what they could speak, and
2 therefore we wouldn't really be chilling
3 anything, because the safe harbor would be as
4 close to the rule itself as we could get.
5 And I know, from having roamed the
6 halls and trying to find four votes on so
7 many issues over the last two years, that
8 that is very, very hard to do, both
9 conceptually, because it is very hard to
10 understand how we would provide a lot of
11 clarity in a very concrete way to what I
12 think the Chief Justice presented as a very
13 close to a vague test, although certainly it
14 was constitutionally not vague, but very
15 close to vague test of what reasonably could
16 be construed, and because there are so many
17 different ways speech can present itself and
18 so many different issues, so we're just sort
19 of struggling through.
20 So I just want to try to frame this
21 and make sure that I really understand where
22 folks are on this, that there really is, I

1 sense, a near consensus that we do best by
2 saying the least here and leaving what I
3 would argue is the greatest degree of
4 ambiguity about what kinds of cases we are
5 going to be pursuing in enforcement and those
6 that we are not.
7 MR. HOERSTING: Mr. Chairman, I am
8 willing to be the first contrarian to some
9 extent.
10 I do worry about safe harbors
11 becoming the default standard and that being
12 the starting point of any enforcement matter
13 or advisory opinion request. I do worry
14 about that.
15 On the other hand, I do think that
16 the regulated community, especially the
17 uninitiated, and they do exist because
18 thankfully they're not all in this room
19 because they have lives, that's a good thing,
20 they need examples. They need safe harbors
21 perhaps, but they do need as much guidance as
22 they can, so they can look to the rules or

1 perhaps the E&J and get some idea of what ads
2 they could do.
3 Now, Heidi's point is well taken
4 and it is one I share that the list should be
5 non-exhaustive.
6 So, I tend to favor articulating
7 the standard, which by way the test is as you
8 know, "no reasonable interpretation other
9 than," that's the test. It is not so much
10 the 4 and then the 11.
11 My understanding of that is that
12 that's the Chief Justice applying his test to
13 a particular ad in the WRTL.
14 But I think you should put into the
15 E&J the examples of every ad, the ones under
16 Wisconsin Right to Life and the ones under
17 Christian Civic League of Maine that you have
18 already conceded fit under WRTL II, put those
19 into the E&J and give as much idea of the
20 factors you will look at.
21 And I am not so sure that I am for
22 the third option, as you framed it, which is

1 carving out the safe harbor. I am more for
2 the second.
3 MR. BOOS: We are clearly for the
4 first option and clearly against the third
5 option as we have articulated before.
6 The third option has the problem,
7 as was articulated, of it becoming a default
8 rule or at least from the viewpoint of the
9 regulated community. People that look at
10 these safe harbors will say anything outside
11 the safe harbor, you're at risk.
12 And I don't know of any lawyers out
13 there, with the exception of possibly me, who
14 would offer advice to go outside the safe
15 harbors. I mean, I would look at the safe
16 harbors and I would say, these safe harbors
17 are just that. They're the most narrow
18 obvious cases.
19 But if you list examples, at least
20 examples provide a little bit of information.
21 But the safe harbors I just view as being
22 dangerous, and maybe in part because I deal

1 with the IRS with respect to their safe
2 harbor provisions at times.
3 Of course, they don't even go as
4 far what is being proposed here with their
5 safe harbors. Their safe harbors just create
6 a presumption and they even go so far as to
7 say, we can overcome the presumption so even
8 if you abide by our safe harbors you still
9 might be in trouble.
10 So I am just very leery of safe
11 harbors, maybe in part because of the
12 experience in dealing with the Internal
13 Revenue Service.
14 CHAIRMAN LENHARD: Commissioner von
15 Spakovsky.
16 MR. von SPAKOVSKY: We have our
17 problems but we are not the IRS.
18 Ms. Abegg, I would like to ask you
19 a question that is related to what Mr.
20 Hoersting said earlier.
21 Mr. Hoersting, if I can summarize
22 your view, I think it's that you think from a

1 constitutional standpoint Alternative 2 is
2 best, but you are recommending Alternative 1
3 because you think procedurally it puts us in
4 the best position in litigation in the
5 courts.
6 MR. HOERSTING: That's half of what
7 I said. There is no question. What I am
8 saying is, you're staring facial validity in
9 the eyes and you have no "as applied
10 challenge" anywhere in 201. You just don't
11 have it.
12 MR. von SPAKOVSKY: I wonder if
13 anybody is affected in your opinion by the
14 line of cases that you raised.
15 Only a couple of people have raised
16 this line of cases. Most of the commenters
17 have said to us, well, when we're looking at
18 the disclosure requirements, you just need to
19 apply campaign finance cases, you know,
20 Buckley, McConnell, to the concept of
21 disclosure and what is required under the
22 statute.

1 And most of the commenters will go
2 on to ignore the issue that you have brought
3 up which is, I believe, now that the court in
4 Wisconsin Right to Life has said these are
5 not electoral ads, these are issue ads.
6 Therefore you have a different line of
7 jurisprudence that comes in, and those are
8 the cases of the Watchtower, Belotti, et
9 cetera. And those cases apply, I believe, to
10 the standard of strict scrutiny because of
11 the issues that you have raised about
12 possible harassment and another issues.
13 Does that other line of
14 jurisprudence, these other cases, apply in
15 such a manner that they overcome the
16 procedural and litigation issues that Mr.
17 Hoersting raises?
18 MS. ABEGG: I believe so and I
19 guess I would disagree with Stephen and I am
20 for "the tie goes to the speaker" and not
21 require another nonprofit to spend a lot of
22 money bringing another lawsuit to challenge

1 the disclosure provisions.
2 The government should bear that and
3 I would presume that that speech is not
4 regulated.
5 CHAIRMAN LENHARD: I have a
6 separate topic I want to talk about briefly
7 which is the degree to which we can consider
8 the context in which an ad appears. Because
9 a couple of you, and I think it was Mr. Boos
10 and Mr. Hoersting, although I'm not sure, who
11 said that either context is irrelevant or
12 that we have to limit ourselves to this text
13 of the ad.
14 The problem that that presents for
15 me is that it is often impossible to
16 understand the meaning of words without the
17 context in which they appear.
18 And my sense of the court's
19 decision is that they are not asking us to do
20 exactly that, ignore anything other than the
21 text of the ads, but not to draw in context
22 other than those things which we could

1 reasonably discern without intrusive
2 discovery.
3 And the example I used the other
4 day -- because it amused me and a small
5 number of other people who were in the room
6 at the time, but you weren't there I don't
7 think, so I can tell the joke again -- was
8 the example of the expression "Yay, Yankees."
9 An expression the meaning of which is very
10 different depending on whether you are on a
11 subway train going to the Bronx in September
12 or if you are in a parking lot in Stone
13 Mountain Georgia on Confederate Remembrance
14 Day. And the context of that speech changes
15 the meaning of it dramatically.
16 The other one I thought of, "Randy
17 Moss is the one," versus "Nixon is the one."
18 Right? Because we know something outside the
19 text of that speech about who Randy Moss is
20 and who Richard Nixon is, those two
21 statements have dramatically different
22 meaning to us.

1 I don't think the court would stop
2 us from drawing some context, and yet
3 certainly we had crossed the line in
4 Wisconsin Right to Life in the court's mind.
5 My question do you is, what sort of
6 context can we take into account? Must we
7 truly ignore all knowledge outside of what is
8 provided in the ads, or is our limitation
9 more on the means by which or to the extent
10 to which we go in search of discovering what
11 I think the court saw as improper, which was
12 the purpose or intent of the speaker.
13 It's a jump-off for anybody who'd
14 like.
15 MR. BOOS: The way I like to
16 analyze it is that I think the Commission
17 goes too far with 100.22(b) in that it looks
18 at too many things outside the context of the
19 words themselves.
20 But I think if you look at the
21 language of 100.22(a) that might be
22 appropriate language, the language we are

1 asking that would be removed from the
2 definition of express advocacy, that might be
3 appropriate language in which to define the
4 functional equivalent of express advocacy
5 where the communication in context can have
6 no other reasonable meaning than to urge the
7 election or defeat of one or more clearly
8 identified candidates.
9 It is when you look at the
10 communication with reference to external
11 events, such as the proximity to the
12 election, that you really get into trouble,
13 because that's precisely what I think the
14 Chief Justice said you can't look at it at
15 all, are issues such as the proximity to the
16 election.
17 On the other hand if you use words
18 such as "Nixon's the one," that is not
19 express advocacy, but I think it would be the
20 functional equivalent of express advocacy if
21 it was done on an ad referring to Richard
22 Nixon and the election itself.

1 So it's a subtle difference and I
2 think the Commission itself has had trouble
3 distinguishing between communications that
4 fall within the latter part of 100.22(a) and
5 100.22(b).
6 An example I like to raise is the
7 Swift-Betts ads. Had the Swift-Betts
8 conciliation agreement been entered into
9 after this decision there probably would have
10 been a lot more doubt as to whether their ads
11 were express advocacy or not.
12 I don't think those ads constituted
13 express advocacy under what was set forth in
14 Wisconsin Right to Life. I think they were
15 the functional equivalent and were
16 legitimately and properly reported as
17 electioneering communications, but I know
18 there were other issues in that case where
19 there may have been some express advocacy and
20 solicitations in that manner, but that's sort
21 of the distinction and it's not a very easy
22 distinction to make between the language in

1 100.22(a) and 100.22(b), but I think that's
2 an area where you might want to start.
3 MR. HOERSTING: First of all, my
4 understanding of epistemology is that truth
5 is objective, not a relative, but it is
6 always contextual. It just is. So I
7 empathize with what you're saying.
8 And when the test is "no reasonable
9 interpretation other than," you have put the
10 word "reasonable" into that.
11 So while I think a four corners
12 test is what you should be looking at and it
13 is very easy to do with regard to type A
14 express advocacy, in a four corners test you
15 are looking for certain words.
16 When you're doing the "no
17 reasonable interpretation other than" test,
18 you are permitted look at the contextual
19 meaning of those words which you are not
20 permitted to do, because you are not
21 permitted to probe intent and effect and that
22 begins to get into types of evidence you can

1 and cannot entertain and this is what the
2 court was talking about.
3 It's talking about injunction mode
4 where the court has to very quickly determine
5 can these guys speak or can they not and they
6 are not going to pull in experts, and ask,
7 what do you think would be the aggregate
8 effect of this ad on the voting populace if
9 they were to hear this?
10 That's not the type of thing you
11 are allowed to determine. But I will do a
12 rough Furgatch analogy because I really can't
13 think of anything else right now.
14 If you say don't let him do it, and
15 the only reasonable meaning of that is you
16 have got to vote the guy out of office, then
17 sure, that's contextual and that is something
18 you can look at, but it's still, I would
19 submit, a four corners test.
20 I don't mean to make light of how
21 difficult it is for you to say what's in and
22 what's out when you are determining what

1 you're allowed to look at in terms of looking
2 at relative context, but you can't do intent
3 and effect and you can't ferret out what they
4 are really trying to do here.
5 CHAIRMAN LENHARD: One of the
6 interesting features of yesterday's panels
7 was when we were looking specifically at the
8 Ganske ad we had a witness who testified that
9 it was express advocacy unless in context
10 there was a vote that was about to happen and
11 then it would look more like lobbying ads to
12 them.
13 So sometimes context ends up moving
14 some reasonable people the other way.
15 Mr. Sullivan.
16 MR. SULLIVAN: I agree it is
17 logical that the Commission should be able to
18 look at the context in order to understand
19 the meaning of the words used within the four
20 corners of the document.
21 I think the context question which
22 raises so much concern is material events

1 outside of the document which address why was
2 it said? What was the intended impact? What
3 other events are going on in the campaign
4 which this may relate to?
5 Those context questions with
6 respect to events or outside factors, or
7 impact, or motivation, I think are the kinds
8 of contextual questions foreclosed by the
9 decision.
10 You always need to know what the
11 context is, I think, in order to understand
12 the meaning of the communication, but going
13 beyond that you go into territory that court
14 I think intended to restrict.
15 CHAIRMAN LENHARD: So, to make it
16 concrete, if we had an ad where somebody was
17 saying that an individual was not qualified
18 to be Commander in Chief of the United
19 States, and we took into consideration that
20 the person was actually running to be
21 president of the United States, which is the
22 same as the Commander in Chief, that sort of

1 context or the awareness of that sort of
2 context which would seem under that analysis
3 to be an appropriate in understanding the
4 meaning of those words. Am I correct in
5 thinking that's what you're saying?
6 MR. SULLIVAN: I think so.
7 MR. HOERSTING: Yes.
8 MS. ABEGG: I would agree with what
9 Mr. Sullivan said. My client, ATA, faced a
10 similar situation out in California. They
11 ran an ad during the energy crisis out there
12 and the tag line was "Grayouts from Gray
13 Davis" and it ended with a light bulb
14 clicking off. And Governor Davis argued that
15 that should be interpreted as advocating his
16 defeat by clicking the light bulb off showing
17 that this just meant that his energy policies
18 were causing everyone's power to go off.
19 MR. HOERSTING: That's a good
20 point. It strikes me that there is a
21 reasonable interpretation other than, for the
22 Gray Davis ads for sure.

1 MR. BOOS: The point we would just
2 like to stress is that these latter ads that
3 are being talked about we view as
4 electioneering communications and not
5 independent expenditures and that is where we
6 would draw the distinction.
7 Otherwise there is no difference
8 between an ad that qualifies as an
9 electioneering communication. It
10 automatically qualifies as express advocacy.
11 You have to draw the line somewhere
12 or else the electioneering communications
13 rules have really no meaning whatsoever.
14 And so if you distinguish between
15 the two, one is express advocacy and one is
16 the functional equivalent, and the
17 electioneering communications rules cover the
18 functional equivalent, at least you have some
19 meaning to the statute that is still on the
20 books.
21 CHAIRMAN LENHARD: Commissioner von
22 Spakovsky.

1 MR. von SPAKOVSKY: This question
2 is for you, Mr. Hoersting, although I would
3 be glad to hear from the rest of the panel
4 what you think about this too.
5 When Congress was debating S-1, the
6 Honest Leadership Open Government Act, which
7 they recently passed, both the House and the
8 Senate specifically defeated amendments that
9 would have required disclosure of the donors
10 to organizations engaged in grassroots
11 lobbying.
12 Do you believe that those were
13 defeated because Congress believed that that
14 kind disclosure was already required by FECA?
15 And if you think that was not the reason, if
16 you think they defeated it for First
17 Amendment reasons or others, is that a factor
18 that we should take into account as the view
19 of Congress on this issue when we are
20 formulating this regulation?
21 MR. HOERSTING: First of all, I was
22 involved in this issue to some extent and I

1 will refer you to a piece I wrote called
2 "MLK, Grassroots Lobbyist," in National
3 Review on-line. You will not find anyone
4 more hostile to grassroots lobbying
5 disclosure than me.
6 And I am very troubled by the
7 procedural posture in this case and where it
8 leads us and where things are. And I am
9 balancing case or controversy doctrine with
10 congressional intent with the other
11 interpretations of other Supreme Court cases
12 and it is very difficult.
13 Do I think you can infer from what
14 Congress did in grassroots lobbying
15 disclosure what it would probably do with
16 regard to grassroots disclosure in the
17 context of electioneering communications?
18 Despite what Marc Elias said
19 yesterday, that LDA and electioneering
20 communications are different, I do think you
21 can read something from that, just as you
22 could and did read something about Congress's

1 actions with regard to 527s during the 2004
2 rulemaking on political committee status.
3 You noted that Congress required
4 that they report but not they be political
5 committees. And I think you were right to
6 look at that and sort of put those two
7 statutes side by side.
8 But I do think there are cases in
9 which the LDA and congressional intent is not
10 going to match up with electioneering
11 communications. At the end of the day do I
12 think Congress foresaw the snafu that would
13 happen in WRTL? No. Not for a minute, but I
14 do believe you do have a provision that is
15 facially valid.
16 You have that from the McConnell
17 court. And you have no "as applied
18 challenge" to it.
19 The question is, when that is where
20 you are, what do you do next? That's a very
21 difficult question for you. I'm just trying
22 to tell you what I would do.

1 MR. BOOS: None of the other
2 exemptions have a reporting requirement.
3 Entities that are exempt from
4 electioneering communications under the news
5 media exemption, for example, do not have to
6 include the disclosure statements in their
7 ads and they do not have to report their
8 donors. They are permitted to run their ads
9 because they are not electioneering
10 communications.
11 And I think that when you determine
12 that something is exempt from the definition
13 of the electioneering communication you are
14 determining it is not an electioneering
15 communication and therefore ipso facto there
16 shouldn't be any disclosure and reporting
17 requirements with that.
18 I think the authority under the
19 statute to promulgate rules exempting certain
20 communications from electioneering
21 communications doesn't say anything about if
22 you exempt them they still have to report.

1 Now, there is a question, of
2 course, with respect to whether certain
3 communications under this exemption with
4 still PASO candidates and therefore maybe
5 don't fall under this, but if you actually
6 define PASO I think you get past that
7 problem.
8 MR. von SPAKOVSKY: So, Mr. Boos,
9 you are saying, for the benefit of any
10 reporters who are still here, that if we
11 adopt Alternative 1, in order to be perfectly
12 fair, then we should extend the disclosure
13 requirements to media organizations also.
14 MR. BOOS: Oh, I think if you were
15 to do that you would have a fire storm on
16 your hands, but, sure. To be fair, why not?
17 CHAIRMAN LENHARD: Are there other
18 questions? Vice Chairman Mason.
19 VICE CHAIRMAN MASON: Ms. Abegg, you talked
20 about the privacy interests of your donors
21 and their desire for anonymity. Could you
22 fill us in a little bit on that? Because one

1 of the things that bothers me and I asked one
2 of the counsels for the party committees who
3 was here before who was sort of suggesting
4 that the incumbents really wanted to know who
5 was behind these ads.
6 And you have mentioned the Gray
7 Davis suit, but it would be useful if there
8 are particular examples that you're aware of.
9 And you may not be able to provide
10 names of people who felt like their personal
11 interests or business interests or political
12 interests were threatened if they were
13 disclosed as donors to particular
14 organizations.
15 MS. ABEGG: I have particular
16 examples, but I can't share them. Some of
17 them are businessmen who are active in the
18 communities or who may be active in one
19 political party but there is an issue that is
20 important to them so they want give to effect
21 change on that issue and they are afraid if
22 they do so they will face harassment or

1 reprisals from those in the other
2 organizations with which they are associated.
3 Some of them just don't want their
4 names known. They don't want any attention.
5 They just want to do it anonymously and go
6 about their way.
7 VICE CHAIRMAN MASON: To try and fill this in
8 a little bit, and I appreciate precisely the
9 people who would want to be anonymous who
10 wouldn't want to be disclosed in this context
11 either, but that you are aware of, vis-à-vis
12 your organization's people who, and perhaps
13 the California case, have interests before
14 the state government and feel like those
15 interests would be threatened -- they care
16 about the energy policy, but they feel like
17 their interests before the state government
18 would be threatened if they had their names
19 identified with those ads.
20 MS. ABEGG: Correct. It is a very
21 real concern. They will talk to the client
22 but they want counsel's reassurance that

1 their names are not going to be disclosed and
2 that's before they even make the donation.
3 MR. HOERSTING: Mr. Vice Chairman,
4 I can tell you I have been on phone
5 conversations, and I cannot reveal their
6 nature of course, but the gist is that people
7 stopped their activities because they heard
8 about this disclosure aspect. They simply
9 stopped their plans, and they were pretty far
10 along and even had the budget worked out.
11 They said, oh, we've got to disclose? They
12 ended their activity.
13 CHAIRMAN LENHARD: Could you just
14 elaborate on exactly concretely what their
15 concern is?
16 MR. HOERSTING: Yes. Well, I am
17 not sure that I could, actually. I just know
18 when they heard disclosure they were no
19 longer interested in pursuing that issue that
20 had a nexus to candidates.
21 It was sort of in that gray line
22 and when they heard that disclosure would be

1 a possibility they just said no thank you.
2 I can give you two other examples
3 if you want. And this is where disclosure is
4 a good thing and it is required.
5 K Street Project. Tom Delay hauled
6 people into his office, and said, if you want
7 to play in our revolution, you have to play
8 by our rules.
9 Another example is Sam Fox's
10 confirmation hearing before the Senate when
11 Senator Kerry used 527 disclosure to tee up
12 Fox for the affiliation. It should not
13 surprise you to know that Sam Fox did not
14 speak much about his First Amendment rights
15 of association in that hearing. He backed
16 down. He called Kerry a hero and he called
17 the work of all 527s disgraceful even though
18 he had given $50,000 to one.
19 So, do I doubt for a moment there
20 is any chill that comes from this stuff? Not
21 for a moment. Do I think there is any basis
22 for compelling disclosure of grassroots

1 lobbying activity? Not for a moment.
2 I just think there is a serious
3 lack in the posture of WRTL II with regard to
4 Section 201 and the follow-up cases, which
5 are WRTL III and Christian Civic League of
6 Maine, that put this Commission in a real
7 pickle. It is a difficult decision for you
8 and I don't undermine that for a moment.
9 CHAIRMAN LENHARD: Are there any
10 other questions? Comments? General counsel?
11 Mr. Sullivan.
12 MR. SULLIVAN: I just want to add
13 one brief point. There is a considerable
14 body of case law dealing with the issue of
15 disclosing the names of individuals who are
16 members of civil rights and labor
17 organizations.
18 Clearly the classic example of an
19 individual who identifies a member of a labor
20 organization, particularly if they are
21 involved in an activity which could be
22 against their employer's interests, either

1 forming a labor organization or taking a
2 position on a public policy issue that is
3 inconsistent with their employer's interests,
4 could and actually are subject to discipline
5 and reprisal in the workplace.
6 There is a fairly well documented
7 body of case law and experience that unions
8 have, attempting to protect their members who
9 were identified as members of the union or
10 supporters of the union's goals.
11 CHAIRMAN LENHARD: Any other
12 closing thoughts from the panel?
13 MR. BOOS: Just one brief issue
14 that we have not discussed and that is with
15 respect to disclosure.
16 What happens if you sell a bunch of
17 DVDs to a wholesaler who is going to then
18 resell those DVDs and you sell them for
19 $10,000, Citizens United were to sell them
20 for $10,000.
21 Is that a disclosable contribution
22 under Alternative 1? Because it's a sale.

1 How do you delineate between the sales
2 revenue and the contributions that are going
3 to pay for the ads? Because very clearly the
4 ads will be paid by revenues out of sales,
5 and that is especially the case with respect
6 to commercial entities.
7 CHAIRMAN LENHARD: That's a problem
8 for us in the definition of this.
9 Anything more? Then I guess with
10 that we will bring this hearing to a close.
11 We are going to keep the record
12 open for four days, that is, until Wednesday
13 of next week. There are a number of
14 questions put to panelists at various stages
15 over the last two days and we had offered
16 them the opportunity to respond in writing if
17 they would like to submit additional
18 information and obviously because the record
19 is open, obviously anyone can submit
20 additional information for our consideration
21 in this matter.
22 With that said I bring this meeting

1 to a close. Thank you very much.

2 (Whereupon, at 3:00 p.m., the

3 HEARING was adjourned.)

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